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VIOLATION OF CONSTITUTIONAL RIGHTS: THE LANGUAGE IMPAIRED PERSON AND THE MIRANDA WARNINGS

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One of the basic guarantees of the Constitution is that all citizens of the United States be informed of their legal rights at the time they are arrested and prior to questioning by the police. This fundamental guarantee is being denied well over half of all prelingually deafened people and millions of other citizens with language disabilities such as aphasia; foreign speaking populations; and mentally retarded persons (Bennett, 1943; Benson and Blumer, 1975; Culombe v. Connecticut, 1961; Garrett & Levine, 1973; Littler, 1950; and Smallwood v. Warden, 1966).

The rights involved are those covered under the Fifth and Sixth Amendments to the Constitution of the United States and affirmed by the Supreme Court (*Miranda v. Arizona*, 1966). The pertinent part of the Fifth Amendment provides that no person shall be compelled to be a witness against himself without due process of law. The Sixth Amendment assures that in all criminal prosecutions the accused shall have the right to assistance of counsel for his defense.

The Miranda Warning (known technically as Advice of Rights) seeks to have the

criminally accused waive his rights under the Fifth and Sixth Amendments and possibly incriminate himself without a lawyer present. The burden is with the State to secure a knowing intelligent waiver of these Constitutional Rights from the accused. Thus, the State must prove that the accused voluntarily waived his Rights at the time of interrogation by the police. It will be demonstrated here that the Miranda Warning is incomprehensible to a significant segment of the deaf population and others with language impairments. They are thereby being denied basic Constitutional Rights when they sign a waiver that they cannot understand.

A case in point is that of David Barker, a 24 year old congenitally deaf man brought in for police questioning in the highly sensationalized murder of a young woman, Rita Kenney. Prior to police questioning he was ostensibly informed of his legal rights, i.e. given the Miranda Warning. The police claim that he waived these rights. What actually happened was that the functionally illiterate Mr. Barker was initially presented the following statement in written form which he signed:

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(Statement presented to Mr. Barker)

I, _____ have been advised of my Constitutional Rights by _____ who has identified himself as a Law Enforcement Officer.

I understand that:

1. You have the right to remain silent. Do you understand this?
2. Anything you say can and will be used against you in Court. Do you understand this?
3. You are not being promised anything to talk to us and no threats are or will be made against you. Do you understand this?
4. You have the right to talk to a lawyer and have him present now or at any time during any questioning. If you proceed to answer any questions without a lawyer the questioning will stop if you should change your mind and request the presence of a lawyer. Do you understand this?
5. If you cannot afford a lawyer, one will be furnished, without charge, before any questioning, if you so desire. Do you understand this?

The following questions must be asked immediately after the warnings are given and an affirmative reply obtained:

6. Do you understand each of these rights I have explained to you?
7. Understanding each of these rights, are you willing to talk to us without a lawyer?

I have elected of my own free will without any force, threats, or promises to answer verbally all questions asked.

Signed _____
Witnessed _____
Date _____ Time _____ Place _____

The first issue is whether or not Mr. Barker was actually informed of his legal rights when they were presented him in written form. Administration of an academic achievement test (Stanford Primary Battery) to him revealed a reading level of only grade 2.8. To understand the Miranda Warning requires a reading level of 6th to 8th grade (Table). Thus, in reality Mr. Barker was not given the Warning. In effect he was denied his Constitutional Rights.

Following his signing of the Miranda Warning, Mr. Barker also signed a written confession incriminating himself in the murder of Ms. Kenney. Had Mr. Barker understood his legal rights he would in all possibility not have confessed, especially not without advice of an attorney.

The second major issue in the Barker Case occurred about a month later when Mr. Barker was once again questioned by police detectives. At this time an attempt

was made to give the Miranda Warning in sign language through an interpreter. Once again Barker repeated and signed essentially the same confession.

The issue remains the same, namely whether Mr. Barker was informed of his Constitutional Rights in a comprehensible way. If not, his confession is not admissible as evidence, nor are those of huge members of other deaf and otherwise language impaired defendants.

It is relevant to note that the only way a sign language interview can be fully recorded is on videotape or film. Thus, as in contrast to the verbatim transcriptions of tape recordings of oral interrogations and Advice of Rights, in the Barker case there is only the transcribed oral statement of what the interpreter **claims** was told to the accused and the interpreter's statement of what he claims the accused said.

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One additional point must be made before going into a more explicit analysis of the Miranda Warning and its somewhat unique application to deaf and/or language impaired people. Nobody advocates that murderers should go free or that deaf people and others with language handicaps should not pay for their crimes exactly as other citizens do. **The issue is that these groups are also entitled to the same Constitutional Rights as all other citizens.** If David Barker is guilty of the murder of Ms. Kenney, he should pay for his crime. However, under no circumstances should a confession obtained by violating his Constitutional Rights be admitted as evidence against him. His attorney, Joseph Touhey, has raised this basic issue as an integral part of David Barker's legal defense. The section which follows outlines the basic problem over half of all prelingually deafened people and many other language impaired persons encounter when dealing with the Miranda Warning.

Reading Level of the Miranda Warning

Evidence clearly places the reading level of the Miranda Warning at sixth to eighth

grade (Table). Thus, persons reading at significantly lower levels (2.8 in Barker's case) cannot understand the warning when it is given to them in writing. This means, in the case of Mr. Barker, that he, in a true sense, was not given the warning at all. Hence, he did not knowingly waive his rights and any confessions or statements he made thereafter should not be admissible as evidence.

Because only about 10% of prelingually deaf adults read at a 6.0 grade level or above, the Miranda Warning should not be given to them in written form such as the typical one reproduced above in this article (Office of Demographic Studies, 1971; Vernon, 1970). Some states recognizing the reading problem presented by the Miranda Warning have attempted to rewrite the statements at a lower reading level. However, this too poses problems, for it is questionable whether the full intent of the warning is conveyed by substituting simple words (see sample below). However, Miranda Warnings essentially like the one reproduced earlier in this article remain the most common written form used in most states.

MIRANDA WARNING (Statements indicated by asterisks are the Warnings written at approximately second grade level according to the Fry Readability Formula, 1968).

1. You have the right to remain silent.
*You don't have to talk to me.
2. Anything you say can and will be used against you in Court.
*We will use the things you tell me in Court.
We will use them to decide if you did something wrong or not.
3. You are not being promised anything to talk to us and no threats are or will be made against you.
*We will not give you anything for talking.
We will not do anything to you if you don't talk.
4. You have the right to talk to a lawyer and have him present now or at any time during questioning. If you proceed to answer questions without a lawyer the questioning will stop if you should change your mind and request the presence of a lawyer.
*You can talk to a lawyer if you want.
You can have a lawyer here while you talk.
If you start to talk and then decide you want a lawyer, we will get one.

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5. If you cannot afford a lawyer, one will be furnished without charge before any questioning if you so desire.

*If you don't have money for a lawyer, we will get one for you.

We can get the lawyer before you start talking.

WAIVER

Do you understand each of these rights I have explained to you?

*Do you understand?

Understanding each of these rights, are you willing to talk to us without a lawyer?

*Will you talk to us without a lawyer?

*Do you know what you are doing?

I have elected of my own free will without any force, threats or promises to answer verbally all questions asked.

*I will talk to you.

No one is making me talk.

No one will give me anything for talking.

No one will do anything to me if I don't talk.

(This sample prepared by J. Greenberg).

To compute the readability level of the Warning, a vast array of scientific formulas are available. The most comprehensive source for these formulas remains the Measurement of Readability by Klare (1963). Despite the appearance of newer formulas, the factors considered are essentially the same and most often center on the elements of vocabulary and sentence structure. The degree of agreement among the three formulas (see Table) demonstrates that the actual reading level of the Miranda Warning falls between 6.0 and 8.0 grade level. This estimate allows for some errors which may be inherent in any formulas.

Table

Miranda Warning Reading Level

Reading Level Formula	Reading Grade Level
Fog (In Jenkins, 1960)	7-8
Flesch (1949)	7
Fry (1968)	7.2

The problem of reading level is not so acute for a normally hearing person because the warning can be administered orally. Most people with reading problems have a listening comprehension (auding) level which exceeds their reading level (Wilson, 1976). Moreover, this can be validated by means of a standardized test of auding. Thus, a hearing person's receptive language skills (auding and reading) can both be assessed to determine whether the individual was able to comprehend the Miranda Warning. For the deaf person, only the receptive skill of reading can be assessed. At the present time there is no adequate standardized assessment that measures the receptive skills of sign language.

For persons such as aphasics and other language impaired groups the listening or auding level may be below the reading achievement. Both of these levels are often far below that needed to understand the Miranda Warnings.

"Miranda Warning" Given in Sign Language

The solution to the problem of the Miranda Warning and deaf persons would ostensibly seem easily resolved by simply

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having an interpreter give it in sign language. Some interpreters have acted as if this were the case. However, the evidence will show that by putting the Miranda Warning in sign language and assuming, thereby, that it was fully understood is fallacious. As a consequence of this fallacy, many deaf people have been denied a lawyer when they needed one; they have confessed to crimes when it was not in their interest; evidence has been used against them which should never have been admitted to court; they have incriminated themselves unnecessarily; and, in general, they have been denied their Constitutional Rights. The evidence for this position is complex and involves at least two key points.

I. **There are no signs which adequately convey key terms and concepts in the Miranda Warning.** A look at the Warning (cited earlier) makes this immediately clear to one fluent in sign language. For example the term of "rights" used in the context of "I have a right to free speech" or "women have a right to equal opportunity" has no sign. The sign for "alright", the sign for "can", and the sign for "correct" are sometimes used. However, none of these is more than remotely similar in meaning to the concept of "rights" in the Constitutional or legal sense. Since full knowledge of this concept is absolutely fundamental and minimal to the understanding of the Miranda Warning, it is obvious that the Warning has not been given if signs having only vaguely similar meanings are used. Since there is no sign for the term "rights" as it is used in the Miranda Warning it is apparent that the deaf person who is given the Miranda Warning in sign language has, in fact, been denied a basic Constitutional Right.

Another key term in the Miranda Warning that cannot be adequately stated in sign language is "waive". Once again there are signs and phrases that may vaguely connote the idea of waive, but in the Con-

stitutional and legal sense of "waive one's rights" they fall far short of communicating the full meaning required by the Miranda Warning. Thus, as indicated earlier, the deaf person given the Warning in sign language is, in reality, not being given his or her Advice of Rights. A basic Constitutional protection is being denied. Additional examples could be given of syntactical structures and individual words in the warnings that cannot be fully signed.

II. Another relevant problem is that of terms in the Warning for which there may be academic or esoteric signs. The term Constitutional illustrates this issue. While there is a sign for 'Constitution', it is used almost exclusively in sophisticated academic settings and by those with such backgrounds. The overwhelming majority of deaf people, David Barker included, have never employed the sign for Constitution and have no concept of its meaning. Consequently, the use of this sign to convey the rights of the Miranda Warnings is a **tour de force**.

III. Basic Problem of Sign Language and The Miranda Warning

Sign language is a repressed language. For years educators and other professionals have punished deaf children and adults who have used the language (Mindel and Vernon, 1972). They have refused to teach signs and, in fact, until recently few even knew the language. Joanne Greenberg highlights the problem in her novel about a deaf couple, *In This Sign*, when she has the protagonist, Abel remark, "Every time I sign I smell urine". What Abel is actually saying is that the only place the children in his school could communicate in sign language was in the bathroom where teachers and supervisors could not catch them.

The point is that while sign language can be a beautiful and frequently sophisticated language, it lacks terms for many legal and other academic and abstract concepts.

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For the educated deaf person these abstract words can be fingerspelled. Thus, for them the reading or the correct signing and fingerspelling of the Warning poses no problem. They can understand them as fully as do hearing people. However, to fingerspell "waive", "Constitutional", or "rights" to a deaf person who is illiterate or who reads at below a sixth or eighth grade level has no more meaning than to write the term in Spanish to one who understands only English.

Evidence

The National Association of the Deaf (NAD) and other leading authorities on sign language have combined their vast linguistic skills to put on film an experimental sign language version of the Miranda Warning. This is a noble but unsuccessful effort by linguistic experts to aid in assuring that the deaf person receives the basic Constitutional Rights that the Miranda Warning embodies. To test the validity of this effort, the NAD version of the Warning was given to a group of deaf graduate students. These were exceptionally bright, highly educated people for whom sign language was a "native tongue". They were permitted to view the NAD's filmed Warning as often as they wished. Then they were asked to write down what had been signed. Three representative examples of what they wrote are shown below:

- I. It is about 3 choices you would have when you are arrested by a policeman. 3 choices are: 1. not to sign anything and keep quiet, 2. make a confession to sign your name — if you change my mind about my confession, I must refuse to sign my name and 3. get a lawyer and that I should not worry about money to pay for lawyer's fee. I can get them for free.
- II. He said "Suppose you had a police interrogating you" — You have 3 choices. 1. keep quiet. 2. get a lawyer — can be free of charge if you have no money. 3. If confession is desired, you can confess some and hold back some information. You have to sign a form called "confession form" (or whatever).
- III. He said: If you get caught by a police you will have three choices. One is — you don't have to talk, just be silent even if police asking you some questions. Two — you can get a lawyer for some advice. Third — you may tell or admit all the list you have done, then you change mind; you have right to change your mind.

If these statements are compared to the actual Miranda Warning it is readily apparent that there are significant differences. In fact the heart and substance of the Warning is lost in the filmed sign language version. If this is so clearly the case with bright deaf graduate students, it is even more obvious that the average deaf person would get far less of what is already demonstrated to be a grossly inadequate communication of Constitutional Rights.

Interpreters

Most sensitive, experienced interpreters are aware that it is not possible to communicate the full Miranda Warning to most deaf persons. Some handle this by simply telling the deaf person to remain silent until they get a lawyer. Others do the best they can do and communicate the parts of the Warning that can be understood. Unfortunately, a significant number become defensive and irrationally maintain to the police and later to the court that what they have conveyed in sign language is the equivalent of the Miranda Warning.

Once again the point is that deaf people being questioned by the police are entitled to their full Constitutional Rights. It is incumbent upon interpreters to stand up for these rights and inform the police, the court, and the deaf person that the Miranda Warning cannot be adequately conveyed in

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sign language or via reading unless the deaf person is one of the relatively few who read at an appropriately high level.

Implications

This analysis of the Miranda Warning as it relates to deaf people has widespread legal ramifications. It means that for deaf persons with reading levels below sixth to eighth grade (this includes over 300,000 prelingually deafened adults) the Miranda Warnings cannot be given (Schein and Delk, 1974). Thus, it is necessary, if these persons are to be assured of their Constitutional Rights, that an attorney must be present when they are questioned by police. All confessions or other data obtained under the assumption that the Miranda Warning has been given and understood are inadmissible as evidence.

The implications go far beyond deaf people to others who have language or reading disabilities. Thus, the communication of the Miranda Warning is subject to serious doubt for rather large segments of the population.

Finally, the issue generalizes beyond just the Miranda Warning to other legal documents. For example, in New Jersey the "Patient's Bill of Rights", a statement that all mental patients are supposed to be given and are supposed to understand, requires a 10th to 12th grade reading level. Thus almost all deaf mental patients (and many with other verbal handicaps) in New Jersey are being denied their Constitutional Rights when hospitalized. The problem is typical of mental health systems in most states.

Summary

The lexical, syntactical, and conceptual levels of the Miranda Warning are of such complexity (sixth to eighth grade reading level) that it is not possible to convey them to the 90 percent of prelingually deafened adults who read at levels

below this; this includes over 300,000 people in the U.S. It is impossible to communicate the concepts adequately even if the Warning is put in sign language because of a lack of existing signs for crucial legal terms contained in the Warning. Therefore, many of the confessions and other statements of evidence which have been obtained from deaf persons were gained in violation of their Constitutional Rights. Verdicts based on these data are subject to reversal. Furthermore, because the Miranda Warning cannot be adequately administered to 90 percent of the deaf population, it becomes essential that deaf persons have their attorneys present at the time they are initially questioned by the police. Other language impaired groups such as the mentally retarded, the aphasic, the brain damaged, and the foreign speaking among others face essentially the same problems.

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