

**“You can talk if you want to”:**

**Is the Police Caution on the ‘Right to Silence’ Understandable?**

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There is a longstanding tension between law enforcement’s interest in obtaining incriminating statements and a suspect’s right to remain free from (possibly) coercive interrogation tactics. In Canada, sections 7 and 10(b) of the Charter are recognized as providing the right to silence. Madam Justice McLachlin (as she then was) explained in *R. v. Hebert*<sup>1</sup> that

**“[t]he 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. Read together, ss. 7 and 10(b) confirm the right to silence in s. 7 and shed light on its nature.”**

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<sup>1</sup> (1990) S.C.J.No. 64, at ¶52.

As Stuesser<sup>2</sup> has noted, when the right to confer with counsel has been exercised it is subsequently assumed that an informed choice has been made regarding the right to silence. This assumption is stated explicitly in *Hebert*<sup>3</sup>: **“Presumably, counsel will inform the accused of the right to remain silent.”** It is clear, however, that sections 7 and 10(b) of the *Charter* differ in terms of the obligations imposed on the police. Section 7 contains no reference to choice, silence, or interrogations.

**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.**

In contrast, 10(b) states unambiguously that the detained person has an absolute right to be *informed* of his right to instruct counsel:

**Everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right.**

It is probable that a failure to alert the accused to his right to silence would influence considerations about the voluntariness of any subsequent confession, but the police are not deemed to have an absolute duty to deliver the caution<sup>4</sup>. Thus, while the right to silence is embedded in the Charter, it is not described to the accused as a “right” nor is there an accompanying right to be informed of it.

Over the last 10 years, it has become apparent that numerous DNA-exonerated innocent defendants had provided confessions prior to their trials<sup>5</sup>. A burgeoning body

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<sup>2</sup> Stuesser, L. (2002). The accused’s right to silence: No doesn’t mean no. *Manitoba Law Journal*, 29, 149-171.

<sup>3</sup> *supra*, note 1, at ¶73.

<sup>4</sup> Stuart, D. (2005). *Charter Justice in Canadian Criminal Law*, 4e. Toronto: Carswell; Quigley, T. (1997). *Procedure in Canadian Criminal Law*. Toronto: Carswell; *R v W.(W.R.)* (1992), 15 C. R. (4<sup>th</sup>) 383 (B.C. C.A.).

<sup>5</sup> Drizin, S. & Leo, R. (2004). The problem of false confessions in the post-DNA world. *North Carolina Law Review*, 82, 891-1007; Scheck, B., Neufeld, P., Dwyer, J. (2000). *Actual Innocence: Five days to execution and other dispatches from the wrongly convicted*. Garden City, NJ: Doubleday.

of social science research has documented the ease with which innocent people can be induced to produce false confessions of wrong doing. Because of these worrisome findings the right to silence is receiving renewed scrutiny because a successful invocation of it could obviate an interrogation that could generate a false confession. Even though the police are not duty-bound to deliver a ‘right-to-silence’ caution, they typically do. The caution is one of the first protections afforded a suspect, however it is a hollow safeguard if it is implemented in a manner that is incomprehensible to the persons it is intended to protect. Researchers around the world<sup>6</sup> have come to the unsettling conclusion that certain police cautions are ambiguous to some civilians. *Miranda* warnings in the United States, as well as the Canadian and U.K. cautions, may be particularly difficult to understand by those who are most vulnerable, namely mentally retarded individuals and those afflicted by a mental disorder or a learning disability .

The standard Canadian caution is intended to inform detained or arrested suspects of their right to remain silent and their right to retain or instruct counsel without delay. While the right-to-counsel caution is often discussed in the context of disputes about the voluntariness of a confession, the two prongs of the caution (i.e., the right to counsel and the right to silence) are, in principle, distinct. A suspect could assert one, neither or both. The ‘right-to-silence’ caution<sup>7</sup> reads as follows:

**“You are charged with X. Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say may be given in evidence”.**

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<sup>6</sup>Everington, C., & Fulero, S. M. (1999). Competence to confess: Measuring understanding and suggestibility of defendants with mental retardation. *Mental Retardation*, 37 (3), 212-220; Fenner, S., Gudjonsson, G. H., & Clare, I. C. H. (2002). Understanding of the current police caution (England and Wales) among suspects in police detention. *Journal of Community & Applied Social Psychology*, 12, 83-93; 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.

<sup>7</sup> In practice, the suspect may also be asked if he or she understands the caution, but the inquiry into its comprehension is not part of the caution itself.

The caution is linguistically complex. The second sentence is an interrogative but the caution is read in its entirety. This violates discourse pragmatics that would expect a pause after the question is posed. The third sentence contains a passive without an expressed agent. Presumably it is the police who are “not obliging” but agency is implicit, not explicit. Research has demonstrated that passive constructions without an identified agent are more difficult to process. “Unless” can be difficult for non native speakers and “obliged” is a low frequency word. “In evidence” is also troublesome because such legal jargon is fertile ground for miscommunication. A suspect could easily infer (falsely) that they have an opportunity to get an exculpatory statement on record. Such statements, however, can be of no assistance to the accused at trial. As McIntyre J. stated in *R. v. Simpson*<sup>8</sup>: “As a general rule, the statements of an accused person made outside court ... are receivable in evidence against him *but not for him*”. (emphasis added).

In contrast to the Canadian caution, the *Miranda* warning used in the United States explicitly states that any elicited statement will be used against the suspect in a court of law<sup>9</sup>. Despite this clarification, research shows that a large proportion of suspects fail to understand the warnings, and waive their right to silence<sup>10</sup>. In this light, it is possible that the Canadian caution in its current form places suspects at even greater risk of self-incrimination than does the *Miranda* warning because it fails to specify that what is said during an interrogation can be used in only one way: against the suspect.

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<sup>8</sup> [1988] 1 S.C.R. 3 (S.C.C.) at 22.

<sup>9</sup> *Miranda v. Arizona* (1966), 384 U. S. 436.

<sup>10</sup> *Supra* note 5.

The purpose of the present study was to evaluate the extent to which changes in wording and style might affect how individuals of average (or above) intellectual ability understand the current Canadian police caution. We also investigated the impact of participants’ perceived guilt or innocence on their decision to remain silent. Previous research<sup>11</sup> has shown that innocent people tend to believe that their innocence is protective and self-evident to others, thus rendering them more likely to waive their right to silence. Finally, because language comprehension is invariably affected by the social context in which it occurs, we provide some commentary on the psychological and social factors that could affect a suspect’s decision to assert (or waive) his or her right to silence. Specifically, we hypothesized that:

- (1) Participants would show greater understanding of the caution in its improvised form(s).
- (2) Participants adopting an “innocent” stance would be more likely to waive their right to silence than their “guilty” counterparts.
- (3) “Innocent” participants would be less likely to waive the right to silence when cautioned that their statements could be used against them.

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<sup>11</sup> Clare, I. C. H., & Gudjonsson, G. H. (1995). The vulnerability of suspects with intellectual disabilities during police interviews: A review and experimental study of decision-making. *Mental Handicap Research*, 8 (2), 110-126; Kassin, S. M., & Norwick, R. J. (2004). Why suspects waive their *Miranda* rights: The power of innocence. *Law and Human Behavior*, 28, 211–221.

## Method

### Participants

A sample of 93 individuals (22 males, 71 females), ranging in age from 17 to 49 years (mean age = 20.33 years), participated in the study. Participants were recruited from two introductory psychology classes at York University in Toronto, Canada. Informed consent from each participant was obtained prior to testing. The students were asked to take part in the study in exchange for a 1% bonus in their course grade.

### Procedure

The study consisted of a 2 x 4 between-subjects design, with the independent variables being 1) the nature of the participant’s involvement in the offense (innocent vs. guilty), and 2) the version of the right-to-silence caution they received. Two dependent measures were of interest: 1) the participant’s decision to remain silent or not when asked whether he or she would like to say anything in response to the charge, and 2) the comprehension score regarding their understanding of the caution. Students were randomly assigned to one of the 8 conditions (guilt vs. innocence [2] x version of the caution [4]). Participants were tested in small groups ranging from 3 to 10 individuals per testing session. The size of each group varied according to the availability of the students. The experimenter provided each participant with a written scenario that assigned him or her to either the innocent or the guilty condition.

## Materials

Each participant was provided with a package that included an informed consent form, one of two possible scenarios (described below), a questionnaire, and a debriefing form. The scenarios were written to establish context and to place participants in a particular frame of mind with respect to their assumed guilt or innocence. More precisely, both scenarios invited participants to imagine that they were sitting in an interrogation room at the police station, waiting for a detective to arrive and deliver the “caution to a charged person” prior to the beginning of an interrogation. The scenarios differed in that one explicitly specified that the participant was under arrest for an offense he or she had indeed committed, whereas the second script indicated that the participant had been arrested for a crime he or she knew for certain they had not committed. The actual offence was “breaking and entering”.

Four cautions were used. Each participant was exposed to only one version of the caution. The first, or standard caution, was the caution to a charged person that police typically use before interviewing a suspect. The right to counsel portion of it was constant across all conditions. Improvisations were applied only to the right to silence component. The first improvisation substituted “you don’t have to” for “you are not obliged”, but was otherwise identical to the standard caution. The second improvisation contained an additional change, in that the question “Do you want to say anything about the charge?” was moved to the end of the caution. The third improvisation maintained these changes but also altered the second sentence so that it read: “... whatever you say

may be used against you”, as opposed to “used in evidence”. All versions of the caution were comparable in terms of overall ease of readability and comprehensibility according to the Flesch Reading Ease Formula<sup>12</sup>.

The cautions were presented to participants in the form of a video recording, in which an actor delivered the various versions of the caution. The actor was a white middle-aged male, formerly in the RCMP, who read the cautions clearly, at a conversational pace, and in a confident, non-judgmental tone of voice.

Respondents were instructed to answer questions about the caution as truthfully as possible, and were reminded of the confidentiality of their responses. The extent to which participants understood the meaning of, and consequences associated with the caution to which they were exposed was assessed by means of a short questionnaire. The first section of the questionnaire solicited demographic information about the participant. The second section began by asking participants to circle what they believed would have been their answer [either “yes” or “no”] had a police officer actually asked them whether they wished to say anything in answer to the charge. The second section also explored participants’ reasons for their hypothetical decision to say something (or not) about the charge. Questions were structured and sequenced in such a way as to discourage participants from going back to the first question and changing their answers once they had committed to waiving their right (or not). The second section also invited participants to describe in their own words: (a) the reasoning behind their decision to issue a statement (or not), (b) their understanding of the ideas or concepts conveyed by

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<sup>12</sup> RFP Evaluation Centers. (2006). *Flesch reading ease readability, other readability scores*. Retrieved November 30, 2006, from <http://www.rfp-templates.com/Readability-Scores/Flesch-Reading-Ease-Readability-Score.html>; University of Memphis. (2006). *Readability formulas*. Retrieved November 30, 2006, from <http://csep.psyc.memphis.edu/cohmetrix/readabilityresearch.htm>

the caution, and (c) their understanding of the consequences of saying something in answer to the charge. Finally, the third section of the questionnaire asked participants to rate the caution on a 5-point Likert scale with respect to clarity, complexity of grammatical structure, vocabulary difficulty, and speed of delivery.

The participants' comprehension of the caution was assessed from their answers to the three open-ended questions that probed for their understanding of the purpose (and consequences) of the caution. Answers were scored using a coding scheme based on the basic ideas that (a) the suspect doesn't have to say anything, (b) anything a suspect says may be used in evidence. The participant's response was awarded a score of 0 if neither of the above concepts were included in their answer, a score of 1 if the answer contained one key idea but not the other, and a score of 2 in cases where the participant included both concepts in his or her response. A random sample of 24 response forms was coded by an independent judge. A Kappa value of .78 was obtained. A debriefing form was issued at the end of the study, which outlined the purpose of the study and provided necessary contact information.

## **Results**

Because there was little variability between or within groups as a result of the altered versions of the caution, the data for versions 2 and 3 have been collapsed. Tables 1 & 2 show the distributions of participants' choices to waive their right to silence and the mean comprehension scores, broken down by their 'guilt' status. Within each group, decisions to speak (or not) were unaffected by the version of the caution received ( $\chi^2 < 1$  in both instances), nor were comprehension scores influenced by the version of the

caution (all F's < 1). The overall mean comprehension score was 1.4 (out of a maximum of 2). Fourteen (14) participants (15%) received a score of zero, while another 36 (39%) received a score of 1. Poor comprehension was not accompanied by an awareness of misunderstanding. For those respondents who demonstrated no comprehension (a comprehension score of zero), the mean Likert ratings for clarity, complexity, difficulty, and pace were indistinguishable for the comparable means of those respondents (n = 43) who received perfect comprehension scores.

There was an overall effect of guilt status, in that innocent participants were more likely to waive their right to silence [ $\chi^2 (1, N = 93) = 6.474, p < .01$ ]. There was a slight, but statistically significant correlation between comprehension and the likelihood of waiving the right to silence ( $r = .21, p < .05$ ). Remarkably, 17 participants (18%) reported that the purpose of the caution was to notify them of their right to speak to the officer, as opposed to their right to remain silent.

**Table 1** Number of innocent participants that waived/exercised their right to silence (mean comprehension scores are in parentheses)

	Caution			Total
	Standard	Improv 1&2	Improv 3	
Waived right	6 (0.8)	10 (1.2)	6 (1.0)	22
Remained silent	8 (1.3)	9 (1.4)	8 (1.0)	25

**Table 2** Number of guilty participants that waived/exercised their right to silence (mean comprehension scores are in parentheses)

	Caution			Total
	Standard	Improv 1&2	Improv 3	
Waived right	4 (1.5)	4 (1.0)	2 (1.5)	10
Remained silent	10 (1.4)	15 (1.5)	11 (1.7)	36

### Discussion

The goal of the present study was to assess comprehension of the current police caution by individuals of average intellectual ability. Changes to the wording of the standard caution did not improve its comprehensibility, nor did the changes influence the likelihood that mock suspects would waive their right to silence. Thus, hypothesis 1 was not supported.

‘Innocent’ suspects were significantly more likely to waive their right to silence than were their ‘guilty’ counterparts. Thus hypothesis 2 was supported, replicating similar findings by other investigators<sup>13</sup>. Eight participants explicitly stated that they would have talked to the police because they wanted to appear cooperative, they felt that they had nothing to hide and that they perceived the situation as an opportunity to give their side of the story. Most importantly, they believed that their statements could later be used in their defence. Previous research<sup>14</sup> has shown that even educated individuals of

<sup>13</sup> Kassin, S. (2005). On the psychology of confessions: Does *Innocence* put innocents at risk? *American Psychologist*, 60, 215-228.

<sup>14</sup> Supra, note 10.

average intellectual ability hold the illusory belief that their innocence will protect them or that it will be obvious to others. ‘Guilty’ participants were more likely to remain silent than were innocent participants, regardless of the version of the caution to which they were exposed, indicating that guilty individuals exercise their right to silence for strategic purposes. Indeed, 28 of the guilty participants reported that they would have remained silent out of fear of saying something self-incriminating, because they felt that they needed legal advice, and that they were aware that anything they said to the police could be used against them. ‘Innocent’ participants were no more likely to exercise their right to silence when presented with an improvised caution making it explicit that statements could be used against them than they were for the standard caution, thus hypothesis 3 was not confirmed.

Overall, participants were unaffected by the changes in wording, both in terms of their comprehension, and in terms of their choice to remain silent, suggesting that the problem of the caution may lie not in its vocabulary, but elsewhere. Notwithstanding the relatively high Likert ratings (all means > 3.5 on a 5-point scale) fewer than half (43%) of the participants received perfect comprehension scores. Considering that 34% of participants indicated that they would waive their right to silence, it is plausible that some portion of this group simply failed to understand the purpose and consequences of the caution. Some respondents conflated the “right to counsel” information with the “right to silence”, as the following examples illustrate:

**“It is saying that you may get a lawyer and if you want to say anything, you can”.**

**“That you can receive counsel if you want, and also you can talk.**

**“The opportunity to speak and also to get legal advice was presented”.**

**"The investigator said that I had permission to say anything that I wanted to”.**

While our tinkering with the wording had no effect, it is possible that larger sample sizes might reveal some salutary effect of the improvisations.

The social psychology of the interrogation room

False confessions can lead to wrongful convictions because the major players in the legal system — police, jurors, and judges — have a strong tendency to believe that confessions are true<sup>15</sup> and they are given considerable weight in the final decision. Nevertheless, before suspects can produce false confessions, they must first either waive their right to silence or have this right violated. If the right to silence is not understood from the outset, it is more likely to be waived. The data described above are worrisome because they suggest that even under optimal conditions of language comprehension, the standard caution is misunderstood by a significant minority of high functioning respondents. Some interpreted the caution as an invitation to talk. We would expect comprehension to be even worse amongst suspects who are fatigued, intoxicated, afraid, or suffering from a mental disorder or deficit.

Custodial interrogation is inherently coercive. Even if the right to silence caution is understood, the subsequent actions and statements on the part of the police could easily cause a suspect to doubt their initial interpretation of it. There is ample documentation of police continuing to question suspects repeatedly, no matter how often their right to silence may have been asserted<sup>16</sup>. Section 7 challenges are sometimes successful<sup>17</sup>, but

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<sup>15</sup> White, W. S. (2003). *Miranda's waning protections: Police interrogation practices after Dickerson*. Ann Arbor: The University of Michigan Press.

the appellate courts do not appear to be providing clear guidance. As Yau<sup>18</sup> recently noted: “... there is no shortage of instances where it seems an accused person, having expressed a wish to remain silent, can do nothing except endure relentless so-called “persuasion” methods that may or may not be legitimate, depending on the court that happens to be hearing a particular *Charter* application”.

### Vulnerable suspects

Intellectually impaired individuals are at particular risk for producing self incriminating statements. One reason for this is their tendency to acquiesce in social situations. Acquiescence is defined as “the tendency to agree with or say yes to statements or questions, regardless of the content of the items”<sup>19</sup>. This inclination towards yea-saying is enhanced in situations when (a) answers are not known, (b) questions are unclear, and (c) the individual has spent relatively little time or energy thinking about the question. Acquiescence in the general population is partly a result of the confirmation bias, whereby people search their memories for examples that confirm what is being asked of them while ignoring counterexamples. Many suspects, and interviewees in general, are predisposed to seek to please the interviewer and to provide whatever information is being solicited. Individuals of lower intellectual ability are at increased risk of being acquiescent because they have learned that submissiveness is adaptive<sup>20</sup>. Consequently, mentally retarded individuals are inherently inclined to

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<sup>16</sup>McArthur, H. (2006). The right to silence: An overview. In Alan D. Gold Collection of Criminal Law Articles ADGN/RP-208 (April 2007).

<sup>17</sup>R v Reader [2007] M.J. No. 225.

<sup>18</sup>Yau, B. (2007). Making the Right to Choose to Remain Silent a Meaningful One. Criminal Reports, 38 C.R. (6<sup>th</sup>) 226 at 240.

<sup>19</sup>Finlay, W. M. L., & Lyons, E. (2002). Acquiescence in interviews with people who have mental retardation, *Mental Retardation*, 40 (1), 14-29, p. 14.

<sup>20</sup>Powell, M. B., Fisher, R. P., & Wright, R. (2005). Investigative interviewing. In N. Brewer, & K. D. Williams. (Eds.), *Psychology and law: An empirical perspective* (pp. 11-42). New York: Guilford Press.

produce self-incriminating statements during police interrogations because of their compliant disposition as well as their aim to appear socially desirable and competent.

In the U.K. Clare and Gudjonsson<sup>21</sup> investigated the comprehension of police cautions on the part of individuals with mental retardation or learning disabilities, and found that acquiescent responding was correlated with intellectual functioning. More specifically, people with mild learning disabilities were more at risk to waive their rights and incriminate themselves during police interviews than their average-ability counterparts.

In the United States, Fulero and Everington<sup>22</sup> investigated the competency of mentally retarded adults to intelligently and voluntarily waive their *Miranda* rights. They found that mentally challenged adults scored considerably lower on measures of *Miranda* comprehension than non-impaired adult and juvenile counterparts from other studies. A subsequent study<sup>23</sup> showed that a significantly larger proportion of persons with mental retardation (than without) failed to comprehend (1) the right to remain silent, (2) the possibility that their statements would be used in a court of law, and (3) the right to obtain legal advice before and during an interrogation. Other researchers have obtained similar results<sup>24</sup>. Moreover, many suspects possess below-average IQs that are not low enough to qualify them as being retarded, but which nevertheless greatly limit their capacity to understand the warnings<sup>25</sup>. The findings from these studies show that persons

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<sup>21</sup> Clare, I. C. H., & Gudjonsson, G. H. (1993). Interrogative suggestibility, confabulation, and acquiescence in people with mild learning disabilities (mental handicap): Implications for reliability during police interrogations. *British Journal of Clinical Psychology*, 32, 295-301.

<sup>22</sup> Fulero, S. M., & Everington, C. (1995). Assessing competency to waive *Miranda* rights in defendants with mental retardation. *Law and Human Behavior*, 19 (5), 533-543.

<sup>23</sup> Everington, C., & Fulero, S. M. (1999). Competence to confess: Measuring understanding and suggestibility of defendants with mental retardation. *Mental Retardation*, 37 (3), 212-220.

<sup>24</sup> Fenner, S., Gudjonsson, G. H., & Clare, I. C. H. (2002). Understanding of the current police caution (England and Wales) among suspects in police detention [electronic version]. *Journal of Community & Applied Social Psychology*, 12, 83-93.

suffering from mental retardation may not fully appreciate the concept of self-incrimination or the importance of having a lawyer present during questioning.

Certain interviewer tactics can influence the responses of individuals with mental retardation<sup>26</sup>. For example, not only did mentally retarded interviewees demonstrate poor comprehension of the *Miranda* warnings, they were also more likely to change their response in order to please the interviewer following friendly rather than unfriendly or neutral feedback. This finding is of particular interest because police often act amicably in order to develop ‘rapport’ with the suspect, in the hopes of eliciting a confession. The fifth theme of the second step in the Reid technique specifically instructs police interrogators to take advantage of suspects’ needs for gratification and attention and to develop rapport by using compliments and false praise: “... the uneducated and underprivileged are more vulnerable to flattery than the educated person”<sup>27</sup>.

People of standard intellectual functioning understand most of their *Miranda* rights, although comprehension is imperfect or distorted in most cases<sup>28</sup>. Similarly, members of the general population possess a significantly limited understanding of the U.K. police cautions<sup>29</sup>. People with an intellectual disability are more likely to believe that a person’s guilt or innocence will be evident to the police, jurors, or judge, than are individuals of average cognitive functioning<sup>30</sup>. Nevertheless, members of the latter group may also construe ‘innocence’ as a shield. These kinds of studies show that people have a naïve trust in the capacity of their own innocence to protect and exculpate them.

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<sup>25</sup> 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.

<sup>26</sup> O’Connell, M. J., Garmoe, W., & Sevin Goldstein, N. E. (2005). *Miranda* comprehension in adults with mental retardation and the effects of feedback style on suggestibility. *Law and Human Behaviour*, 29 (3), 359-370.

<sup>27</sup> Inbau, F. E., Reid, J. E., Buckley, J. P., & Jayne, B. C. (2004). *Criminal Interrogation and Confessions* (4th ed.). Sudbury, MA: Jones and Bartlett Publishers, p. 271.

<sup>28</sup> *Supra*, note 5.

<sup>29</sup> *Supra*, note 23.

<sup>30</sup> *Supra* note 10.

Furthermore, such findings indicate that the consequences of waiving one’s rights are misunderstood, and that the *Miranda* warnings may not satisfactorily protect the innocent against police authority, their own self-incriminating statements, or from false confessions.

Consider the following caution recently delivered in a (unreported) Ontario case (emphases have been added):

**Officer Todd: ok, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say may be given in evidence, do you understand this caution?**

**Suspect: no response.**

**Officer Todd: do you want me to read it again to you there?**

**Suspect: sure.**

**Officer Todd: ok, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say may be given in evidence, basically what that means let me explain to you that anything you tell me here tonight...**

**Suspect: yeah.**

**Officer Todd: ok, *can be used for and against you, ok?* Uhm so anything you tell me that ah can be used against you in court, everything’s going to be recorded and it could be used against you later on, ok, if that is deemed necessary, do you understand that?**

**Suspect: yes.**

**Officer Todd:** ok, also basically stating that ah you are not obliged to tell me anything unless you wish to do so, so you are under no obligation to talk to me right now about this at all, ok, that’s something else ah I’ll explain to you and if you want to talk to me *I hope you are going to want to talk to me to clear this up ah.*

**Suspect:** I want to clear this up and hopefully get back to work tomorrow.

**Officer Todd:** There’s no ahm there’s no duress here or whatever ahm I am not forcing you to do this, you’re doing this voluntarily.

**Suspect:** Ya, I am doing it voluntarily, I been I got called in and I voluntarily showed up.

**Officer Todd:** ok.

**Suspect:** and *I want to clear this up as soon as possible and be on my way and be working.*

**Officer Todd:** *ok.*

During the ensuing 2-hour interrogation, the suspect, who was cognitively impaired, produced a “confession”. The defence did not mount a section 7 challenge, however the judge excluded the statement on the grounds that the manner in which it had been elicited cast considerable doubt on its reliability. The above caution (delivered loudly and at a staccato pace) is troublesome for a number of reasons. The suspect is misinformed that his statement could be used “for” him. He is told that he’s under no obligation to talk, but in the same breath is told that Officer Todd hopes that he will talk.

Officer Todd implies that the matter can be “cleared up” if the suspect talks, and does nothing to correct the suspect’s expectation that he can soon be on his way.

The literature abounds with evidence that innocent people confess to crimes they have not committed. In his review, Sherrin<sup>31</sup> concluded that factitious confessions frequently occur because of the way the legal system is structured. A confession is customarily accepted as evidence if it can be considered to be reliable and voluntary, but the system fails to protect those most prone to producing false confessions, namely the youth, mentally retarded, fatigued, and those experiencing withdrawal. A fabricated admission can result directly from the genuine or perceived pressure exerted on the suspect throughout the interrogation<sup>32</sup>. Furthermore, individuals with a mental disability tend to believe that a false confession can be rescinded and would not be considered as evidence of guilt if repeated in court. Many such suspects were also more likely to think that they could go home, at least until trial, following a confession<sup>33</sup>. Overall, these findings indicate that intellectually disabled individuals are at an increased risk of waiving their rights and producing a false confession.

In summary, the protection that the right to silence is supposed to provide is largely spurious for the following reasons:

- (1) The caution is not well understood in the first place.
- (2) It may or may not be properly delivered.

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<sup>31</sup> Sherrin, C. (2005). False confessions and admissions in Canadian law. *Queen’s LawJournal*, 30, 601-659.

<sup>32</sup> Forrest, K. D., Wadkins, T. A., & Larson, B. A. (2005). Suspect personality, police interrogations, and false confessions: Maybe it’s not just the situation [electronic version]. *Personality and Individual Differences*, 40, 621-628.

<sup>33</sup> Clare, I. C. H., & Gudjonsson, G. H. (1995). The vulnerability of suspects with intellectual disabilities during police interviews: A review and experimental study of decision-making. *Mental Handicap Research*, 8 (2), 110-126.

- (3) If it is properly delivered and understood, subsequent police statements and actions belie the caution’s essential purpose.
- (4) Appellate reviews of interrogation tactics provide little guidance regarding what constitutes coercion during a custodial interrogation.

What is a *trick*?

In *Hebert*<sup>34</sup>, Justice McLachlin makes note of “the impossible task of subjectively gauging whether the suspect appreciates the situation and the alternatives. [The Charter] seeks to ensure that the suspect is in a position to make an informed choice by giving him the right to counsel. ... [T]he test for whether that choice [i.e., whether to speak to the police or not] has been violated is essentially objective. Was the suspect accorded his or her right to consult counsel”? The clear implication here is that if counsel has been consulted, any subsequent statements to the police are, by definition, the result of an informed choice. Justice McLachlin goes on to say that “the scope of the right must extend to exclude tricks which would effectively deprive the suspect of this choice. To permit the authorities to trick the suspect into making a confession to them after he or she has exercised the right of conferring with counsel *and declined to make a statement*, is to permit the authorities to do indirectly what the Charter does not permit them to do directly. This cannot be in accordance with the purpose of the Charter<sup>35</sup>” (emphases added).

A social science perspective<sup>36</sup> on the determinants of informed choice shows that some social contexts are psychologically disabling and thus thoroughly compromise the

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<sup>34</sup> Supra note 1, at ¶55.

<sup>35</sup> Supra. Note 1 at ¶66.

<sup>36</sup> Ross, L, & Shestowsky, D. (2003). Contemporary Psychology’s challenges to legal theory and practice. Northwestern University Law Review, 97(3), 1081-1114.

assumption of free and independent choice. The social dynamics of the interrogation room constitute one such context. The single most important lesson from the last few decades of research in social psychology has been the demonstration of the power of the situation as a determinant of people’s behavior. The *fundamental attribution error* consists of our strong tendency to underestimate the influence of the situation and overestimate the import of dispositional factors<sup>37</sup>. There is a Kafkaesque quality to the suspect’s situation at the outset of an interrogation. He has been instructed (presumably) by counsel not to speak to the police. Minutes (or hours?) later, the police (presumably) caution the suspect that (s)he is “not obliged to say anything”. If the suspect then asserts his or her unwillingness to speak, the police are nevertheless permitted to proceed as if the suspect had not asserted their right to silence. As Alan Gold has noted<sup>38</sup>, the police practice of continuing questioning, despite the suspect’s expressed aversion to talk, produces “a dangerous and unconstitutional encouragement of police persistence that ignores the inherently coercive and intimidating setting of the police interrogation room”.

A suspect who is sensitive to their wishes having been ignored might easily infer that they have no choice but to answer the questions. Moreover, the interrogator is usually the same agent who delivers the caution, which, if properly grasped, is going to preclude any interrogation taking place. The issue of outright deceit<sup>39</sup> or trickery is, for the most part, moot. An interviewer who is eager to move on to case-specific questions may deliver the caution hurriedly and perfunctorily, and make little or no effort to confirm that the caution has been properly understood<sup>40</sup>. The conflict of interest

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<sup>37</sup> Zimbardo, P. (2007). *The Lucifer effect: understanding how good people turn evil*. New York: Random House.

<sup>38</sup> Gold, A. (2002). Charter rights – and wrongs. Alan D. Gold Collection of Criminal Law Articles (ADGN/RP-160, October 25, 2002).

<sup>39</sup> Leo, R. A. (1996). *Miranda’s revenge: Police interrogation as a confidence game*. *Law & Society Review*, 30(2), 259-288.

<sup>40</sup> Baldwin, J. (1993). Police interview techniques: Establishing truth or proof? *British Journal of Ciminology*, 33(3), 325-352.

produces a social dynamic that would be comical were the stakes not so high. Most interrogations are guilt presumptive, rather than investigative. The purpose of the exercise is to extract a confession from a recalcitrant law-breaker. The confession, however, may be inadmissible without a bow in the direction of a ‘right-to-silence’ caution. From the perspective of the police, an ideal caution would be one that meets the letter of the law, but which is also incomprehensible and thus not likely to be acted on by the suspect. In addition to its already awkward wording, further confusion can be sown by adding extraneous information, speeding up the delivery, and feigning deafness<sup>41</sup> if and when the suspect expresses a wish to remain silent. Recall Officer Todd in the above example telling the suspect (who had Grade 2 level language skills) “...**you are under no obligation to talk to me right now about this at all . . . I hope you are going to want to talk to me to clear this up**”. The defendant did want to clear things up and participated in the subsequent interrogation. From the interrogator’s point of view, the “ideal” caution is the one in place today and the incentives for the police to continue with current practices are numerous.

## Conclusion

McArthur<sup>42</sup> has recommended a number of steps that defence counsel could take to ensure that the rights of their clients are protected. She suggests that (a) counsel inform clients not only of their right to silence, but also warn them that the police may ignore a stated wish to remain silent; (b) clients should be advised to clearly state that they no longer wish to be held in the interrogation room; (c) clients should be informed

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<sup>41</sup> Or, alternatively, engaging in an argument with the suspect about whether, notwithstanding counsel’s advice, it is *really* in his or her best interests to remain silent.

<sup>42</sup> *Supra* note 15.

that they can request and receive legal advice more than once, and should not hesitate to do so once their wish to remain silent is being disregarded; and (d) counsel should seek to have the statement excluded if it emerged from a Section 7 violation.

Stuesser<sup>43</sup> goes further in recommending that an accused be given the right to have counsel present during any police interview, and that the interrogation be terminated upon an accused’s refusal to answer questions. He also recommends that all police interviews conducted in Canada be videotaped to ensure protection against inappropriate questioning. This method has been shown to help jurors and judges more accurately distinguish between true and false confessions<sup>44</sup>. The accuracy of these judgments declines when the camera is directed primarily at the suspect, but increases when the camera angle subsumes both the interrogator and the suspect. Nevertheless, the likelihood of a bias on the part of jurors and judges is most reduced when interrogator-focussed videotaped confessions are presented.

Although the possibility of wrongfully convicting an individual is reduced when interrogations are videotaped, this method is only effective if it is implemented in a consistent manner. For example, in *R. v. Philogene*<sup>45</sup>, the accused was informed of his right to counsel upon his arrest, and expressed his desire to speak with a lawyer. The police officer failed to provide him with the opportunity and proceeded with the interrogation. After extensive questioning off-tape, Philogene confessed to robbery and aggravated assault. The police then asked the accused to repeat what he had said, this time while being videotaped. The latter interview was presented at trial and resulted in a conviction. However, the appeal court ruled that the appellant’s right to counsel had been

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<sup>43</sup> Supra note 2.

<sup>44</sup> Lassiter, G. D., & Geers, A. L. (2004). Bias and accuracy in the evaluation of confession evidence. In G. D. Lassiter (ed.), *Interrogations, confessions, and entrapment* (pp.197-214). New York: Kluwer Academic/Plenum Publishers.

<sup>45</sup> [2006] CanLii 38729 (ON C.A.)

violated, and that the taped statements were not voluntary. One wonders how often the court is presented with a videotaped confession which is the culmination of a lengthy sequence of prior, unrecorded interrogations or exchanges<sup>46</sup>.

Although most versions of the *Miranda* warnings in the United States are written in English, there exist over 70 Spanish versions intended for use with members of the country’s populous Hispanic community<sup>47</sup>. In Canada, however, the official police cautions only come in English and French. In the event that the suspect is not fluent in either official language and a translator is required, police often resort to asking a colleague who speaks the language of interest. If no such officer is available, a language assistance telephone service is used. These various sources of translated cautions may lead to a great variability in the content of the cautions administered in foreign languages in Canada. Such variability may be putting individuals who face a language barrier at increased risk for self-incrimination, if the information is not adequately translated or conveyed. Official cautions in Mandarin, Cantonese, Spanish, Tamil, and other languages could be created and distributed to police stations across the country in an effort to limit discrepancies between versions, and as such, to better protect this stratum of vulnerable individuals.

One need not be developmentally delayed in order to misunderstand the purpose and consequences of police cautions pertaining to one’s right to remain silent. The right is not described as a ‘right’ in the first place, nor is there any requirement that it be respected<sup>48</sup> when a suspect attempts to invoke it. Even educated individuals may find the Canadian police caution ambiguous (without realizing that they have misconstrued the

<sup>46</sup> *R. v. Unger* 2005 MBQB 238, November 4, 2005.

<sup>47</sup> 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, 177-192.

<sup>48</sup> *R. v. Singh*, 2007 SCC 48 (CanLII).

message). The subsequent behavior of the police further jeopardizes comprehension. Language difficulties and cognitive deficits further exacerbate an already confusing scenario. The inevitable conclusion to all this is that the protection that the right to silence is supposed to afford is illusory.