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When in Doubt, Be Compliant: The Social Dynamics of the Right to Silence

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1. Introduction

The criminal justice system in Canada attempts to achieve a balance between the power of the state and the vulnerability of suspects to possible coercion when detained by the police. This balance is especially important to achieve because some police interrogators in Canada are trained to exploit the vulnerabilities of detainees. For example, the *Reid* manual — the training manual used across most of North America — suggests that ". . . the uneducated and underprivileged are more vulnerable to flattery than the educated person . . .".[1] Interviewers are instructed to capitalize on suspects' needs for social connection by using false praise. Interrogation strategies such as these put suspects (including innocent ones) at an increased risk for self-incrimination.

Some of the protections for suspects are enshrined in the *Canadian Charter of Rights and Freedoms*.[2] Whereas the right to counsel is explicitly stated in s. 10(b) of the Charter, the right to silence has been established only through common law. In *R. v. Hebert*,[3] the Supreme Court ruled that the right to silence is understood when ss. 7 and 10(b) of the Charter are read together. Section 7 states that, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" while s. 10(b) states that, "Everyone has the

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1. Inbau, F.E., Reid, J.E., Buckley, J.P. & Jayne, B.C. (2013). Criminal Interrogation and Confessions (5th ed.). Burlington, MA: Jones and Bartlett Publishers, at p. 232.
2. *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, enacted by the *Canada Act 1982* (U.K.), c. 11, Sched. B. (R.S.C. (1985), Appendix II, No. 44.
3. *R. v. Hebert*, [1990] 2 S.C.R. 151, 57 C.C.C. (3d) 1, 77 C.R. (3d) 145 (S.C.C.).

right on arrest or detention to retain and instruct counsel without delay and to be informed of that right". Thus, to protect citizens from the potentially overwhelming power of the state, the detainee is entitled to speak with legal counsel at the outset of an interrogation so that he or she may make an informed decision about whether or not to participate in the criminal investigation. Further, it was implied in *Hebert* that when a detainee has exercised the right to counsel, he or she has, *de facto*, made an informed choice about whether or not to speak to police since "[p]resumably, counsel will inform the accused of the right to remain silent."[4]

By way of comparison, detainees in the United States are provided with greater protection than are detainees in Canada. In the landmark United States Supreme Court decision in *Miranda v. Arizona*[5] it was established that police must follow detailed warning and waiver guidelines before interrogating suspects in order to protect their Fifth Amendment right against self-incrimination.[6] Although the content and structure of *Miranda* warnings vary greatly, a typical *Miranda* warning reads: "You have the right to remain silent; anything you say can and will be used against you in a court of law". The wording of the caution varies by jurisdiction, but it is relatively concise, and clearly states that anything that suspects say will be used *against* them in court.[7] Right to silence cautions in Canada also vary by jurisdiction but in general, they are less clear than *Miranda* and they are not mandated by law.

2. Importance of Cautions and Risk of False Confessions

Suspects frequently believe that it is in their best interest to talk to police.[8] Because innocent suspects may be more likely than guilty ones to speak with police, they are thus at an increased risk for self-

4. *Ibid.*, at para. 73.
5. *Miranda v. Arizona*, 10 A.L.R.3d 974, 16 L.Ed.2d 694, 86 S.Ct. 1602 (U.S. Sup. Ct., 1966), affirmed 17 L.Ed.2d 121, 87 S.Ct. 11, 385 U.S. 890 (U.S. Sup. Ct., 1966).
6. Rogers R., Hazelwood L.L., Sewell K.W., Harrison K.S., & Shuman D.W. (2008). The language of Miranda warnings in American jurisdictions: A replication and vocabulary analysis. *Law and Human Behavior*, 32(2), 124-136; White, W.S. (2003). *Miranda's Waning Protections: Police interrogation practices after Dickerson*. Ann Arbor, MI: The University of Michigan Press.
7. Rogers, R., Harrison, K.S., Shuman, D.W., Sewell, K.W., & Hazelwood, L.L. (2007). An analysis of *Miranda* warnings and waivers: Comprehension and coverage. *Law and Human Behavior*, 31(2), 177-192.
8. Hartwig, M., Granhag, P.A., & Strömwall, L.A. (2007). Guilty and innocent suspects' strategies during police interrogations. *Psychology, Crime and Law*, 13(2), 213-227; Oberlander, L.B., & Goldstein, N.E. (2001). A review and update on the practice of evaluating Miranda comprehension. *Behavioral Sciences and the Law*, 19(4), 453-471.

incrimination.[9] Innocent people may falsely suppose that their innocence will serve as a protective factor. They may mistakenly believe that their intentions and emotional states are apparent to others[10] or that they will go free because the world is just and they *deserve* to be free.[11] Not only are innocent people more likely to waive their right to silence than guilty people, in some cases, an innocent person may eventually falsely confess as a result of psychologically coercive techniques in the interrogation room.[12] The risk of false confessions could be reduced if measures were taken to ensure that the suspect understood and knowingly invoked his or her right to silence.

Section 10(b) of the Charter legally requires the police to inform a detainee of their right to counsel. Although there is no similar legal duty with respect to the right to silence, the police usually read a standard caution to an arrested suspect which informs them of their right to remain silent. In order to be genuinely protective however, this caution would need to be thoroughly understood. Research into caution comprehension has revealed that many suspects have difficulty understanding their right to remain silent and do not grasp the implications of waiving this right.[13] This lack of

9. Kassin, S.M., & Norwick, R.J. (2004). Why People Waive their Miranda Rights: The power of innocence. *Law and Human Behavior*, 28(2), 211-221; Kassin, S.M. (2005). On the psychology of confessions: Does innocence put innocents at risk? *American Psychologist*, 60(3), 215-228; Moore, T.E., & Gagnier, K. (2008). "You can talk if you want to": Is the police caution on the 'right to silence' understandable? *Criminal Reports*, 51, 233-249.
10. Gilovich, T., Savitsky, K., & Medvec, V.H. (1998). The illusion of transparency: Biased assessments of others' ability to read one's emotional states. *Journal of Personality and Social Psychology*, 75(2), 332-346; Hartwig et al. (2007). *supra* at footnote 8;
11. Lerner, M.J., & Miller, D.T. (1978). Just world research and the attribution process: Looking back and ahead. *Psychological Bulletin*, 85(5), 1030-1051.
12. Cutler, B., Findley, K.A., & Moore, T.E. (2014). Interrogations and false confessions: A psychological perspective. *Canadian Criminal Law Review*, 18(2), 153-170; Kassin (2005), *supra*, footnote 9; Kassin, S.M. (2008). False confessions: Causes, consequences, and implications for reform. *Current Directions in Psychological Science*, 17(4), 249-253; King, L., & Snook, B. (2009). Peering Inside a Canadian Interrogation Room: An examination of the Reid model of interrogation, influence tactics, and coercive strategies. *Criminal Justice and Behavior*, 36(7), 674-694; Moore, T.E., & Fitszimmons, L. (2011). Justice Imperiled: False confessions and the Reid technique. *Criminal Law Quarterly*, 57(4), 509-542.
13. Abramovitch, R., Higgins-Biss, K., & Biss, S.R. (1993). Young Persons' Comprehension of Waivers in Criminal Proceedings. *Canadian Journal of Criminology*, 35, 309-322; Davis, K., Fitzsimmons, C.L., & Moore, T.E.

comprehension suggests that the right to silence may be a hollow safeguard because it does little to protect detainees from the potentially coercive power of the police. Furthermore, because the reading of a standardized caution is not a legal requirement, there is considerable variability in how the information is communicated.[14] Cautions are often hastily delivered, poorly phrased, convoluted, and conveyed with a diffidence that masks their true importance.

The spontaneous and automatic patterns of dialogue that occur regularly in everyday life are not characteristic of the social dynamics in an interview room. In a forensic context the reading of the right to silence is not "normal conversation". In some respects the police are in a conflict of interest when informing a suspect of their right to silence. A confession, the primary objective of many interrogations, will not be forthcoming from an uncommunicative suspect. Delivering the right-to-silence caution may thus be perceived by the police as a necessary evil, a formality that precedes their central purpose of eliciting a confession from a noncompliant offender.[15] A noncommittal affirmative "ok" from the suspect may be more than enough to demonstrate to the court that the suspect understood his options, and that the officer fulfilled his or her duty. It is a low threshold.

Many cautions are difficult to understand even under ideal circumstances.[16] The stress of an interview room would further jeopardize full comprehension.[17] The right to silence caution used in

(2011). The right to silence: Investigating the comprehensibility of a Canadian police caution. *Journal of Police & Criminal Psychology*, 26(2), 87-99; Eastwood, J., & Snook, B. (2009). Comprehending Canadian Police Cautions: Are the rights to silence and legal counsel understandable? *Behavioral Sciences and the Law*, 28(3), 366-377. Eastwood, J., & Snook, B. (2012). The Effect of Listenability Factors on the Comprehension of Police Cautions. *Law and Human Behavior*, 36, 117-183; Eastwood, J., Snook, B., & Luther, K. (2014). On the need to ensure better comprehension of interrogation rights. *Canadian Criminal Law Review*, 18, 171-181. Moore & Gagnier (2008) *supra*, footnote 9.

14. Eastwood, J., Snook, B., & Chaulk, S. (2010). Measuring Reading Complexity and Listening Comprehension of Canadian Police Cautions. *Criminal Justice and Behavior*, 37(4), 453-471.
15. Moore & Gagnier (2008), *supra*, footnote 9; Walsh, D. and Bull, R. (2010). Know your rights? A study comparing fraud investigators approaches to informing suspects of their rights and ensuring they are understood and observed. *Cambrian Law Review*, 41, 24-39.
16. *Supra*, footnote 13.
17. Scherr, K.C., & Madon, S. (2011). You Have the Right to Understand: The deleterious effect of stress on suspects' ability to comprehend Miranda. *Law and Human Behavior*, 36, 4, 275-282.

Winnipeg, Manitoba illustrates a variety of features that obfuscate rather than clarify the purpose of the caution. It reads:

> You are not bound to say anything but any word or act while in custody of the police may be subject to written, audio and or video recording and any such recording may be used as evidence. Do you understand?

The caution contains low-frequency phrases (e.g. "you are not bound . . ." and "any word or act . . .") and potentially problematic terminology (e.g. "subject to" and "evidence"). Furthermore, conspicuously absent is the question of whether or not the suspect wishes to speak to the police. The suspect has been informed that he or she is "not bound" to say anything, but that "any word or act" may be recorded. Even if the suspect says "yes", when queried about his or her understanding, it is unclear which portion of the preceding sentence he or she is purporting to have understood. It is impossible to know. The suspect is not asked if he or she wishes to say anything. Consequently, a "yes" reply to the question "Do you understand?" is difficult to interpret. Does "yes" show that the detainee knowingly and voluntarily declined his or her right to remain silent? Not necessarily. Answers to closed yes/no questions are notoriously difficult to interpret because interviewees are often predisposed to be acquiescent.[18] Suspects may say "yes" — a committal affirmation — even when they do not understand because they seek to please the interviewer. This response bias is referred to in the literature as a response set.[19] The inadequacy of "Do you understand?" in the context of comprehension appraisal has been well documented.[20]

In summary, the right to silence is meant to protect suspects from self-incrimination. In cases where an innocent suspect has been targeted, the effective use of the right to silence may guard against false confessions, which sometimes lead to false convictions. Procedures that obscure its purpose, social factors that may

18. Fenner, S., Gudjonsson, G., & Clare, I. (2002) Understanding of the current police caution (England and Wales) among suspects in police detention. *Journal of Community and Applied Social Psychology*, 12(2), 83-93; Forgas, J. (1985). *Interpersonal skills: The psychology of social interaction*. Pergamon: Oxford; Knowles, E. & Nathan, K. (1997). Acquiescent responding in self reports: Cognitive style or social concern? *Journal of Research in Personality*, 31, 293-301; Sigelman, C.K., Budd, E.C., Spanhel, C.L., & Schoenrock, C.J. (1981). When in doubt, say yes: Acquiescence in interviews with mentally retarded persons. *Mental Retardation*, 19(2), 53-58.
19. Couch, A., & Keniston, K. (1960). Yeasayers and Naysayers: Agreeing response set as a personality variable. *The Journal of Abnormal and Social Psychology*, 60(2), 151-174.
20. Rock, F. (2007). *Communicating rights: The language of arrest and detention*. NY: Palgrave MacMillan.

jeopardize its effective use, and problems with the caution's wording may all threaten the protective value of the right to silence. Given these concerns, there were two goals of the current study.

The first objective was to explore the effect of question framing on professed comprehension. Half of the participants were asked "Do you understand?" and the other half were asked "Is there anything you do not understand?" after hearing various passages. We wondered if our data would reveal a compliance bias as opposed to a "yes" bias. A test of this idea entailed examining the extent to which participants professed understanding even if the question was framed so that a "no" response indicated understanding.

The second objective was to compare rates of professed comprehension with rates of *actual* comprehension, in order to determine if respondents falsely claim to understand information presented by an authority figure. Actual comprehension was determined by the number of key points described by a participant in response to open-ended comprehension verification questions.

2. Method

(a) Participants

The sample consisted of 128 undergraduate students, aged 18-46 years. Sign-up sheets were circulated in an introductory psychology course at York University's Glendon Campus and a call for participants was placed through York's Undergraduate Research Participant Pool (URPP). Students who participated in the study were awarded partial credit toward their final grade in their introductory psychology course. Of the 128 participants in the study, six (4%) had previously been arrested and 46 (32%) indicated a first language other than English.

(b) Design

Participants were randomly assigned to four different conditions which varied in terms of the passage that was presented. Within each condition, half the participants received a Positive Query (Do you understand?) while the other half received a Negative Query (Is there anything you do not understand?).

> Materials included 1) a written consent form, 2) a script of instructions read to participants, including one of the four passages, and 3) a questionnaire designed for the present study to evaluate participants' comprehension of the passages. The written consent form detailed the purpose of the study, the task required of participants, the promise of anonymity and confidentiality, the freedom to withdraw from the study at any time without penalty, and the researchers' contact information.

The four passages were worded as follows:

(i) Modified

The Modified caution was the revised right to silence caution from Davis, Fitzsimmons and Moore (2011). It was crafted by making several changes to the standard right to silence caution routinely delivered to detainees in Ontario. The alterations were intended to (and did) increase comprehension by outlining the suspect's rights and their implications more clearly, by adhering to proper discourse pragmatics, and by simplifying the terminology used in the caution.

> You are charged with breaking and entering. You have the right to remain silent. This means that you don't have to say anything if you don't want to. If you do say anything, whatever you say can be used against you in court. If you refuse to say anything, your refusal cannot be used against you in court.

(ii) Winnipeg

The Winnipeg caution, referred to earlier, is the standard caution used by police in Winnipeg, chosen for the present study because it is particularly complex and difficult to understand. In a study examining the reading complexity of police cautions across Canada,[21] of all the right to silence cautions evaluated, the Winnipeg caution contained the most difficult words, some requiring at least a grade 10 reading level.

> You are charged with breaking and entering. You are not bound to say anything but any word or act while in custody of the police may be subject to written, audio and or video recording. And any such recording may be used as evidence.

(iii) Parallel

The Parallel passage, devised expressly for use in this study, is a linguistic and structural parallel of the Winnipeg caution, but the content and vocabulary have been simplified. The aim was to remove the effects of complex subject matter and terminology on participants' responses.

21. Eastwood, Snook & Chaulk (2010). *Supra*, footnote 14.

> You do not have to get in the car, but if you do, we will drive to Loblaws. At Loblaws we will shop.

(iv) Control (Nonsense)

The Control (Nonsense) passage was very similar to the Parallel caution in content and vocabulary — both concerned a car trip to Loblaws — but the Nonsense passage was designed to be confusing and semantically nonsensical.

> You do not have to get in the car, but if you do not, we will drive to Loblaws. At Loblaws we will melt.

The first sentence is confusing because it presents a perplexing scenario; there is no explanation of the causal link between not getting in the car and the resultant trip to Loblaws. The second sentence depicts an impossible situation ("we will melt"). The inclusion of a Control (Nonsense) passage allowed us to examine how people respond when asked whether or not they understand an inherently difficult to understand statement.

For each passage in the present study, the Flesch Kincaid (FK) and Flesch Reading Ease (FRE) readability measures were calculated, providing a grade-equivalence and difficulty level for readability (see Table 1). It is important to note that only the number of sentences, words and syllables are taken into account in the Flesch measures – not content, complexity or vocabulary. Readability measures may not be valid predictors of comprehension when a passage is delivered verbally.[22] As such, the Flesch measures are employed here as a crude indicator of complexity and must be interpreted with caution.

PASSAGE	FK Grade Level	FRE Score	Difficulty Level
Modified	4.6	82.7	easy
Winnipeg	9.5	60	standard
Parallel	2.2	99.5	very easy
Control (Nonsense)	1.9	103	very easy

Table 1: Flesch Kincaid (FK) and Flesch Reading Ease (FRE) readability measures for the four Passages.

The Modified caution produced a FK Grade Level of 4.6 and a FRE score of 82.7, indicating a Readability Level of "easy". The Winnipeg caution yielded a FK Grade Level of 9.5 and a FRE score of 60.0, for a Readability Level of "standard". The Parallel passage fell

22. Eastwood & Snook (2012). *Supra*, at footnote 13.

at the 2.2 FK Grade Level with a FRE score of 99.5, indicating a Readability Level of "very easy". Finally, the Control (Nonsense) passage had a FK Grade Level of 1.9 and a FRE score of 103.0 for a Readability Level of "very easy". As predicted, the Winnipeg caution was the most difficult in terms of readability and grade level. The Parallel and Control passages could be easily read by people functioning around a grade 2 level.

In order to assess comprehension, the Comprehension Verification Questionnaire was designed for the present study, based on the measures used in Davis et al. (2011).[23] The questionnaire probed comprehension using a variety of response formats, in an attempt to thoroughly examine understanding. First was the comprehension verification question ("Do you understand?" v. "Is there anything you do not understand?") which participants were to answer by circling "Yes" or "No" on the front page of their response booklets. The "Yes" and "No" options were counterbalanced such that half of the participants received a booklet with "Yes" on the left hand side of the page and "No" on the right hand side, and the other half of participants received a booklet with the opposite layout. Next, participants were required to explain in their own words (1) *why* they answered "Yes" or "No", (2) what they thought the statement communicated, (3) whether or not they thought the statement was a warning and (4) whether they thought any information was missing from the statement. In question 5, participants checked off any reasons that applied for having answered "Yes" or "No" to the comprehension verification question. Participants were also presented with the Caution that they had heard earlier, this time in writing. They were asked (in print) if they understood the Caution, and to circle "Yes" or "No" accordingly (here, the question for both the positive and negative query groups read, "Do you understand the statement" and the "Yes" and "No" answers were not counterbalanced). Finally, demographic information was obtained.

(c) Procedure

Participants were tested in groups of between 2 and 20 students at a time. Testing sessions lasted between 20 and 30 minutes each. At each session, students were greeted and given an informed consent form. Once the students had signed and returned the form, the researchers went over the consent form verbally with them, and obtained verbal confirmation that they understood the information and wished to participate in the study. Then, a Comprehension Verification

23. Davis et. al. (2011). *Supra*, footnote 13.

Questionnaire was placed face down on the desk in front of each participant. The researcher was blind to which *question type* any particular participant was assigned. Participants were asked not to turn over the test booklet until instructed to do so.

Next, the researcher informed the participants that they would be read a passage and that immediately upon having heard it, they were to flip the booklet over and answer the question on the front page (the comprehension verification question). Participants listened while the researcher read one of the four passages (Modified, Winnipeg, Parallel or Control (Nonsense)), and then they flipped their booklets over and answered the comprehension verification question. They were then instructed to fill out the rest of the questionnaire. In accordance with the promises of confidentiality and anonymity outlined in the consent form, no identifying information (e.g., name, student number) was written on the questionnaire, and signed consent forms were stored separately from the questionnaire booklets.

(d) Results

The comparisons of interest pertained to: (1) Question format, and (2) actual v professed understanding. Between group differences in comprehension were of no theoretical interest because there were *a priori* substantial differences in passage complexity (see Table 1). Moreover the Winnipeg passage is inherently difficult to understand because there is little information in it related to its intended purpose (a right-to-silence caution). Also, the Control (Nonsense) passage was crafted to be unintelligible.

Rates of professed comprehension are displayed in Table 2. With the exception of the Nonsense passage, the vast majority of respondents professed understanding of the passage presented to them.

PASSAGE	Claim to comprehend	Claim not to comprehend	x^2 (1, n=32)
Modified: (negative query)	16	0	0.00 n.s.
(positive query)	16	0	
Winnipeg: (negative query)	13	3	1.14 n.s.
(positive query)	15	1	
Parallel: (negative query)	14	2	.37 n.s.
(positive query)	15	1	
Control (Nonsense): (negative query)	3	13	2.33 n.s.
(positive query)	7	9	

Table 2: Rates of professed comprehension.

(e) Question Format

To determine if rates of professed comprehension were affected by question format (Objective 1), a series of Chi-Square tests was conducted (professed comprehension x question format). The first Chi-Square test compared professed comprehension to positive and negative queries, collapsed across all four conditions. The result of this Chi-Square test was not significant [$X^2(1, N = 96) = 1.39, p = .24$]. Generally speaking, participants purported to understand, regardless of how the question was posed. Four more Chi-Square tests were performed to compare professed comprehension across question format within each of the passage groups separately (see Table 2). None of the Chi-Square tests was significant, demonstrating that rates of professed comprehension were equivalent regardless of question framing.

(f) Comprehension Verification

Participants' responses to questions probing comprehension were analyzed[24] to investigate whether rates of professed comprehension reflected *actual* comprehension (Objective 2). In the Modified condition (positive and negative query groups combined), we

24. Two independent judges scored comprehension questions from a random sample of 16 questionnaires (4 from each condition) to establish interrater reliability. Kappa values ranged between .83 and 1.00. The first author coded the remaining questionnaires.

tallied which of the 32 participants (100%) who professed comprehension *actually* understood the key information communicated in the caution. The information was broken down into three prongs:

(1) I have the right to remain silent
(2) anything I say can be used against me in court
(3) my refusal to speak cannot be used against me

Nine participants (28%) demonstrated comprehension of all three prongs. A total of 11 participants (34%) described two of the three prongs, with prong 2 being the most commonly understood. Nine participants (28%) demonstrated comprehension of only one prong — mostly prong 2 — and none described only prong 3. Three participants (9%) described no prongs: one wrote a more general answer that did not describe any prongs ("an explanation of one of the arrested person's rights and the potential consequences . . .") and two described prong 2, but suggested that anything they said might also be used *in their defence* (". . . justice system can use anything someone says at his/her favour or against." and ". . . I should explain what happened carefully to defend myself"), which contradicts what the caution aims to communicate, effectively spoiling the response. Three participants (9%) stated that their silence could be used against them. Overall, 16 participants (50%) understood that they had the right to remain silent, 25 (78%) understood that anything they said could be used against them and 17 (53%) understood that their silence could not be used against them.

In the Winnipeg condition, the responses of the 28 participants (87.5%) who professed comprehension were analyzed to determine *actual* comprehension of the key information communicated in the caution. Responses were evaluated based on the following three prongs:

(1) I have the right to remain silent
(2) anything I say can be used as evidence
(3) anything I say can be used against me in court

The first two prongs are the two key pieces of information actually contained (albeit obliquely) in the Winnipeg caution. Descriptions of prong 3 (*anything I say can be used against me in court*) were noted to distinguish between participants who understood that what they said could be used "as evidence" from those who understood that it could be used specifically "against them", because this is a meaningful distinction. If a participant described prong 3, they were scored as having also understood prong 2. Five participants (18%) did not

describe any prongs correctly. Five participants (18%) described prongs 1 and 2. Four participants (14%) described prongs 1 and 3. One participant demonstrated comprehension only of prong 1, five (18%) understood only prong 2, and eight (29%) described only prong 3. Overall, 10 participants (36%) understood that they had the right to remain silent, 22 (79%) understood that anything they said could be used as evidence and 12 (43%) understood that anything they said could be used *against* them.

In the Parallel condition, 29 participants (91%) professed comprehension. Actual comprehension of this passage was assessed by the inclusion of the following information in participants' responses:

(1) I do not have to get in the car
(2) if I get in the car we will go to Loblaws
(3) we will shop

Two participants (7%) did not explain any prongs in their responses. Nine participants (31%) only explained two prongs and 18 participants (62%) described all three prongs.

The responses given by the 10 participants (31%) who professed comprehension in both the positive and negative conditions of the Control (Nonsense) passage were tallied based on the following three prongs:

(1) I do not have to get in the car
(2) they will drive to Loblaws if I do not get in the car
(3) people will 'melt'

Two participants (20%) did not explain any prongs. One participant described all three prongs. Four participants (40%) explained two prongs and the remaining three participants (30%) described only one prong. Across all conditions, of the 99 participants who claimed to understand the passage read to them, only 37 included the key information in their responses.

When participants were presented (in writing) with the Caution that they had heard earlier, and asked if they understood, 23 (18%) changed their answer. Nine changed from "understand" to "not understand", while 14 reversed their "not understand" to "understand". Changes were unaffected by the framing of the original question. The majority (61%) of the changes were in the Nonsense condition. Five switched to "not understand"; nine switched to "understand". Because the Nonsense statement was intrinsically confusing it is unsurprising that its interpretation would be variable over time, even within the same respondent.

Passage	Comprehension Scores (max = 3)			n
	Complete (Score = 3)	**Moderate** (Score = 2)	**Poor** (Score = 0 or 1)	
Modified	9 (28%)	11 (34%)	12 (37%)	32
Winnipeg	0	9 (32%)	19 (68%)	28
Parallel	18 (62%)	9 (31%)	2 (7%)	29
Control (nonsense)	1 (10%)	4 (40%)	5 (50%)	10
				Total 99

Table 3. Comprehension scores for those professing understanding (n = 99). Cell numbers refer to the number of participants who received that score.

3. Discussion

As predicted, rates of actual comprehension were lower than rates of professed comprehension for each passage; rates of professed comprehension were equivalent whether a "yes" or a "no" response indicated comprehension.

The purpose of evaluating *actual* comprehension among participants who *professed* comprehension was to determine how often participants claimed to understand something that they did not fully understand. Of particular interest were the Modified and Winnipeg groups. In the Modified group, where professed comprehension was 100%, actual comprehension was moderate. Only half of participants understood that they had the right to remain silent and only 53% grasped that their silence could not be used against them. Most participants (78%) who professed understanding understood that anything they said could be used against them. Only 28% of participants demonstrated full comprehension. Among participants who professed comprehension of the Winnipeg caution, only nine (32%) fully understood it (i.e., that they had the right to remain silent and that anything they said could be used as evidence).

Of concern regarding *all* right to silence cautions is that even if suspects fully understand it, they are not informed that their refusal to speak to police cannot be held against them. Suspects may automatically assume that their silence *will* be used against them. They may assume that it will appear that they have something to hide if they do not speak with police — that the judge will think they were

being difficult or uncooperative or impeding the investigation. To our knowledge, *no* Canadian right to silence caution informs the suspect that his refusal to speak cannot be held against him. Arguably, suspects should be so informed because otherwise the police are exploiting a natural tendency towards candor, without the suspect (usually) even realizing that he or she is already in an adversarial situation.

A number of participants understood that what they said could be used *against* them, despite the Winnipeg caution not stating this specifically. Perhaps television and media exposure to the *Miranda* warning — which typically states that anything you say or do can and will be used *against* you in a court of law — may have contributed to this finding. Unprompted, 9 (14%) of the 64 participants in the Control and Winnipeg conditions stated that they were familiar with the caution from portrayals in the media.

The results in Table 2 show that people tend to overstate their understanding of passages of varying difficulty and content, but that this tendency declines when the passage is incomprehensible. The majority of participants in the Modified, Winnipeg and Parallel groups claimed to understand the passages and the majority of participants in the Nonsense group claimed not to understand it. Rates of comprehension were equivalent regardless of how the comprehension was indicated (i.e., "yes" v. "no"). This suggests that what may be operating is a "compliance bias" rather than a "yes bias". Whether a 'yes' or a 'no' means 'I understand' or 'I do not understand', people tend to answer in the way they believe the person in authority wishes them to.

In the Control (Nonsense) condition, 31% of participants professed comprehension. An analysis of the justifications given for doing so was conducted. The most common explanation given for "if you do not [get in the car], we will drive to Loblaws" was that the people already in the car would drive to Loblaws *without* the person who was given the option to get in the car, should he/she choose not to. There were two approaches that participants used to explain "At Loblaws, we will melt": they either ignored it or they imbued it with their own meaning. These explanations are consistent with previous research suggesting that when asked bizarre questions, adults will sometimes generate interpretations that make sense to them rather than drawing attention to the ambiguity of the questions.

The choice to waive (or not) the right to silence has more serious ramifications for Canadian suspects than it does in comparable jurisdictions in the U.S. or the U.K. where, if a suspect asserts their right to silence, police questioning cannot proceed. In Canada, the

Supreme Court's decision in *Singh*[25] allows interrogators to continue to question a suspect, notwithstanding the suspect's objection that he did not wish to speak. Singh had declared his right to silence eighteen times. The court noted that although the suspect can seek refuge in silence, there is no right "not to be spoken to by state authorities". The distinction is significant and arguably erodes the protection that the right to silence is intended to provide. Typically, a suspect will have been instructed by counsel to remain silent. The suspect's resolve to do so may be compromised by the confusion arising from legal advice to remain silent set against interminable questions from the police. As Alan Gold has noted, "Surely once an accused states he does not wish to speak that must be the end of it. The law should not require an accused to repeat once, twice or any number of times the choice of silence, or else only the rude, obstinate and determined will get constitutional rights . . ."[26]

The dialogue reproduced below illustrates the challenges that a naïve suspect faces when attempting to follow his lawyer's advice.

Officer: I'm going to go through some things with you before I get started, okay? My name is Don Henry. I am a detective. This is one of our interview rooms. This is the best way to capture an interview and you and I sit down and talk with one another, okay? Obviously we are being audio and video taped.
Suspect: Mm Hm.
Officer: I understand that you have already spoken to counsel.
Suspect: Yes, I talked to I guess it was Duty Counsel or something?
Officer: Yup, Legal Aid.
Suspect: Somebody in Toronto and they told me I shouldn't answer any questions. That's what they told me.
Officer: Okay.
Suspect: Now . . . [interrupted]
Officer: The question is do you wish to call a lawyer now or no? Like it's a yes or no thing. You have already gotten some advice? You understand?
Suspect: Yeah, well they . . [interrupted]
Officer: You're happy with the advice that they gave?
Suspect: They told me . . . [interrupted]
Officer: Sorry I don't want to be rude but I don't need them to tell you to tell me what they told you. Because that's your private conversation with them. The question is "Do you wish to call a lawyer right now?" Because you've already spoken to one right?
Suspect: Yes.
Officer: And are you happy with that advice? Do you think calling a different lawyer would give you some different advice?
Suspect: No I don't think so.
Officer: Okay so do you wish to call a lawyer right now? This second?
Suspect: No.
Officer: Okay. I'm going to read you a caution. You will be charged with Sexual Assault. Do you wish to say anything in answer to the charge? Obviously you're not obliged to say anything unless you wish to do so but whatever you say will be given in evidence okay, and the last caution is if you've spoken to any police officer or to anyone with authority or any such person has spoken to you in connection with this case I want it clearly understood that I do not want it to influence you in making a statement, okay?
Suspect: Okay.
Officer: Now, before we get going, how do we spell your last name?

25. *R. v. Singh*, [2007] 3 S.C.R. 405, 225 C.C.C. (3d) 103, 51 C.R. (6th) 199 (S.C.C.); see also *R. v. Fitzgerald* (2009), 71 C.R. (6th) 183, 203 C.R.R. (2d) 238, 2009 CarswellBC 3166 (B.C. S.C.).
26. Gold, A.D. (2002). Charter Rights – and Wrongs. Alan D. Gold Collection of Criminal Law Articles (ADGN/RP-160, October 25, 2002), at p. 2.

There are a number of aspects of this exchange that make it improbable that an informed choice to speak (or not) was made. Indeed, a clear choice was not even offered. It is implied from the outset that a conversation is going to take place (i.e., ". . . you and I sit down and talk with one another"). The suspect is interrupted and prevented from broaching any discussion of duty counsel's advice to "[not] answer any questions". The caution itself was read quickly, with no pause after the question "Do you wish to say anything in answer to the charge?" The phrase "given in evidence" is legal jargon that could easily be misinterpreted to mean that an exculpatory statement could be put on the record. Further confusion is sown by attaching the 'secondary caution' to the original. As Justice Langdon noted in *Armishaw*,[27] the secondary caution is "a confusing collection of words at the best of times". At no time did the officer make any attempt to ascertain if the suspect truly understood his options. He was not explicitly informed that he had the right to remain silent, nor that it was his choice as to whether he spoke or not. He was not informed that remaining silent could not be held against him, that it would not imply guilt, or that no adverse inference could or would be drawn from his remaining silent. He was not informed that anything he said could be used at his trial to prove his guilt of the alleged crime(s). It was not explained to him that nothing he might say now in his own defence could be used to assist him at trial. Little (usually

27. *R. v. Armishaw* (2011), 278 C.C.C. (3d) 299, 2011 CarswellOnt 11001, [2011] O.J. No. 4662 (Ont. S.C.J.), at para. 58.

none) of this preceding information is *ever* included in a police caution, notwithstanding its legal accuracy. The preceding exchange is not atypical. It is common for the right to silence caution to be communicated in a manner that defies adequate understanding, and thus the caution rarely affords the suspect the protection that it is supposed to provide.[28]

In a different case, the suspect had already stated her wish not to answer any questions twenty six times prior to the following exchange.

Suspect: Duty Counsel said not to say anything until Monday — until I see my lawyer. Like, I'm listening to what my lawyer says.
Officer: Fair enough, but they're not sitting here.
Suspect: Right, but they said I don't have to answer anything.
Officer: You don't have to.
Suspect: So why are you getting mad at me?
Officer (shouting): Because Jacob is dead!
Suspect: I know that.
Officer And you're gonna face charges in his murder.

In both of the preceding examples, the suspects eventually provided statements that were interpreted to be inculpatory.

An up-to-date review of the role of *Miranda* warnings in the U.S. concluded that *Miranda* has not served its intended protective function.[29] The purpose of *Miranda* was to shield suspects from making self-incriminating statements elicited by coercive interrogation tactics. In the U.S., as in Canada, the police are not permitted to threaten suspects with legal penalties or to offer leniency in exchange for providing information. Such maneuvers would jeopardize the perceived voluntariness of the obtained statements. To circumvent these constraints police employ a range of persuasion strategies designed to get the suspect talking. Indeed, as noted above, the right to silence in Canada is not accompanied by a right *not* to be asked questions. Numerous legal scholars and researchers have catalogued the means by which the police achieve indirectly what they are not permitted to achieve directly.[30] These tactics include creating

28. Snook, B., Eastwood, J., & MacDonald, S. (2010). A descriptive analysis of how Canadian police officers administer the right-to-silence and right-to-legal counsel cautions. *Canadian Journal of Criminology and Criminal Justice*, 52(5), 545-560.
29. Smalarz, L., Scherr, K.C., & Kassin, S.M. (2016). Miranda at 50: A Psychological Analysis. *Current Directions in Psychologica Science*, 25(6) 455-460.
30. Davis, D., & Leo, R.A. (2012). Interrogation through pragmatic implication: Sticking to the letter of the law while violating its intent. In L. Solan & P. Tiersma (Eds.). The Oxford handbook on language and law. (pp. 354-366).

the impression that an immediate admission will preempt dire future difficulties; suggesting that remaining silent will invite adverse inferences by 'others'; and disguising the adversarial nature of the situation by expressing sympathy and understanding for the 'mistake' that was made.

A recent case before the Alberta Court of Appeal[31] illustrates the ongoing difficulties with how the right to silence is communicated as well as the legal difficulties associated with determining if the right has been breached. Having been provided with his s. 10(b) Charter warning the suspect indicated his wish to consult a lawyer. The officer then continued: "You are not obliged to say anything unless you wish to do so, but whatever you say may be given in evidence. Do you wish to say anything"? to which the suspect made an incriminating reply. As we noted earlier, a 'caution' about remaining silent that includes an invitation to speak may obfuscate, if not defeat the purpose of the caution. Moreover, delivering the 10(b) caution without allowing for its implementation obviates any protection that 10(b) would otherwise provide. As McLaughlin, J. observed in *Hebert*[32] "The most important function of legal advice upon detention is to ensure that the accused understands his rights, chief among which is his right to silence. The detained suspect, potentially at a disadvantage in relation to the informed and sophisticated powers at the disposal of the state, is entitled to rectify the disadvantage by speaking to legal counsel at the outset, so that he is aware of his right not to speak to the police and obtains appropriate advice with respect to the choice he faces (at ¶52) . . . The guarantee of the right to counsel in the Charter suggests that . . . the test for whether [the choice to speak or not] has been violated is essentially objective. Was the suspect accorded his or her right to consult counsel? (at ¶55). G.T.D. clearly was not afforded his right to counsel. The majority nevertheless found the violation to have been minor. The inculpatory statement was admitted.[33]

Cambridge: Oxford University Press; Leo, R.A. (1996). Miranda's revenge: Police interrogation as a confidence game. *Law & Society Review*, 30, 259-288; Scherr, K.C., Alberts, K.A., Franks, A.S., & Hawkins, I. (2016). Overcoming innocents' naiveté: Pre-interrogation decision making among innocent suspects. *Behavioral Sciences & the Law*, 34, 564-579.
31. *R. v. G.T.D.* (2017), 355 C.C.C. (3d) 431, 40 C.R. (7th) 25, [2018] 4 W.W.R. 645 (Alta. C.A.), reversed (2018), 359 C.C.C. (3d) 340, 43 C.R. (7th) 210, [2018] 4 W.W.R. 690 (S.C.C.).
32. *R. v. Hebert*, [1990] 2 S.C.R. 151, 57 C.C.C. (3d) 1, 77 C.R. (3d) 145 (S.C.C.).
33. Upon further review the S.C.C. (*R. v. G.T.D.* (2018), 359 C.C.C. (3d) 340, 43 C.R. (7th) 210, [2018] 4 W.W.R. 690 (S.C.C.)) determined that the police were obliged to postpone questioning GTD until after he had had an opportunity to speak with counsel. The majority decided that the statement should be excluded, the appeal allowed, and a new trial ordered.

4. Conclusion

As this study has demonstrated, people are prone to comply with the social demands of the situation in which they find themselves, and therefore may indicate that they understand information presented to them despite incomplete comprehension. Even when presented with incomprehensible information, some nonetheless profess to have understood it. These findings show that we may have inflated confidence in the current right to silence caution procedures in Canada. If suspects claim to understand their right to silence even when they do not, and/or waive it in order to comply with the perceived wishes of a police officer, then the caution is an ineffective safeguard against self-incrimination even when the individual is innocent. These concerns are not new. Many of them have been raised before.[34] Current Canadian police practices with respect to communicating to a suspect their right to silence are woefully inadequate. Many cautions are inherently confusing and complex in the first place,[35] little effort is made to determine if the suspect understands their right, and often it is not clearly established that an informed choice to speak (or not) was made.

As noted in the introduction, the police have no legal duty to deliver the right-to-silence caution. Does it matter, therefore, how well they convey it if the ultimate responsibility for doing so rests with

34. Baldwin, J. (1993). Police interview techniques: Establishing truth or proof? *British Journal of Criminology*, 33(3), 325-352; Cloud, M., Shepherd, G.B., Nodvin Barkoff, A., & Shur, J.V. (2002). Words Without Meaning: The constitution, confessions, and mentally retarded suspects. *University of Chicago Law Review*, 69, 567-601; Ives, D. E., & Sherrin, C. (2008). R. v. Singh – A meaningless right to silence with dangerous consequences. *Criminal Reports*, 51, 250-261; McArthur, H. (2006). The right to silence: An overview. In Alan D. Gold Collection of Criminal Law ArticlesADGN/RP-208, (April 2007); Michalyshyn, P. (1990). Brydges: Should the police be advising of the right to counsel? 74, *Criminal Reports* (3d) 151; Stuart, D. (2011). "Criminal Justice - Many More Kudos than Brickbats". In David Wright and Adam Dodek (Eds.). Public Law at the McLachlin Court: The First Decade. Toronto: Irwin Law; Stuesser, L. (2002). The Accused's Right to Silence: No doesn't mean no. *Manitoba Law Journal, 29*(2), 149-170; Yau, B. (2007). Making the Right to Choose to Remain Silent a Meaningful One. *Criminal Reports*, 38 C.R. (6th) 226 at 240.

35. Portions of some cautions in use today are a holdover from England's *Indictable Offences Act* of 1848: ". . . give him clearly to understand, that he has *nothing to hope from any promise of favour, and nothing to fear from any threat* which may have been held out to him to induce him to make any admission or confession of his guilt. . ." (Chapter X, S. 13, p. 183). The fact that such antiquated terminology is still being used in 2018 is eloquent testimony to the need for an overhaul of the entire exercise of how suspects' rights are communicated.

defence counsel? In our opinion, it *does* matter because an interrogation that yields a contested "confession" is almost invariably preceded by a right-to-silence dialogue in which the defendant often replies "yes" to a 'yes/no' query regarding their understanding of whatever it is the interrogator has put to them. This exchange may be used at trial to buttress the prosecution's claim regarding the voluntariness of the ensuing confession. As we have shown, the social dynamics of this pivotal exchange should reduce our confidence in the reliability of the suspect's "yes" response.

Many, (possibly most) interrogation practices in North America are guilt presumptive, accusatory, confrontational, aggressive, and psychologically manipulative. The *Reid*[36] technique is not a truly investigative exercise. It is not designed for the discovery of facts and evidence, nor are its fundamental operating assumptions based on a sound empirical foundation.[37] Consequently, in our opinion, a suspect has far more to lose than they have to gain by participating in such an interrogation. There exist genuinely investigative interviewing techniques that seek to: (1) administer legal rights comprehensively, and (2) discover information that can be validated as fact and converted into evidence. If implemented, such methods would go a long way towards obviating concerns with false confessions.[38] Until such time that these evidence-based practices are adopted, defence counsel can best serve their client's interests by advising them to remain silent.

36. *Supra*, footnote 1.

37. Gallini, B. R. (2010). Police "Science" in the interrogation room: Seventy years of pseudo-psychological interrogation methodsto obtain inadmissible confessions. *Hastings Law Journal*, 61(3), 529-580; Hirsch, A. (2014). Going to the source: The "new" Reid method and false confessions. *Ohio State Journal of Criminal Law*, 11(2), 803-826.

38. Shepherd, E. (2007). Investigative interviewing: The conversation management approach. New York: Oxford University Press; Snook, B., Eastwood, J., Stinson, M., Tedeschini, J., & House, J.C. (2010). Reforming investigative interviewing in Canada. *Canadian Journal of Criminology & Criminal Justice*, 52(2), 215-229; Snook, B., Luther, K., & Barron, T. (2015). Interviewing suspects in Canada. In D. Walsh, G. Oxburgh, A. Redlich, & Myklebust (Eds.), Contemporary developments and practices in investigative interviewing and interrogation: An International perspective (at pp. 229-239). Oxford: Routledge Press; Watkins, K., Turtle, J., & Euale, J. (2017). Interviewing and Investigation (3e). Toronto: Emond Montgomery Publishing.