LEXSEE 90 NW. U.L. REV. 387

Northwestern University Law Review

Winter, 1996

90 Nw. U.L. Rev. 387

LENGTH: 28433 words

ARTICLE: MIRANDA'S SOCIAL COSTS: AN EMPIRICAL REASSESSMENT

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BIO:

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SUMMARY:
... A confession can strengthen the prosecution's case considerably. ... The district attorney will always charge a suspect and prosecute a case if there's a confession, and the district attorney will also be less likely to accept a plea or make a reduced plea himself." ... The eighth study, conducted in Seaside City, California, found only a modest 2.0% reduction in the confession rate. ... The data for the regression were the reliable confession rate data, that is, data from (in order of ascending population) "Seaside City," New Haven, New Orleans, Kansas City, Pittsburgh, Philadelphia, Chicago, and New York. ... While an alternative explanation was that the small sample (173 suspects) was simply unrepresentative, at a minimum the Pittsburgh confession rate data provide no support for the rebound thesis. ... In *Edwards*, the Court reaffirmed a blanket prohibition of police-initiated resumption of interrogation after a suspect invoked the right to counsel. ... The *Miranda* rules would do little to prevent false confession of either type. ... In Detroit, there was, at most, a 2.8% drop in the confession rate after police began warning suspects of their rights under *Escobedo* -- from 60.8% of all cases in 1961 to 58% of all cases in 1965. ...

TEXT:
[*440] [EDITOR'S NOTE: PART 2 OF 2. THIS DOCUMENT HAS BEEN SPLIT INTO MULTIPLE PARTS ON LEXIS TO ACCOMMODATE ITS LARGE SIZE.]

B. Indirect Costs in Terms of More Lenient Plea Bargains

Based on the empirical evidence, we can calculate a rough estimate not only of *Miranda's* direct costs (in terms of lost cases), but also indirect costs (changes in case disposition resulting from plea bargaining). Any assessment of the effects of *Miranda* on the criminal justice system would be incomplete if it did not consider plea bargaining. In the

United States, the great majority of criminal cases are resolved by a guilty plea rather than a trial. n313 The literature suggests that in most jurisdictions, 70% to 90% of all felony cases are resolved by a plea of guilty or its functional equivalent. n314 Many, though not [*441] all, n315 of these guilty pleas will result from plea negotiations or plea "bargaining."

Plea bargaining depends on the strength of the government's case. Even where the government appears to have sufficient evidence to convict, an eccentric jury can always return a not guilty verdict. Prosecutors avoid this risk by taking "the bird in the hand" and allowing a plea to a lower charge. Because the risk of a not guilty verdict diminishes as the government's case becomes stronger, the incentives to allow pleas to reduced charges will become weaker.

The empirical research suggests that the strength of the government's case is an important factor in plea bargaining. For example, David Neubauer's study of "Prairie City" found strength of the prosecution's case to be one of three factors that play a major role in plea bargaining and concluded that the facts of the case are a "prime consideration[]." n316

A confession can strengthen the prosecution's case considerably. A confession is "direct" evidence of a defendant's guilt and thus is generally superior to indirect or circumstantial evidence. n317 Indeed, the Supreme Court has recognized that "a defendant's confession is probably the most probative and damaging evidence that can be admitted against him. The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct." n318 Accordingly we can hypothesize that any reduction in the rate at which police obtain confessions [*442] would increase defendants' success in plea bargaining. n319 This was a hypothesis advanced by Justice White in his *Miranda* dissent. n320

Anecdotal evidence suggests that the hypothesis is accurate. As one police officer has explained, "getting a confession . . . puts a case on an entirely different track so to speak. The district attorney will always charge a suspect and prosecute a case if there's a confession, and the district attorney will also be less likely to accept a plea or make a reduced plea himself." n321 On the other hand, when confessions are unavailable, notorious plea bargains sometimes result. n322

The available empirical evidence also supports the hypothesis. Detailed information on plea bargaining and confessions comes from David Neubauer's study of confessions in "Prairie City," which concluded that "the presence or absence of a confession has a marked effect on the outcomes of the plea bargaining process. A defendant who has confessed . . . received fewer concessions from the prosecutor when he pleads guilty." n323 Neubauer reported data for property crimes and violent crimes. n324 For property crimes, of those suspects who confessed, 69% pled to the original charge as compared to 45% who did not -- a 24% difference. n325 For violent crimes, 24% of those [*443] who confessed pled to the original charge, while 18% of those who did not confess did so -- a 6% difference. n326

Peter Nardulli, James Eisenstein, and Roy B. Flemming also found that confessions affected the guilty plea process. They conducted a sophisticated regression analysis of guilty pleas in three states in a sample involving several thousand cases. One of the variables in their equations measured confessions. n327 They found that defendants who had confessed were less likely to receive a reduction in the number of counts charged against them. n328 At the same time, Nardulli and his colleagues found no relation of confessions to charge reductions, reductions in the primary charge, or reductions in the magnitude of the projected sentence to be served by the defendant. n329 The effects of confessions were more pronounced when the data were disaggregated into four groups of counties defined by the extent of plea bargaining practices. In three of the four groups, confessions had some effect on charge or count reductions. n330

The Yale Project also reports data suggesting the importance of confessions to plea bargaining. In 9 cases in which the defendant had confessed and was unable to bargain for a lower charge, the defense attorneys attributed this outcome to the confession. n331 In 16 more confession cases, the prosecutor simply would not bargain at all. n332 Bargaining was successful in reducing the charge in only 15 of the 49 confession cases (30.6%), whereas charges were reduced or nolle [*444] prossed in 16 of the 26 cases (61.5%) in which the defendant had not talked to the police. n333

Recent data reported by Richard Leo also suggest that incriminating statements have a significant effect on the plea bargaining process. In his study of cases in the California Bay area, he found that "suspects who provide incriminating information to detectives are significantly more likely to be treated differently at every subsequent stage of the criminal process . . . ." n334 Although Leo did not collect data on charge disposition in particular, he found that suspects who incriminated themselves "were 24% less likely to have their cases dismissed" and "25% more likely to have their cases resolved by plea bargaining." n335

Finally, the most recent research on this issue is my 1994 Salt Lake County study. It found that defendants who confessed were less likely to receive concessions in plea bargaining. For example, of suspects whom police successfully questioned, 30.6% pled to charges at the same level as were initially filed, compared to only 15.4% for suspects invoking *Miranda* rights, 9.4% for suspects questioned unsuccessfully, and 10.8% for suspects not questioned. n336

Miranda has one possible offsetting effect to lenient dispositions that should be examined. The plea bargain literature contains some suggestions that defendants who confess to police may receive lighter sentences. n337 The theory might be that defendants who confess "are further along the path of reformation than those who do not repent" [*445] and thus deserve credit at sentencing. n338 While the theory appears tenable, the limited empirical evidence cuts against it. n339

Although confessions may appear to affect only a small percentage of plea bargained cases, a basis for concern appears when we realize that plea bargaining implicates a substantial proportion of criminal cases in this country. Based on the calculation discussed in the preceding section, *Miranda* appears to have reduced the confession rate by approximately 16%. In all of these cases, the prosecution has a weaker hand from which to bargain. Indeed, the previous section concluded that in roughly one out of four of these cases (24%), the entire case would be "lost" because the prosecution would not have sufficient evidence to convict. n340 In the remaining three out of four cases in which a confession is lost, the defendant may receive a more favorable disposition through a plea bargain.

Although the empirical data here are much more limited than those examined on confession rates, it is possible to provide some very rough quantitative estimate of *Miranda's* effects on plea bargaining. To do this, assume that Neubauer's observed effects in Prairie City apply equally across the country. n341 Specifically, we can generalize from his findings that in property cases approximately 19% fewer suspects [*446] who did not confess pled to the original charge; n342 in violence cases, 6% fewer suspects who did not confess pled to the original charge and 13% fewer pled to reduced charges. n343 Taking these percentages and taking the 16% reduction in the confession rate from *Miranda* discussed previously leads to the conclusion that, because of *Miranda*, roughly 3.0% fewer property offenders plead guilty to the original charge; 1.0% fewer violent offenders plead guilty to the original charge; and 2.1% fewer plead guilty to reduced charges (a total of 3.1%). n344 To come up with a general approximation of the total number of cases affected, we can use again the 1993 FBI arrest figures n345 for index crimes of 754,110 arrests for violent crime and 2,094,300 arrests for property crimes. Multiplying the percentages derived here suggests that in 1993 there were 67,000 pleas to reduced charges in property cases and 24,000 pleas to reduced charges in violence cases attributable to *Miranda*. n346

IV. PROBLEMS WITH GENERALIZING

The methodology employed in the previous section requires several generalizations from limited data sources. First, the available data on changes in confession rates and necessity rates from only a few jurisdictions are averaged and extrapolated to the entire country. Second, studies conducted in the late 1960s are equated to conditions in the 1990s. Finally, police success in obtaining confessions for specified offenses is universalized to all offenses reported in the FBI's crime index. These three generalizations are then applied to the two variables in my *Miranda* cost calculation -- changes in the confession [*447] rate after *Miranda* and importance of confessions -- producing a total of six areas in which generalizations are used. This Part examines the propriety of these six extrapolations.

Before examining the validity of these generalizations, however, it might be useful to briefly recall the types of

claims that have been made about *Miranda* by the decision's defenders. They have exhibited no hesitancy in generalizing from a few studies purporting to show little impact from the decision to nationwide conclusions. n347 As will be seen, the extrapolations made in this Article are more defensible.

A. Generalizations on Confession Rates

1. Generalizing Across Jurisdictions. -- One critical and possibly controversial part of the cost estimate is the nationwide extrapolation of an estimate of a 16% drop in the confession rate after *Miranda*. The data for this estimate come from before-and-after studies conducted in just eight jurisdictions: Pittsburgh, New York County, Philadelphia, "Seaside City," New Haven, Kansas City, Kings County, and New Orleans. Was their experience under *Miranda* typical of that elsewhere in America?

An agnostically inclined critic might argue that we simply do not know anything about other areas. After all, there are "virtually endless variations, large and small, overt and subtle, from one local law enforcement jurisdiction to another." n348 From a public policy perspective, such criticism seems unpersuasive. To be sure, more and better studies in various parts of the country would add to our knowledge about *Miranda's* effects. But in the absence of such studies, policy makers must do the best they can with the data at hand.

Also supporting the reasonableness of the extrapolation is the general consistency in the data, at least when drawn from urban areas. The reliable urban area studies all found fairly substantial post-Miranda reductions in the confession rate -- 16.9% in Pittsburgh, 34.5% in New York County, 24.6% in Philadelphia, 16.0% in New Haven, 6% in Kansas City, 15.5% in Kings County, and 11.8% in New Orleans. This congruity tends to suggest that these studies are representative of other cities. n349

[*448] This consistency is obtained, however, only by looking at the seven urban area studies. The eighth study, conducted in Seaside City, California, found only a modest 2.0% reduction in the confession rate. Seaside City is a residential community within the Los Angeles metropolitan area and thus is "not confronted with the same crime problems as those encountered by [police] departments in large metropolitan areas." n350 One possible hypothesis is that *Miranda* has more substantial effects on the confession rates in cities, effects that dissipate beyond urban frontiers.

Support for the cities-are-affected-more hypothesis can be found in a 1968 survey conducted by Cyril Robinson. n351 Robinson surveyed police departments in various jurisdictions across the country to assess the impact of the *Miranda* decision. He found that while both "city police" and "small city police" thought that *Miranda* had reduced confessions, city police noticed the greatest change. n352

That *Miranda* has a larger effect on major urban areas is suggested by several considerations. Big-city police are under the heaviest caseload pressure. As a result, they might be less able to take advantage of effective but time-consuming stratagems for avoiding *Miranda's* effects. n353 For example, they might not have the luxury of time to conduct noncustodial interviews outside of the *Miranda* strictures. n354 Another possible factor is that if *Miranda* has a greater effect on serious violent crimes, as suggested below, n355 urban law enforcement agencies that handle a disproportionate number of such cases would be more substantially affected. Finally, it may be, as Robinson suggests, that outside the major cities there are "closer relationships [*449] among police, attorneys, and courts" that mean court decisions have less effect on police practices. n356

To test the hypothesis that *Miranda* affected the confession rate more in larger cities, one can regress confession rate changes after *Miranda* against the population of the jurisdiction. The data for the regression were the reliable confession rate data, that is, data from (in order of ascending population) "Seaside City," New Haven, New Orleans, Kansas City, Pittsburgh, Philadelphia, Chicago, and New York. n357 As suggested by Figure 1, a regression of the logarithm of the city population and the change in the confession rate produced a strong, statistically significant relation between the two variables. n358

[SEE FIGURE IN ORIGINAL]

[*450] While the foregoing analysis suggests that *Miranda* has differential effects on the confession rate in cities of varying sizes, that problem is not as substantial for estimating *Miranda's* nationwide costs as it might first appear. Major urban areas contain much of this country's crime and, consequently, many of the criminal interrogations. One measure of this fact is found in the *Uniform Crime Reports*, which reports that in 1993 the 63 largest cities in the country (those with populations over 250,000) contained only 19.2% of the country's population but 31.6% of the index crimes and 43.1% of the country's violent crimes. n359 Thus, even if the data used here are representative only of the largest cities, they should still reflect roughly one-third of the nation's crimes and close to half of the violent crimes. Including Seaside City as one-eighth of the data base also serves to make the calculations more representative.

2. Generalizing Across Time. -- Another generalization on which the *Miranda* cost estimate rests is a temporal one: that data on confession rates taken from the 1960s are reflective of confession rates in the 1990s. It is possible that, since the 1960s, confession rates have "rebounded" to pre-Miranda levels. A number of *Miranda's* defenders have made this rebound argument. n360

It seems appropriate to assign to those who take this view the burden of proof. After all, the data recounted above show significant drops in the confession rate after *Miranda* that did not seem to disappear in the year or two following the decision. If some offsetting long-term effect has since appeared, its proponents should demonstrate it.

Why might a rebound occur? One theory, which we might dub the "publicity hypothesis," was ventured by Kansas City police chief (and later FBI Director) Clarence Kelley. His view was that the reduction in confession rates would probably fade with time "as the case becomes more remote [in suspects' minds]." n361

Publicity can cut another way. A competing hypothesis suggests that awareness of *Miranda* has increased over time, causing more serious effects today. For example, Professors LaFave and Israel, while taking the view that the studies done in the immediate wake of *Miranda* show only a marginal effect on confession rates, speculate that rates may have dropped "now that *Miranda* has become a part of our culture and presumably the rights declared therein are more widely perceived by the public at large." n362 There is some support for the [*451] hypothesis that the population has now, in effect, been "*Mirandized*." A 1991 public opinion poll found that 80% of Americans knew about their right to remain silent. n363 Assuming that today's criminal suspects are at least as knowledgeable as the citizenry at large, n364 this would appear to be an increase in awareness of rights. n365 If increased understanding correlates with fewer confessions, n366 confession rates may have dropped over time since *Miranda*. Given the two competing publicity hypotheses, we cannot determine through *a priori* reasoning whether publicity effects have increased or decreased *Miranda's* harms over time. Resort to the empirical data is our only choice.

Before turning to those data, another theory, which might be labelled the "accommodation hypothesis," should also be outlined. Sometimes it is argued that police have now "accommodated" the *Miranda* decision through "techniques to subvert its effects." n367 As a result, Professor Schulhofer among others argues that the before-and-after studies are "at most, irrelevant for assessing *Miranda's* current impact because they record its initial effects, before police had an opportunity to adjust interviewing methods and investigative practices to *Miranda's* requirements." n368 One of the frequently suggested accommodations springs from *Miranda's* application to custodial "interrogations," [*452] but not police "interviews." Because of this limitation, careful observers of police behavior suggest that "police who are seeking admissions have learned how to *interview* rather than *interrogate*," thereby escaping *Miranda's* strictures. n369 Another often-cited accommodation is police delivery of the warnings in a manner designed to discourage suspects from invoking their rights. n370

The accommodation hypothesis could justify a conclusion that confession rates have rebounded only if police discovered and employed these new techniques after the completion of the before-and-after *Miranda* studies. That the police discovered such tactics only belatedly remains unproved. Many police departments quickly received advice regarding the *Miranda* decision and were probably able to respond to the decision relatively promptly. n371 For example, the *Miranda* opinion itself explicitly suggested its limitation to custodial interrogation n372 and police were probably aware of the "interview" option around that time. n373 As another example, police in New Haven just a

month or two after the decision were trying to "de-fuse" the warnings by bureaucratic delivery or other similar devices. n374 The *Miranda* decision was also preceded by earlier decisions by the Court and other courts, and police probably had considerable pre-Miranda experience to draw upon in formulating their response. n375

[*453] Even if accommodating tactics spread and improved over time, at best they would ameliorate, not eliminate, *Miranda's* harmful effects. The possibility of a shift away from interrogations to casual "interviews," for example, would not work for the significant proportion of police business involving suspects who must be taken immediately into custody, either because they pose a danger to the community or a risk of flight. Moreover, even when police can interview suspects, it is not clear that they will be as successful in obtaining confessions. It appears that the privacy of the interrogation room is an important ingredient in obtaining confessions. n376 I have done the only empirical research on this question and found that custodial questioning is more likely to produce a confession (56.9% vs. 30.0% for noncustodial questioning, a statistically significant difference). n377

Even if police tactics for dealing with *Miranda* have improved over time, it is also important to recognize a competing hypothesis we can label the "compliance hypothesis": that police compliance with *Miranda* may also have improved, thereby increasing *Miranda's* costs. As noted above, the early studies may not have captured all of *Miranda's* harms because some police did not actually follow the requirements of the decision. n378 Since then, police have more closely adhered to *Miranda's* requirements. n379 Police forces have been carefully trained in the *Miranda* rules n380 and now receive better information about compliance. n381 The increasing professionalization of police forces might also contribute to this trend. n382 One might therefore conclude that, as police have complied more strictly with the *Miranda* rules, confession rates have dropped even further than shown in the [*454] early studies. n383 Some evidence supports this position. n384 If this hypothesis is true, then the 3.8% cost figure estimated in this Article is too low. The cost estimate is based on studies concluded just a year or so after *Miranda*, not long enough to capture later reductions in the confession rate.

Again, there is no *a priori* method to determine which of the competing hypotheses -- accommodation or compliance -- will predominate. Our only hope for an answer is the empirical data.

(a) Empirical data from the before-and-after studies. -- The limited empirical data from around the time of *Miranda* (decided on June 13, 1966) offer no support for the rebound argument. The only before-and-after study to track confession rates over a substantial period of time is the Seaside City study. n385 While the study found only a modest reduction in confession rates after *Miranda* (2% to be exact), the study offers an illuminating five-year progression of confession rates over time: 1964 -- 67%; 1965 -- 70%; 1966 -- 77%; 1967 -- 71%; 1968 -- 61%. n386 The data show steadily increasing confession rates until 1966, the year of *Miranda*, followed by steadily declining confession rates, reaching a substantially lower rate in 1968, the last year studied. While Witt cautioned against attributing this year-to-year decline solely to *Miranda*, n387 the data at least offer no support to those looking for a rebounding confession rate over time. n388

The Pittsburgh study contains data from a shorter time period that also support the conclusion that *Miranda's* effects did not dissipate. The Pittsburgh study rests on two sets of data: one from shortly [*455] after the decision (exactly when is not made clear in the article) and a second, more recent set drawn from June 20 through September 5, 1967 -- more than one year after *Miranda*. n389 While the first set showed a drop in the confession rate of 16.2%, the second set showed a larger drop of 21.4%. n390 The authors noted that the second figures "involve more recent cases so perhaps the confession rate continues to decline as suspects become more aware of their rights." n391 While an alternative explanation was that the small sample (173 suspects) was simply unrepresentative, n392 at a minimum the Pittsburgh confession rate data provide no support for the rebound thesis. n393

The only other multi-year data available on confession rates come from the *Yale Law Journal* study, which found that confession rates declined approximately 10 to 15% from 1960 to 1966. n394 Unfortunately, the Yale data terminate in the summer of 1966 and thus are of little use for determining *Miranda's* long-term effects. In sum, the before-and-after studies contain no evidence of a rebound in confession rates over time.

(b) Evidence from later time periods. -- In response to these before-and-after data, an advocate of the rebound hypothesis might argue that a longer view is needed. Police could not be expected to accommodate *Miranda* in just a few months or years following the decision, the argument might go. Rather, one must look over the two-and-a-half decades since the decision to observe the rebound effect.

Even taking a longer time horizon, it is hard to find any empirical data supporting the notion that confession rates have rebounded to pre-Miranda levels. n395 The confession rates found in later studies do not seem, on average, to be as high as pre-Miranda rates, generally falling below 50%. For example, David Neubauer reported that in 1968 in "Prairie City," a medium-sized city in central Illinois, suspects gave damaging statements in 46% of all cases. n396 Lawrence Leiken interviewed fifty suspects held in the Denver jail in 1969. Sixteen of [*456] the fifty defendants (32.0%) reported that they had made a damaging statement. n397 Gary LaFree found that an average of 40.3% of all cases contained confessions in a sample drawn from six cities (El Paso, Texas; New Orleans, Louisiana; Seattle, Washington; Delaware County, Pennsylvania; Tucson, Arizona; and Norfolk, Virginia) during 1976 and 1977. n398 A study by Floyd Feeney, Forrest Dill, and Adrianne Weir in 1979 found that in Jacksonville, Florida of suspects for robbery, burglary, and felony assault, 32.9% confessed and an additional 18.4% admitted being at the scene of the crime. n399 Assuming generously that an on-the-scene admission is always an incriminating admission, n400 the percentage of incriminating statements in Jacksonville might be as high as 51.3%. n401 In San Diego, California, the study found that of suspects for the same crimes, 20.3% confessed and an additional 16.2% admitted being at the scene of the crime. n402 Therefore, a total of 36.6% might be viewed as incriminating themselves.

Two recent studies of confession rates have been completed. In 1993, Richard Leo observed, either in person or on videotape, 182 interrogations in the Bay area of California. n403 He found that 64.3% of the suspects gave incriminating information of some type. n404 However, he used a very broad definition of what was incriminating, n405 and [*457] for comparison with other studies the more relevant figure is the 41.8% who gave either a confession or partial admission. n406 Even this rate is likely significantly overstated as a measure of overall police success, n407 because of both the study's narrow focus on stationhouse interrogation by detectives n408 and the study's sampling methodology. n409 In 1994, my research assistant and I collected data on confessions and incriminating statements in cases submitted for prosecution to the Salt Lake County Attorney's Office. n410 In 33.3% of the cases, the suspects either confessed, gave incriminating statements, or were locked into a false alibi. n411

[*458] While these studies report varying results, it is hard to read the figures as proving that confession rates have rebounded to pre-Miranda levels. If anything, they support the conclusion that rates have continued to fall. n412 For comparison, the confession rate data I have been able to find, from both before and after *Miranda*, are set out in Table 3. n413 Comparing these rates from various jurisdictions is extremely difficult because of varying definitions of "confessions" and differences in police practices. But it is hard to see in the data support for those who claim that confessions are now obtained as often as before *Miranda*. n414 [*459]

TABLE 3 -- PRE- AND POST-MIRANDA CONFESSION RATES

City	Pre-Miranda Year	Confession Rate
Pittsburgh	1966	48.5%
New York County	1966	49.0%
Philadelphia	1964	45% (est./der.)
"Seaside City"	1964	68.9%

New Haven	1960	58-63% (est.)
D.C. - total	1966	21.5%
Kings County	1966	45% (est./der.)
New Orleans	1966	40% (est.)
Los Angeles	1965	40.4%
City A, CA	1960	58.1%
City B, CA	1960	88.1%
Detroit	1961	60.8%
Detroit	1965	58.0%
Sacramento	1961	46.9%
Baltimore	1961	30.9%
White Plains	1961	84.7%
Dayton	1961	73.8%
Atlanta	1961	47.0%
Newark	1961	77.0%
Kings County	1961	42.4%

Post-Miranda

Pittsburgh	1967	29.9%
New York County	1966	14.5%
Philadelphia	1967	20.4% (der.)
"Seaside City"	1968	66.9%
New Haven	1966	48.2%
D.C. - total	1967	20.0%
Kings County	1966	29.5% (der.)
New Orleans	1967	28.2%
Los Angeles	1966	50.2%
New York -- Manhattan	1967	16.8%

New York --		
Manhattan	1967	23.7%
"Prairie City"	1968	46.0%
Denver	1969	32.0%
Six City		
Sample	1977	40.3%
Jacksonville	1979	32.9%
Jacksonville -		
incl. on-	1979	51.3%
scene		
San Diego	1979	20.3%
San Diego-		
incl. on-	1979	36.6%
scene		
Bay area - all	1993	63.8%
Bay area -		
incriminating	1993	41.8%
Bay area -		
adjusted	1993	38.7%
Salt Lake		
County	1994	33.3%

est. = estimated
der. = derived

[*460] *(c) The effect of doctrinal changes since* Miranda. -- Another gambit sometimes tried by *Miranda's* defenders is to argue that *Miranda* doctrine has now been scaled back by the more conservative Burger and Rehnquist Courts. n415 This approach can skirt the empirical studies on confession rates by instead observing court opinions and arguing that the rules have since changed in favor of the police.

The premise of this position -- that *Miranda* has been significantly restricted -- is open to challenge. While recently the Court has decided more *Miranda* issues in favor of the police than suspects, the decisions have often been narrow ones involving peripheral questions. n416 The core *Miranda* apparatus is the same today as it was on June 13, 1966, the day the decision was announced. The prevailing marginal philosophy found in the more recent decisions is perhaps best expressed by Chief Justice Burger's statement in 1980 that "the meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda*, disparage it, nor extend it at this late date." n417 Several respected commentators seem to suggest that, on balance, the core requirements of *Miranda* have not been substantially cut back since its pronouncement. n418

The one area where there perhaps has been some significant doctrinal movement in favor of law enforcement is in the custody area. In several decisions, the Court has limited the circumstances in which a suspect will be considered to be subject to "custodial" interrogation, which is the triggering event for the *Miranda* regime. n419

While we cannot say concretely how much difference doctrinal changes in the definition of "custody" might make,

we can say that there are some offsetting doctrinal shifts that must be considered as well. The prime example is the Court's decision in *Edwards v. Arizona*, n420 [*461] which "reinvigorated *Miranda* in an important respect." n421 In *Edwards*, the Court reaffirmed a blanket prohibition of police-initiated resumption of interrogation after a suspect invoked the right to counsel. n422 In recent years, the Court "has not merely reaffirmed but actually expanded the scope of this protection . . . ." n423 The *Edwards* line of cases is particularly significant for present purposes because its blanket prohibition of questioning is precisely the kind of rule that has the most effect on confession rates. n424 Similarly, the Court "gave the key term 'interrogation' a fairly generous reading in *Rhode Island v. Innis*." n425

One is thus left with competing doctrinal shifts and no solid empirical evidence concerning whether the changes have had a noticeable effect on confession rates. My impression, however, is that these changes have made relatively little difference in the day-to-day conduct of police interrogation. One example is provided by the "public safety exception" to *Miranda*. In 1984, in *New York v. Quarles*, n426 the Court held that police could dispense with *Miranda* warnings in situations involving an immediate threat to public safety. Shortly after the decision, commentators predicted that the decision might portend a significant change in police questioning. n427 Yet four years after the decision, a law review note could find only 27 published appellate cases in all of the federal and state courts in the country discussing the public safety exception, n428 a tiny number when one considers how frequently *Miranda* issues arise. Only eight of the decisions clearly applied the exception as the sole ground for admitting evidence. n429 Most of these eight cases involved reflexive police questioning (often involving the location of weapons) rather than deliberate attempts to use public safety concerns to skirt *Miranda's* requirements. My data [*462] from Salt Lake County also suggest that public safety questioning is quite rare. n430 The available information fails to provide evidence of new police interrogation practices designed to capitalize on the "public safety" exception to increase confession rates. n431

In sum, there is no persuasive evidence that confession rates have, over time, rebounded to pre-Miranda levels. To be sure, this question deserves further study. It is startling to discover that we have so little useful data on such a basic question as the rate of confessions in this country. n432 Hopefully scholars will begin to probe this area.

3. Generalizing Across Offenses. -- The numbers recited in this Article involve generalizing not only across jurisdictions and time but also across offenses. The before-and-after studies gathered data on different crimes, which are, for purposes of extrapolation, assumed to be representative of all crimes in the FBI's crime index. Is this assumption valid?

It might be useful first to canvas the specific offenses covered in the eight before-and-after studies relied on for the extrapolation. The Pittsburgh study covered homicide, forcible sex, robbery, burglary (including receiving stolen goods), and auto larceny. n433 The Philadelphia study covered "the most serious offenses, such as homicide, robbery, rape and burglary, and some other offenses, such as aggravated assault and battery and larceny." n434 The New York County study examined "almost all felony cases in New York County except homicides." n435 The Seaside City study reviewed "murder, forcible rape, robbery and burglary." n436 TheNew Haven study reviewed a range of what were apparently felony offenses. n437 The Kansas City, Kings County, and New Orleans studies also apparently involved a wide range of criminal [*463] offenses. n438 The studies thus cover a broad range of offenses, which should facilitate generalizations.

The extrapolation across offenses may in fact understate *Miranda's* costs. The limited empirical data suggest that *Miranda's* harmful effects may be more substantial for the most serious crimes, especially crimes of violence. The only before-and-after data broken down by type of crime come from the Pittsburgh study, which found that while confession rates dropped 16.9% overall, the rate in homicide cases fell 27.3% and in robbery cases 25.7%. n439 Smaller reductions were observed for auto larceny (21.2%), burglary and receiving stolen goods (13.7%), and sex offenses (0.5%). n440 Greater impact on police success in the most serious cases was also observed in Britain when new interrogation regulations were imposed there. n441

While the Pittsburgh study is the only before-and-after data on whether *Miranda* affected serious crimes more, indirect support for the proposition comes from the post-Miranda confession data, which show generally lower

confession rates for the most serious crimes. My study of Salt Lake County in 1994 found more confessions by property offenders than violent offenders, although the difference was not statistically significant at the standard 95% confidence level. n442 Neubauer's study in "Prairie City" found that confession rates were much lower for crimes of violence than for property crimes. n443 The D.C. study found that statement rates were generally lower for offenses [*464] against persons. n444 The Vera Institute study in New York City in 1967 found that denials were more likely than admissions for offenses against the person while admissions were more likely than denials for property, instrumentality (*e.g.*, possession of burglar's tools or illegal weapons), and narcotics offenses. n445 Data from Chicago in 1967 also suggest that violent offenders are more likely to invoke either their right to counsel or their right to silence. n446 The American studies suggesting lower confession rates for more serious crimes are consistent with more detailed data available from Britain reporting that serious offenders are less likely to confess. n447 On the other hand, the New Haven study found some (statistically insignificant) suggestion that interrogation-rate success increased as the crime became more serious, which was attributed to more vigorous interrogation in more serious crimes. n448

One other differential that might be obscured by aggregation should be mentioned. It is possible that *Miranda* adversely affects police success the most when dealing with repeat offenders. Anecdotal evidence suggests that repeat offenders are most likely to invoke their *Miranda* rights. After spending a year with Baltimore detectives, journalist David Simon concluded that

> the professionals say nothing. No alibis. No explanations. No expressions of polite dismay or blanket denials. . . . For anyone with experience in the criminal justice machine, the point is driven home by every lawyer [*465] worth his fee. Repetition and familiarity with the process soon place the professionals beyond the reach of a police interrogation. n449

The available empirical research supports this conclusion. The Prairie City study found that, of those with a prior felony conviction, only 36% confessed, compared to 59% without. n450 For violent crimes, the differential was even more substantial: only 15% with prior convictions confessed, compared to 45% without. n451 The study also found that suspects with prior convictions were less likely to execute a waiver of rights form, with 68% of those with records waiving compared to 80% of those without. n452 The New Haven study similarly found that "prior record tends to reduce the likelihood of success." n453 Interrogation was successful for 41% of the suspects with a previous arrest, compared to 60% without. n454 Recent data from the Bay area also found "a suspect with a felony record . . . was almost four times as likely to invoke [*Miranda* rights] as a suspect with no prior record . . . ." n455 Data from Britain also support the conclusion that "hardened criminals" are more likely to take advantage of procedural rights and less likely to confess. n456 However, my study in Salt [*466] Lake City found no relation between prior record and interrogation success. n457

Taken together, the available studies suggest that, if anything, the calculation reported here may misleadingly understate *Miranda's* harms by averaging all crime categories together -- transferring some of the lost cases from the more serious violent crime category to the less serious property crime category, and obscuring *Miranda's* more harmful effects on the prosecution of repeat criminals. This is of particular concern in view of the difficulty of the criminal justice system in bringing violent, professional offenders to justice. n458

B. Generalizations on the Necessity for Confessions

Turning from confession rates to necessity rates, the reader will recall the earlier estimate that a confession is needed for conviction in 24% of all cases. n459 Like confession rates, this necessity estimate was derived by averaging the reliable studies from around the country. Like confession rates, the extrapolation requires justification on three points: generalizing across jurisdictions, generalizing across time, and generalizing across offenses.

1. Generalizing Across Jurisdictions. -- The necessity estimate used in this Article comes from a few studies: Pittsburgh, Seaside City, New York County, and Los Angeles, as shown previously in Table 2. The necessity estimates from these various jurisdictions are not widely divergent. The same rough convergence is noted even if one includes the

studies found to have problems: taking all the studies that report data on all cases, the necessity figures range from a low of 10.3% to a high of 28.3%; for studies reporting data on confession cases, the necessity figures range from 8.2% to 25.9%. n460 In contrast to confession rates, where big cities seem to have been more adversely affected by *Miranda's* requirements, confession necessity figures show no obvious relation to city size.

2. Generalizing Across Time. -- This Article takes research on the need for convictions in the 1960s and then applies it to generate [*467] estimates for the 1990s. Has the importance of confessions changed over time?

One area worth exploring is whether improved investigative techniques have made reliance on confessions obsolete. Indeed, one of the underlying rationales for *Miranda* and related decisions was that police reliance on confessions discouraged the use of other, more scientific methods of investigation. n461 With recent advances in investigative techniques -- such as DNA analysis, fiber and hair comparisons, and similar technologies n462 -- it might be argued that confessions are even less necessary than when *Miranda* was handed down. A related argument might be that police agencies have devoted more resources to physical evidence collection since *Miranda*. n463

While the application of scientific techniques has advanced, it is unclear that this would make an appreciable difference in the need for confessions to convict. n464 The "confession necessary" category of cases likely embraces those with the least physical or other evidence. Improved techniques for analyzing evidence will have the smallest effect on these cases.

Even looking at the broad run of cases, the empirical literature suggests that scientific improvements have not altered the proof available to prosecutors in a significant percentage of cases. For example, studies suggest that fingerprints rarely solve crimes. n465 Along the same lines, studies suggest that other evidence susceptible to scientific analysis, such as paint chips and bloodstains, is collected in only a small percentage of cases. n466

The British seem to have performed the most extensive empirical research on this subject, which quantifies the conclusion that forensic techniques are of limited usefulness in obtaining convictions. Perhaps the most detailed investigation was done by John Baldwin and Michael McConville, who concluded in 1980 that "forensic evidence was either not available or was unimportant in 95 per cent of all cases [*468] within the sample and, in the other five per cent, it was buttressed by supplementary incriminating evidence." n467 At the same time, Baldwin and McConville noted that confessions were highly important to ultimate outcomes. n468 When McConville gathered additional data on the role of forensic science thirteen years later, he also found a minor role for scientific evidence: "Scientific or forensic evidence appears to play a statistically insignificant part in the identification of suspected offenders." n469

My point here is not to denigrate innovative police investigative techniques, but to show that scientific analysis can be brought to bear on such a small fraction of cases that improvements over time could not explain away a continuing need for confessions. Indeed, forensic improvements might actually *increase* the need for confessions, by enhancing the ability to identify possible suspects but leaving police with the need to obtain sufficient evidence to prove guilt beyond a reasonable doubt. n470 In short, it seems unlikely that the march of science has, since the 1960s, significantly changed the need for confessions.

Even if improvements in science have made some dent in the need for confessions, other factors may have more than offset that gain. If the *Miranda* assumption that cases can be solved without confessions is correct, it is clear that this will require an expenditure of additional police resources. n471 While greater police diligence in investigation might have been sanguinely prescribed in the mid-1960s, n472 today such a suggestion seems rather divorced from the burgeoning crime rates and limited police resources. For example, a widely cited [*469] statistic during the recent debate on the federal crime bill was that in 1961 there was only one reported felony for every American police officer; by 1990, that number had risen to 4.6 felonies per officer. n473

David Simon's book *Homicide* captures the current police environment, at least in major urban areas. He describes the plight of the District of Columbia homicide squad as "awash in a deluge of violence . . . [with] no time for follow-up

investigation, no time for pretrial preparation, no time for anything but picking up bodies." n474 Such workload pressures affect not only street detectives, but also forensic laboratories. n475 In such an environment, quick solutions to crimes through interrogations might take on greater importance. n476 In this connection, it is interesting that the most recent field research on police interrogations found that "virtually every detective to whom I spoke insisted that more crimes are solved by police interviews and interrogations than by any other investigative method." n477

Finally, the necessity for confessions may have increased over time because prosecutors now have more difficulty persuading juries to convict. Some troubling anecdotal evidence along these lines comes again from David Simon's 1988 book about criminal justice in Baltimore. He reports that in that year, 55 homicide defendants faced a trial by jury; 25 (or 45%) were acquitted. n478 While Simon attributes some of this to racial animosities, he believes that the more telling factor in "crippling the jury system in Baltimore" is television, which has perceptibly raised the functional burden of proof for prosecutors:

> Television ensures that criminal juries are empaneled with ridiculous expectations. Jurors want to see the murder -- see it played out in front of their eyes on videotape in slow motion or, at the very least, see the guilty party fall to his knees at the witness stand, begging for mercy. Never mind that fingerprints are recovered in less than 10 percent of criminal cases, the average juror wants fingerprints on the gun, fingerprints on the knife, fingerprints on every door handle, window, and house key. n479

Simon reports that, "as a consequence, city juries have become a deterrent of sorts to prosecutors, who are willing to accept weaker pleas or tolerate dismissals rather than waste the city's time and money on cases involving defendants who are clearly guilty, but who [*470] have been charged on evidence that is anything less than overwhelming." n480

Misimpressions from television are not the only malady in the criminal justice system that has grown worse with time. For example, witness intimidation seems to be a more serious problem, n481 with the result that confessions may now be more important. n482 Also it is possible that urban juries may have become more distrustful of police testimony or less likely to convict for other reasons. n483 In such an environment, the estimate of confessions needed to convict in 23.8% of all cases seems unreasonably low.

Fully consistent with this conclusion is my own data from Salt Lake County -- the only data on this subject collected in at least 20 years -- which found that confessions were much more important in 1994 than suggested in earlier studies. n484

3. Generalizing Across Offenses. -- The final generalization made in the necessity-for-confessions estimate is that the necessity will be the same for all offenses. The offenses on which the estimate is based have been set out earlier. n485 It is possible, of course, that the need for confessions might vary by offense.

The available evidence suggests that confessions may be needed to convict more often for burglary, robbery, and crimes of violence generally. The Detroit study found that confessions were needed most for robbery and burglary cases. n486 The Pittsburgh study also provided such data, finding that confessions were most often needed for robbery and burglary charges. n487 A British study found that if confessions were excluded from the prosecution's case, all offense types would have been weakened, but robbery and burglary charges would have been weakened more than any other. n488

Other than these studies, we are left with only the speculations of various commentators to explain the necessity of confessions for various [*471] offenses. David Neubauer has read the confession data as suggesting that confessions are more often needed to convict for serious, violent crimes, perhaps because police are more likely to have physical evidence in property cases. n489 Some empirical evidence supports Neubauer's differential evidence hypothesis. n490 William Stuntz has reached the same conclusion, apparently by applying a different methodology. Noting that prosecutors drop more cases against violent offenders and that fewer violent offenders are ultimately convicted, n491 he concludes that violent felonies are "the category of cases where incriminating statements from the defendant probably matter most." n492

In sum, based on the available empirical evidence and discussions in the literature, confessions may be more important for the prosecution of burglaries and robberiesand for crimes of violence than for the prosecution of other crimes. In any case, taking an average necessity figure and extrapolating it across offenses seems likely to produce a reasonable, conservative estimate of the overall costs of *Miranda*.

V. THE LEGITIMACY OF THE CONCEPT OF A "COST" TO *MIRANDA*

The preceding sections have assumed that a lost confession due to *Miranda* is properly identified as a "cost" to the decision. This Part considers arguments that might be made against such a characterization.

A. Miranda's *Cost as Dictated by the Fifth Amendment*

In the empirical debate over the costs of the search and seizure exclusionary rule, defenders of the rule have made the plausible argument that the concept of a "cost" is simply inappropriate. A case that is lost, either because the police did not unreasonably search or because the results of such a search were later suppressed, is simply the logical consequence of the Fourth Amendment. As retired Justice Potter Stewart explained, "In many of the cases in which exclusion is ordered, police officers would not have discovered the evidence at all [*472] if they had originally complied with the fourth amendment." n493 A similar argument might be tried against my assessment of *Miranda's* costs: that I have simply calculated the costs of complying with the Fifth Amendment's prohibition against compelled self-incrimination.

Whatever force such an argument might have in the exclusionary rule context n494 disappears in the *Miranda* context. *Miranda's* costs are quite different than those stemming from the Fourth Amendment. *Miranda's* costs are generated regulations on police not required by the Constitution and to which reasonable alternatives clearly exist.

The Supreme Court has now made clear that the *Miranda* rules are not themselves constitutional rights or requirements. Rather, they are only "suggested safeguards" whose purpose is to reduce the risk that the Fifth Amendment's prohibition of compelled self-incrimination will be violated in custodial questioning. This means that the police can violate *Miranda* without actually violating the Fifth Amendment -- without, that is, having compelled a defendant to become a witness against himself. As explained in *Michigan v. Tucker*, n495 *Miranda* established a "series of recommended 'procedural safeguards' . . . . The [*Miranda*] Court recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." n496 Thus, in *Tucker*, the Court excused noncompliance with *Miranda* because failure to provide a full set of warnings "did not abridge respondent's constitutional privilege . . . but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege." n497 To obtain a confession in violation of *Miranda* is not necessarily -- or even usually -- to obtain a coerced confession in violation of the Fifth Amendment. n498

[*473] *B.* Miranda's *Cost as the Benefit from the Disappearance of Coercion*

Miranda's unique costs involve confessions that were not obtained under the *Miranda* rules that would have been obtained under the traditional Fifth Amendment prohibition of coercion. Based on this view, an alternative argument against the *Miranda* harms calculated here is that the "cost" is simply the "benefit" of the disappearance of coerced confessions. Specifically, one might acknowledge the post-Miranda drop in the confession rate but attribute the change to a reduction in unconstitutional police coercion. After all, if the police were extracting confessions before *Miranda* with rubber hoses and the like, we would need to "back out" of the cost estimate any reduction in confessions because of the elimination of such tactics.

Undoubtedly, police coerced confessions from suspects before *Miranda*. It is also conceivable that police abuses declined over time after *Miranda*, although whether the decline is attributable to the decision is highly disputable. n499 For purposes of determining *Miranda's* costs, however, we need only consider a limited issue: whether any significant portion of the drop in the confession rate found in the before-and-after studies is attributable to police

abandonment of unconstitutionally coercive tactics within a few months or a year after the *Miranda* decision. Such a conclusion is unlikely for at least three reasons.

First, genuinely coerced confessions were, statistically speaking, rare at the time of *Miranda*. n500 Changes of the magnitude suggested here (in the neighborhood of a 16% reduction in confessions, or roughly one out of every six criminal cases) seem unlikely to have occurred because of the disappearance of coercion in the immediate wake of the decision. To be sure, we cannot consult an FBI Report on the number of coerced confessions each year, yet some reputable assessments allow a ballpark estimation to be made.

To develop our estimate, it is useful to consider coerced confessions in historical perspective. In 1931 the National Commission of Law Observance and Enforcement, headed by George W. Wickersham, reported that the "third degree," that is, "the employment of methods which inflict suffering, physical or mental upon a person, in order to obtain from that person information about a crime" was widespread throughout the United States. n501 Following the publication of the Wickersham Report, the Supreme Court, among other institutions, [*474] took a greater interest in preventing such police abuses. In *Brown v. Mississippi*, n502 the Court for the first time used the Fourteenth Amendment Due Process Clause to reverse a state conviction involving a clearly coerced confession. Later cases continued to signal that the Court would review suspects' claims of coerced confessions -- a fact that discouraged police from using coercive interrogation methods. n503

The Wickersham Report was followed by not only increased judicial regulation of the interrogation process but also increased police professionalization. For example, FBI Director J. Edgar Hoover began a movement to train police in scientific techniques of crime detection. n504 Training and awareness of legal norms increased so that by the mid-1940s most police chiefs in America had openly condemned the use of third-degree tactics. n505 Police interrogation manuals also began telling police that brutality was an ineffective way to obtain confessions. n506 Police professionalization thus had its start well before *Miranda* and was considerably developed by 1966. n507

As the result of these twin restraining developments -- judicial oversight and police professionalization -- coercive questioning methods began to decline in the 1930s and 1940s, n508 and by the 1950s their use had, according to a leading scholar in the area, "diminished considerably." n509 For example, observers for the American Bar Foundation Study, who witnessed interrogations in police departments in Michigan, Wisconsin, and Kansas in 1956 and 1957, found that use of coercion during custodial questioning (whether physical or psychological) was exceptional. n510 When the Supreme Court began issuing more detailed rules for police interrogation in the 1960s, it was dealing [*475] with a problem "that was already fading into the past." n511 Chief Justice Warren's majority opinion in *Miranda*, while citing the Wickersham Report and other historical records of police abuses, acknowledged that they are "undoubtedly the exception now" and that "the modern practice of in-custody interrogation is psychologically rather than physically oriented." n512 At the time of the *Miranda* decision, the President's Commission on Law Enforcement and the Administration of Justice reported that "today the third degree is almost nonexistent" and referred to "its virtual abandonment by the police." n513 In January 1966, the Los Angeles District Attorney's office reported that they found no involuntary confessions among cases that they rejected for prosecution or presented to a judge at a preliminary hearing. n514 In the summer of 1966 in New Haven, when detectives were generally operating under pre-Miranda rules, n515 the student observers saw no undue physical force used by the detectives and doubted "that many of them would employ force as a calculated tool to pry out a confession. . . . Few are such crusaders against crime that they feel physical violence is justified to get a confession." n516 The empirical surveys thus provide solid support for Professor Gerald Rosenberg's assessment: "Evidence is hard to come by but what evidence there is suggests that any reductions that have been achieved in police brutality are independent of the Court and started before *Miranda*." n517

Of course, coercive police questioning can involve not only police brutality but also other techniques as well. It seems unlikely, however, that reductions in other forms of coercion shortly after *Miranda* [*476] could explain large changes in the confession rate. Professor Wayne R. LaFave reported the year before the *Miranda* decision:

> In the great majority of in-custody interrogations observed, the possibility of coercion appeared slight. In many instances the suspect is merely confronted with the evidence against him or with evidence

> inconsistent with his prior statements and is asked to give an explanation. Often he is just given an opportunity to admit to other outstanding offenses recited to him. Lengthy, continuous questioning is the exception rather than the rule. In practice the interrogating detective often terminates the questioning after a brief period to appear in court or elsewhere on other cases or to check upon the statements already given by the suspect. n518

Similarly, the student observers in New Haven in 1966, assessing all forms of police "tactics," found "a low level of coerciveness in most questioning." n519

Indirect confirmation of the statistical scarcity of all forms of coercion is provided by statistics on motions to suppress confessions. Even if a coerced confession is obtained, "such confessions are typically withdrawn and challenged at a pretrial voluntariness hearing." n520 If coerced confessions were prevalent before *Miranda*, we should find frequent challenges to the voluntariness of confessions. n521 The very limited data from around the time of *Miranda* suggest that such challenges were rare. The Los Angeles study found that in 1965 prosecutors rejected only about one percent of police requests for complaints because of inadmissibility of the defendant's statements n522 and courts, at the preliminary hearing stage, rejected less than two percent. n523 To be sure, these data do not indicate the percentage of cases in which defendants claimed that they had been coerced and, in view of the [*477] difficulties of proving police coercion, the fact that the courts frequently admitted confessions is not incontrovertible proof that they were voluntary. Nonetheless, these figures fail to provide support for the theory that disappearing coercion was a significant factor in explaining changes in confession rates around the time of *Miranda*.

Beyond the relative infrequency of coercion, a second factor suggesting that the confession rate reductions reported here did not stem from the disappearance of coerced confessions comes from the nature of the *Miranda* rules themselves. *Miranda* was not particularly well tailored to prevent coerced confessions. Justice Harlan's point in his *Miranda* dissent has never been effectively answered: "The new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion. Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers." n524 It is not clear why police using rubber hoses before *Miranda* would have shelved them afterwards -- at least in the generally short time period following the decision during which the confession rate changes were observed. n525 Isolated instances of police brutality have been reported after *Miranda*. n526 Less extreme forms of coercion might have continued as well. n527

The relation of *Miranda* to the elimination of such practices remains unclear and unproved. To be sure, under *Miranda* police must obtain a waiver of rights. But once a valid waiver is obtained, police are relatively unconstrained. Shortly after *Miranda*, Neal Milner studied the police response in Wisconsin and found that "generally most interrogations continued to operate under rules formalized prior to the *Miranda* decision." n528 As the Office of Legal Policy concluded, after a waiver, "*Miranda* is . . . virtually worthless as a safeguard against specific interrogation practices that were characterized as abusive in the *Miranda* decision . . . ." n529 This is not an isolated finding, as there appears to have been "general agreement among writers on the [*478] subject that *Miranda* is an inept means of protecting the rights of suspects . . . ." n530

A final point cutting against the disappearance of coercion as an explanatory factor is empirical research in other countries with observers and videotape equipment to guard against police abuses. As shown previously, in those countries police obtain confessions at rates comparable to the pre-Miranda rates in the United States (in excess of 60%), even though coercion in violation of constitutional norms was not observed. n531

In light of all three of these factors -- the virtual nonexistence of the third degree and minimal coerciveness of questioning around the time of *Miranda*, the ineffectiveness of the *Miranda* rules in preventing coercion, and international empirical confirmation that high confession rates are obtainable without coercion n532 -- it seems quite unlikely that a reduction in coercion had much to do with the confession rate drops that form the basis of the *Miranda* cost estimate. n533

[*479] *C.* Miranda's *Cost as the Benefit of Protecting the Innocent*

If the confession rate decline after *Miranda* cannot be explained by a reduction in coercive questioning, it might still be defended as the result of protecting innocent persons in the criminal justice system. n534 For example, if *Miranda* prevented a large number of false confessions, this would be a virtue, not a vice. More generally, if *Miranda* protected an appreciable number of innocents from being convicted, the decision might be defensible even if guilty persons escaped. n535

It seems unlikely that *Miranda's* costs can be defended on such grounds. Setting aside the immediate rejoinder that there are better ways than *Miranda* of regulating police questioning to protect innocents n536 and that *Miranda* has retarded the search for these superior alternatives, n537 *Miranda's* defenders have yet to establish that the decision does much for innocent suspects.

Turning specifically to the question of false confessions, the psychological literature has developed a typology of false confessions, identifying two main types apart from the coerced false confession just discussed: the coerced-internalized false confession and the voluntary false confession. n538 The *Miranda* rules would do little to prevent false confession of either type.

The coerced-internalized false confession arises when "suspects come to believe during police interviewing that they have committed the crime they are accused of, even though they have no actual memory of having committed the crime." n539 While it is impossible to quantify precisely the extent of false confessions, the few bizarre cases reported of such situations seem unlikely to account for even a tiny fraction of the reported confession rate drops. n540 Even if the cases were statistically significant, persons susceptible to such confessions are particularly unlikely to be helped by the *Miranda* rules because [*480] they trust the police n541 and, at least initially, are likely to want to waive their *Miranda* rights to convince the police of their innocence. n542

A voluntary false confession is "offered by individuals without any external pressure from police," often because of the publicity associated with the crime. n543 For example, over 200 persons reportedly "confessed" to the famous Lindbergh kidnapping. n544 The *Miranda* rules seem unlikely to dissuade such confessions.

It has sometimes been argued that proof of the significance of false confessions comes from examining their role in the conviction of innocent persons. For example, Jerome H. Skolnick and Richard A. Leo have suggested that false confessions "are one of the leading sources of erroneous conviction of innocent individuals." n545 However, even within the already tiny fraction of tragic cases involving innocents who are convicted, it appears that false confessions of all types play only a small role. The support for Skolnick and Leo's assertion is the Bedau-Radelet "study" of allegedly innocent persons convicted in capital cases, n546 which has been refuted elsewhere. n547 Even taking the study at face value, however, it found "coerced or other false confessions" to be responsible for erroneous convictions in 49 out of 534 cases -- less than 10%. n548

Skolnick and Leo attempt to demonstrate a serious problem with wrongful convictions by citing the work of C. Ronald Huff, Arye Rattner, and Edward Sagarin for the proposition that a "conservative estimate" of wrongful convictions each year in this country is 6000. n549 However, the Huff study is flawed in its conclusion. Read properly, [*481] the study suggests the more likely estimate -- particularly using "conservative" assumptions -- of roughly 350 wrongful convictions each year in this country, n550 a total error rate of approximately .02% n551 (roughly one in 5000). Combining 350 wrongful convictions with the Bedau-Radelet estimate that 10% of such convictions stem from false confessions produces a total of around 35 wrongful convictions from false confessions each year. Even this number might be too high, because Huff and his colleagues did not find false confessions to be among the major factors contributing to the already small number (comparatively speaking) of wrongful convictions. n552 While each such wrongful conviction is an undeniable tragedy, these calculations show that false confessions could not play any significant role in the *Miranda* cost estimate calculated here. n553

[*482] *Miranda* not only fails to do much about false confessions but, speaking more generally, may in fact positively harm innocent persons by making it more difficult to separate guilty defendants from innocent ones. As Professor William Stuntz has argued, "it seems likely that making government investigation easier improves the welfare of innocent defendants." n554 Stuntz explains in some detail that prosecutors face the difficult task of separating guilty suspects from innocent ones. Given that prosecutors operate in a world of imperfect information, "innocent defendants stand to gain a great deal if there are low-cost separating mechanisms available to the government after suspects are identified or arrested but before trials. . . . Various common police interrogation tactics[] can plausibly serve as such mechanisms." n555

The claim here is not that *Miranda* makes it more difficult for innocent suspects to give their alibis and explanations to police officers during questioning. Presumably innocent persons could waive their rights and talk to police as well after *Miranda* as before. n556 The claim is that, for suspects who do not convince police of their innocence, *Miranda* perversely may make it more likely that they will be convicted and unjustly punished. n557

To see how this might happen, consider the case load of a hypothetical prosecutor before and after *Miranda*. Before *Miranda*, the prosecutor has 100 cases to handle, 60 with confessions and 40 without. n558 After *Miranda*, the confession rate drops at least 15%, n559 so now the prosecutor handles 45 cases with confessions and 55 without. Assume further that, both before and after *Miranda*, there is one innocent defendant among the 100 cases. n560 The prosecutor does not know which defendant is innocent -- other than that the innocent defendant did not confess. It seems plausible that the prosecutor will [*483] have less success in culling the innocent defendantfrom a pool of 55 nonconfessors than from a pool of 40 nonconfessors. After all, needles are harder to find in bigger haystacks. n561 To be sure, our innocent defendant might gain an acquittal at trial. But we are concerned here with the odds innocent persons would be unjustly convicted, either before *Miranda* or after. Other things being equal, *Miranda* might make the prospects worse for such defendants.

A related possibility is that *Miranda* reduces information that might be useful to innocent defendants in clearing themselves. Presumably, the confessions that are lost under *Miranda* might have prevented police from charging the wrong person or, if charges were filed, might have contained information an innocent could use to establish his innocence. Judge Friendly made an analogous point about the costs of the privilege against self-incrimination, explaining that "[a] man in suspicious circumstances but not in fact guilty is deprived of official interrogation of another whom he knows to be the true culprit . . . ." n562 The same loss of evidence results when a suspect invokes his *Miranda* rights. In sum, it seems hard to justify *Miranda* because of its role either in specifically preventing false confessions or more generally in preventing the conviction of innocent persons.

VI. ASSESSING *MIRANDA* IN LIGHT OF ITS COSTS

In concluding this Article, this Part discusses the relative significance of *Miranda's* costs and whether reasonable alternatives could avoid them.

A. Miranda's *Costs in Perspective*

One possible response to the costs of *Miranda* calculated in this Article is that, all things considered, they are quite small. After all, it might be argued, "only" 3.8% of cases are lost due to *Miranda*. My [*484] reaction is quite different. We should be concerned about the total number of lost cases from such a percentage. n563 Roughly 28,000 arrests for serious crimes of violence and 79,000 arrests for property crimes slip through the criminal justice system due to *Miranda*, and almost the same number of cases are disposed of on terms more favorable for defendants. n564

The Supreme Court has reached the same conclusion in modifying the Fourth Amendment exclusionary rule. In creating a good faith exception to the exclusionary rule, the Court cited statistics tending to show that the rule resulted in the release of between 0.6% and 2.35% of individuals arrested for felonies. n565 The Court concluded that these "small percentages . . . mask a large absolute number of felons who are released because the cases against them were

based in part on illegal searches or seizures." n566 *Miranda's* lost cases are 160% to 630% of those from the exclusionary rule. n567 Moreover, while the costs of the exclusionary rule are sometimes said to be simply the price of complying with the constitutional prohibition of unreasonable searches, the costs of *Miranda* stem from restrictions that are not constitutionally required and for which reasonable alternatives exist. This suggests that reforming *Miranda* deserves a higher priority from court reformers than reforming the search and seizure exclusionary rule.

Another method of demonstrating that *Miranda's* costs require a public policy response is to consider them in light of the recent debates in Congress over how to deal with the problem of crime. The various proposals ranged from midnight basketball leagues to placing more police officers on the streets. Each of these measures may be quite desirable on its own merits. Yet little empirical support was provided that any of these changes would have a quantifiable impact on the prevention of crime or conviction of criminals -- certainly nothing suggesting that any individual measure could achieve a change in the handling of almost four percent of all criminal cases. Reducing *Miranda's* costs thus is more important than any of these hotly debated proposals.

[*485] Still another suggestion of the seriousness of *Miranda's* costs comes from taking the perspective of victims of crime. n568 Concern for victims suggests that society is obligated to do its best to avoid the kinds of miscarriages of justice as when a confessed killer walks out of a courtroom with a "big smirky grin" on his face because of what can fairly be described as a *Miranda* technicality. n569 While cases in which confessions are suppressed under *Miranda* allow us to put a human face on *Miranda's* costs, far more often *Miranda* means that a confession will not be obtained, with the result that a crime will go unsolved or unpunished. How do we tell the victims of these crimes that their suffering doesn't count? n570 Quantification of costs is important, but the calculus here stops well short of conveying the human toll involved in murders that go unpunished, rapists that remain at large, and treasured heirlooms and other stolen property that are never recovered. As Professor Caplan has concluded, the statistical studies "reduce crime to something remote and abstract, a string of numbers, an event that one reads about in the newspapers, something that happens in another part of town. There is no hint of rape as a nightmare come alive, or robbery as a ruinous matter." n571

A final way of showing the significance of *Miranda's* harms is the simple truism that an unnecessary cost is a cost that is too high. Given that *Miranda* is only one way of structuring custodial interrogation, even one inappropriately released defendant is one too many. n572 If *Miranda's* costs can be reduced without sacrificing other values, they should be reduced -- and as quickly and completely as possible. To argue against considering reform of *Miranda* on the grounds that its cost is small has always struck me as equivalent to arguing against curing diabetes because its toll is smaller than that from cancer. Yet surely no one in the medical profession is stopping a quest to cure a particular disease because the relative cost, compared to other human miseries, is small. Instead, the medical profession can tell the legal profession that it is moving forward on a broad range of fronts to solve all manner of medical problems. In contrast, in the area of the law governing confessions, we in the legal profession can report only that we are frozen in a 1960s conception of the optimal resolution of [*486] the issue. The fact that there has been no substantial change since *Miranda* is attributable either to *Miranda's* foresight or our lack of progress -- the costs documented in this Article strongly suggest the later.

B. Moving Beyond Miranda

The analysis so far will strike some as incomplete because I have simply calculated *Miranda's* costs without acknowledging any of the possible benefits. In view of the need to enforce the Fifth Amendment prohibition of coerced confessions, *Miranda's* costs are "unnecessary" only if other alternatives serve Fifth Amendment values equally well. This already lengthy Article is not the place for a detailed consideration of the alternatives to *Miranda*. n573 But to make my case that *Miranda's* costs are largely unnecessary, I want to briefly outline one alternative approach that can protect the other values thought to be served by *Miranda* while at the same time minimizing *Miranda's* costs.

Miranda's defenders have argued that any change in the decision's requirements would "roll back the clock" to an outmoded day and age. But time has passed these Warren Court warriors by -- they are, in effect, advocating a 1966

solution to the problem of preventing coerced confessions when the 1990s offer superior solutions. Consider, then, videotaping of interrogations as an alternative to *Miranda*.

1. Recording as an Alternative to Miranda. -- One example of a replacement for the *Miranda* regime is to record, preferably by videotape, all custodial interrogations. Even around the time of *Miranda*, the ALI proposed recording of interrogations as a way of avoiding police coercion, with the additional benefit of eliminating disputes concerning what was actually said during interrogations. n574 Other commentators have since recommended videotaping. n575

[*487] Videotaping interrogations would certainly be as effective as *Miranda* in preventing police coercion and probably more so. The *Miranda* regime appears to have had little effect on the police misconduct that does exist. n576 In contrast, videotaping, when used, has often reduced claims of police coercion and probably real coercion as well. n577 To be sure, police conceivably could alter tapes n578 or deploy force off-camera. n579 But if you were facing a police officer with a rubber hose, would you prefer a world in which he was required to mumble the *Miranda* warnings and have you waive your rights, all as reported by him in later testimony? Or a world in which the interrogation is videorecorded and the burden is on law enforcement to explain if it is not; where date and time are recorded on the videotape; where your physical appearance and demeanor during the interrogation are permanently recorded? Videotaping is the clear winner. Not surprisingly, those who are most concerned about police brutality have seen videotaping as a means of control. n580

[*488] Recording confessions also promises to be effective in preventing not only physical coercion but also in detecting, if not preventing, other fine points of coercion as well. In this regard, it is interesting that some of the most detailed assessments of voluntariness have come in cases of recorded interrogations, which permitted judges to parse implicit promises and threats made to obtain an admission. n581 Recording also allows a review of police overbearing that might not be revealed in dry testimony. n582 Taping is thus the only means of eliminating "swearing contests" about what went on in the interrogation room. n583

Videotaping also promises to offer more effective protection against the more esoteric problem of false confessions induced by noncoercive police questioning. A complete record of the proceedings promises to be the most effective means of identifying such cases. n584 A recent story in the *American Lawyer* regarding three false confessions to involvement in the murders of nine people at a Thai Buddhist temple near Phoenix provides a good example. n585 Police obtained and taped these false confessions in apparent compliance with [*489] *Miranda* following lengthy questioning. While the real killers were discovered before the innocent men stood trial, the *American Lawyer* concluded that the tapes would have been their only hope:

> Only these tape recordings gave the suspects any chance of defending themselves at trial. Only the tapes reliably document how much information was fed to the suspects before they repeated it back. Only the tapes document all the inaccuracies in the suspects' statements. Only the tapes document the manner in which investigators steered the suspects toward tidying up the details of their confessions. Only the tapes document the suggestiveness of the questions and the ambiguity of the answers. Police reports provide none of this information. n586

While recording maintains, and in many ways exceeds, *Miranda's* supposed benefits of deterring coercion and preventing false confessions, it has the advantage over *Miranda* of not significantly impeding law enforcement. n587 In 1992 the National Institute of Justice (NIJ) published a nationwide survey of a representative sample of police agencies about videotaping interrogations. n588 The survey found that about one-sixth of all police and sheriffs' departments in the United States videotaped at least some confessions. n589 The survey found that 59.8% of the agencies believed that they obtained more incriminating information from suspects, 26.9% the same amount, while 13.2% thought they obtained less. n590 Also, 8.6% thought suspects were more willing to talk to police, 63.1% thought there was no difference, while 28.3% reported suspects less willing to talk. n591 Videotaping also had many other benefits, such as improving police interrogation practices, rendering confessions more convincing, facilitating their introduction into evidence, assisting prosecutors in negotiating more acceptable plea bargains and obtaining guilty pleas, and helping in securing convictions. n592 Taping had not proved to be a significant financial burden. n593

[*490] The striking conclusion of the NIJ survey was that

> 97 percent of all departments in the nation which are videotaping either confessions or full interrogations find videotaping "very useful" (65.8%) or "somewhat useful" (31.3%). An additional 2.5 percent of the agencies find this use of electronic technology "neither harmful nor helpful," and less than 1 percent cited the practice of videotaping as "somewhat harmful." n594

This ringing endorsement of videotaping is particularly striking because in many departments detectives initially resisted the innovation only to be won over by its benefits. n595

One qualification to this endorsement should be noted. In many of the jurisdictions surveyed, the videotaping was at the discretion of the interrogating detective. n596 It is possible that a mandatory videotaping regime might be more problematic for law enforcement.

Recent and substantial experience with a mandatory recording requirement in Britain suggests that such a requirement would not significantly harm police efforts to obtain confessions. In 1988, a Code of Practice took effect that generally required that police tape-record interviews with suspects. n597 A 1993 review of the requirement by the Royal Commission on Criminal Justice reported that "by general consent, tape recording in the police station has proved to be a strikingly successful innovation providing better safeguards for the suspect and the police officer alike." n598 No significant adverse effect on obtaining confessions has been observed in the empirical studies specifically focusing on taping, and in fact police obtain more confessions and information about other offenses when interrogations are taped. n599 According to one survey, 91% of police officers approve of the practice, with 65% reporting "very favorable" views about it. n600

[*491] A carefully monitored study of mandatory videotaping of confessions in Canada suggests the same conclusion. Police obtained confessions or admissions in 68% of their interviews, even with videocameras running. n601 The study concluded that "the videotaping process does not appear to inhibit suspects from making confessions or admissions . . . ." n602

The only specific controlled empirical study in the United States also suggests that a taping requirement does not harm the confession rate. In 1967, the Vera Institute made a comparison of audiotaped police interrogations in one New York City precinct with standard interrogation in other comparable precincts. More admissions were obtained in the taped precinct. n603 The same result is suggested by my 1994 Salt Lake County study. Although not based on a "controlled" sample, my study found that suspects were just as likely to confess when police videorecorded the questioning. n604

A final indication that mandatory taping does not inhibit suspects is found in Alaska. The Alaska Supreme Court in 1985 imposed a requirement that all custodial interviews be recorded on audio tape. n605 I have seen reports of several interviews with law enforcement officers in that state which suggest that the recording has not been harmful to the confession rate. An Alaskan appellate judge was quoted recently as saying "I've seen no indication that the requirement has been onerous [*492] or unworkable." n606 The judge also noted that officers now frequently carry portable microcassette recorders to record every potential contact with a suspect, a policy that often preserves other damaging evidence against suspects. n607

My reading of the available empirical information is that a mandatory videotaping requirement would not noticeably inhibit suspects from confessing and would produce significant collateral benefits for law enforcement. However, further study of this question is warranted, as some law enforcement concerns have been expressed about such a requirement. For example, 28.3% of police agencies in the NIJ survey thought that suspects were somewhat less willing to talk on videotape. n608 Similarly the current edition of the Inbau interrogation manual discourages taping confessions. n609 This is slender evidence on which to build a case against taping from a law enforcement perspective, particularly when factoring in the possibility of covert taping to avoid inhibiting suspects. n610 But to obviate any objection from law enforcement, a reasonable, interim compromise could be tried: Allow police to depart from *Miranda*

(under the conditions outlined below) if they videotape the interrogation; if not, they can continue to operate under the *Miranda* rules. This compromise would allow police to shift to the alternative if they thought it would be more effective. It would also develop a body of empirical evidence that would be useful in developing future policy recommendations.

2. Minimizing Miranda's *Costs. -- Miranda's* defenders might be prepared to concede that videotaping has many advantages but argue that police should comply with both *Miranda* and videotaping requirements. But such an approach single-mindedly pursues the goal of eliminating coerced confessions without considering the countervailing costs identified in this Article. The Court has described *Miranda* as "a carefully crafted balance designed to fully protect *both* the defendants' and society's interests." n611 An approach that strikes a reasonable balance between maximizing benefits and minimizing costs would be to require taping to prevent police coercion while at the [*493] same time relaxing the features of the *Miranda* regime that extract the greatest costs in terms of lost confessions. The existing empirical literature allows us to identify the particularly harmful features of *Miranda*. These features can then be modified, without disturbing the other protections. In particular, the *Miranda* warnings can be retained without significantly lowering the confession rate, while the waiver and questioning cutoff rules should be eliminated, as they cause the bulk of *Miranda's* harms.

(a) Warnings. -- Simply advising suspects of their right to remain silent does not appear to be the critical factor in the post-Miranda decline in the confession rates. The best evidence of this fact comes from the experience of law enforcement agencies following the *Escobedo* decision, when many police agencies began giving various warnings n612 without substantial effects on confessions. At the annual meeting of the National Association of Attorneys General, held in May 1966 (after *Escobedo* but shortly before *Miranda*), the "clear consensus" was that *Escobedo* had had little effect on the rate of confessions and that confession rates remained constant even in those states where *Escobedo* had been extended to require the police to warn suspects of their rights. n613 For example, J. Joseph Nugent, Attorney General of Rhode Island, reported that warning suspects of their rights to counsel and to remain silent along with obtaining written waivers had not affected confession rates. n614 In New Jersey in February 1966, the Essex County prosecutor reported that confession rates remained stable even though police had been advising suspects of their rights since June 1964. n615 A related indication that warnings per se were not responsible for the change in the rates comes from the practice of the FBI, which gave warning of the right to remain silent without apparent adverse effect. n616

The available empirical evidence confirms that warnings have comparatively little effect on confession rates. In Detroit, there was, at most, a 2.8% drop in the confession rate after police began warning [*494] suspects of their rights under *Escobedo* n617 -- from 60.8% of all cases in 1961 to 58% of all cases in 1965. n618 In Pittsburgh, a substantial decline occurred in the confession rate after *Miranda*, even though it was the pre-Miranda practice of the detectives to warn suspects of their right to remain silent and to, at some point, advise suspects that they would receive counsel. n619 In New Haven, the *Yale Law Journal* reported no support in its data for the claim that warnings of rights caused a decline in police success at obtaining confessions. n620 Finally, in Philadelphia, an estimated 90% of arrested suspects made statements before *Escobedo*, 80% (estimated) after *Escobedo* when police gave limited warnings, 68.3% when police gave more extended warnings as required by the Third Circuit, and 40.7% when police followed *Miranda*. n621 Thus, the biggest drop followed not the imposition of warning requirements, but rather the imposition of the *Miranda* requirements.

A final indication that warnings can be given to suspects without significantly harming the confession rate comes from studies in Britain and Canada. Historically, both countries gave warnings to suspects about their right to remain silent, but achieved much higher confession rates than found in America. n622 In structuring less costly alternatives to *Miranda*, eliminating warnings of rights need not be the main focus of reform.

(b) Waiver and questioning cut-off requirements. -- While the warnings are perhaps the most famous (and least harmful) part of the *Miranda* decision, the decision also made important changes in requiring that police obtain an affirmative waiver of rights from suspects before conducting any custodial questioning and that police stop questioning

whenever a suspect invoked his right to counsel or right to silence. These changes seem to have been responsible for some significant [*495] portion of the drop in confessions, as every study suggests that some suspects cannot be questioned at all because of these *Miranda* rules. The available historical data on invocation of *Miranda* rights are set out in the footnote here, arranged in order of largest to smallest possible impact. n623 The percentages vary widely (from 77% to 4%, averaging somewhere around 20% n624). In addition to the historical data, two recent studies suggest that about 20% of suspects cannot be questioned because of *Miranda*. In 1993, the Bay area study found [*496] that 22% of suspects invoked their *Miranda* rights. n625 In 1994, my Salt Lake County study found that 16.3% of suspects given *Miranda* warnings invoked their rights initially. n626

The fact that a significant proportion of suspects invoke their *Miranda* rights certainly marks these requirements of *Miranda* as responsible for a good part of the confession rate decline. In the absence of such rules, officers could be expected to successfully persuade some suspects to make incriminating statements. n627 And these raw percentages do not measure any reduction in questioning effectiveness due to the fact that officers need to avoid giving a suspect reason to terminate an interview. n628 It must be remembered that 20% of all suspects represents a huge number of criminal cases. Using the same methodology employed earlier, n629 if 20% of suspects invoke their *Miranda* rights, police cannot question in any way approximately 550,000 criminal suspects each year. In modifying *Miranda*, then, the waiver and questioning cut-off rules along with the prophylactic right to counsel n630 should be the main targets for reform.

3. The Replacement for Miranda. -- In light of the benefits of videotaping and the costly features of *Miranda*, what might a replacement for *Miranda* look like? Suspects could continue to be advised of their rights, as follows:

(1) You do not have to say anything.
(2) Anything you do say may be used as evidence.
(3) You have the right to be represented by a lawyer when we bring you before a judge.
(4) If you cannot afford a lawyer, the judge will appoint one for you without charge.
(5) We are required to bring you before a judge without unnecessary delay. n631

[*497] While adding a new, fifth warning that is not required by *Miranda*, the modified warnings would dispense with the *Miranda* offer of counsel, n632 identified as a particularly harmful aspect of *Miranda* and, in any event, a right that has proved to be purely theoretical since police always terminate questioning rather than finding a lawyer. n633 Also, the alternative would dispense with the requirement that police obtain an affirmative waiver of rights from suspects, another particularly harmful feature of *Miranda*. However, police could continue to ask suspects whether they understood the rights communicated to them, since nothing in the empirical literature identifies this aspect of *Miranda* as being particularly harmful. Also eliminated would be the requirement that police immediately terminate an interview whenever the suspect requests an end to the interview or an opportunity to meet with counsel. These features have been identified as harming the confession rate. n634

While these changes would eliminate most of *Miranda's* costs, the additional safeguard of taping confessions could be added on top of existing requirements without adversely affecting confession rates. Videotaping would be required for custodial interrogation in the stationhouse; audiotaping would be required for custodial interrogation in the field (as is currently done in Alaska). Such a requirement might be operationalized for police agencies as follows:

> Custodial interviews with suspects shall be electronically recorded. Videorecording shall be the preferred form of recording, but sound recording may be used if operational videorecording equipment is not readily available or if the interview is conducted outside of the stationhouse. If both videorecording and sound recording are impossible because of equipment malfunction, an interview may be carried out without recording. If the suspect indicates that he does not wish to have the interview recorded, the interview may also be carried out without recording. The recording shall include the delivery of the rights to the suspect.

One final point should be made in favor of this proposal. Since police are still required to give modified warnings

and since they will be videotaped while conducting interrogations, police will not gain the mistaken impression that any judicial supervision of the interrogation process has ended.

[*498] *C.* Miranda's *Greatest Cost*

No doubt some will find this alternative to *Miranda* to be too favorable for police. Others may argue that it is still too restrictive. n635 But this kind of discussion, which has been virtually nonexistent since 1966, demonstrates *Miranda's* greatest cost. Beyond the release of dangerous criminals, the undeniable tragedy of the *Miranda* decision is that it has blocked the search for superior approaches to custodial interrogation -- alternatives that might better protect not only society's interest in apprehending criminals but also criminal suspects' interests in preventing coercive questioning. n636 *Miranda* itself seemed to invite exploration of alternatives, explaining that "our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform." n637 The Court's invitation, however, was in reality empty because it did not specify what alternatives would be deemed acceptable. n638 In the quarter-century since *Miranda*, reform efforts have been virtually nonexistent. As the Office of Legal Policy concluded:

> The *Miranda* decision has petrified the law of pre-trial interrogation for the past twenty years, foreclosing the possibility of developing and implementing alternatives that would be of greater effectiveness both in protecting the public from crime and in ensuring fair treatment of persons suspected of crime. . . . Nothing is likely to change in the future as long as *Miranda* remains in effect and perpetuates a perceived risk of invalidation for any alternative system that departs from it. n639

This period of stagnation in the United States should be contrasted with reform efforts in other countries where varying modification of interrogation rules have been made or recommended. n640 It seems difficult to quarrel with the assessment that "the police interrogation [*499] process in the United States would benefit from a comparable effort." n641

The time has come for the Supreme Court to allow serious exploration of less costly ways of regulating police interrogation. As *Miranda* itself recognized, the Court's announced rules are not necessarily the best accommodation of the various concerns. n642 This Article suggests that the requirements imposed by the Court in 1966 continue to exact a heavy toll in lost cases -- a toll that could be substantially reduced under reasonable alternatives. Justice Harlan's dissent in *Miranda* recognized this possibility, explaining that while the Court's change by judicial fiat might have the benefit of being speedy, other approaches "when they come would have the vast advantage of empirical data and comprehensive study." n643

This Article has tried to begin the effort in that direction by comprehensively surveying the available empirical literature on *Miranda's* costs and by preliminarily surveying such literature on videotaping as a replacement. If nothing else, this Article may highlight areas for future academic research. More importantly, perhaps it is not too optimistic to think that this Article might serve as something like a petition for rehearing on behalf of those who have borne *Miranda's* social costs. Justice White's dissent in *Miranda* recognized the fact that "in some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets . . . to repeat his crime whenever it pleases him." n644 He continued, "There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case." n645 While this Article cannot identify *Miranda's* specific victims, it should at least prove that they are numerous and that their victimization could have been avoided under reasonable alternatives to *Miranda*. As our criminal justice system prepares to enter the next century, one hopes that the Court will take advantage of this new knowledge and permit Congress and the states to craft better regimes for regulating police questioning of suspects.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & ProcedureInterrogationMiranda RightsCustodial InterrogationCriminal Law & ProcedureInterrogationMiranda RightsSelf-Incrimination PrivilegeCriminal Law & ProcedureGuilty PleasGeneral Overview

FOOTNOTES:

n313 *See generally* HERBERT S. MILLER ET AL., NATIONAL INST. OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, U.S. DEP'T OF JUSTICE, PLEA BARGAINING IN THE UNITED STATES (1978) (discussing prevalence of plea bargaining in the United States).

n314 *See* BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS -- 1993, at 536 (1994) (estimating that 91% of all felony convictions in state courts in the United States in 1990 resulted from a guilty plea); BARBARA BOLAND ET AL., PROSECUTION OF FELONY ARRESTS, 1988, at 24-29 (1988) (1988 sample of ten felony courts found proportion of guilty pleas to range from 83% to over 95%); DAVID A. JONES, CRIME WITHOUT PUNISHMENT 192 (1979) (among 24 states and D.C., only 6 tried more than 10% of their cases). *But cf.* Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1047-50 (1984) (collecting evidence suggesting that plea bargaining is less prevalent than generally believed).

n315 *See* PETER F. NARDULLI ET AL., THE TENOR OF JUSTICE: CRIMINAL COURTS AND THE GUILTY PLEA PROCESS 205 (1988).

n316 DAVID W. NEUBAUER, CRIMINAL JUSTICE IN MIDDLE AMERICA 218-19, 241 (1974); *see* MILLER ET AL., *supra* note 313, at 81; Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 58 (1968); Henry H. Rossman et al., *Some Patterns and Determinants of Plea-Bargaining Decisions: A Simulation and Quasi Experiment, in* PLEA-BARGAINING 77, 78, 82-83 (William F. McDonald & James A. Cramer eds., 1980); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 901 (1964). *But cf.* PETER F. NARDULLI, THE COURTROOM ELITE: AN ORGANIZATIONAL PERSPECTIVE ON CRIMINAL JUSTICE 193 (1978) (finding that regression analysis of Chicago sample shows no relation between strength of the state's case and prosecution's decision to pursue a case to trial).

n317 JONES, *supra* note 314, at 95-96; *see* NEUBAUER, *supra* note 316, at 199.

n318 Arizona v. Fulminante, 111 S. Ct. 1246, 1257 (1991); *see* Saul M. Kassin & Lawrence S. Wrightman, *Confession Evidence, in* THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 67, 83-87 (Saul M. Kassin & Lawrence S. Wrightman eds., 1985) (collecting mock jury evidence to the same effect); Gerald R. Miller & F. Joseph Boster, *Three Images of the Trial: Their Implications for Psychological Research, in* PSYCHOLOGY IN THE LEGAL PROCESS 19, 21-22 (Bruce D. Sales ed., 1977) (reporting mock jury trial showing strong correlation between confession evidence and likelihood of guilty verdict); *cf.* DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 454 (1991) (explaining that juries are sometimes skeptical of police testimony about confessions); UVILLER, *supra* note 14, at 185 (same).

n319 Some data also suggest that those who confess are less likely to go to trial. *See* David W. Neubauer, *Confessions in Prairie City: Some Causes and Effects*, 65 J. CRIM. L. & CRIMINOLOGY 103, 110 (1974)

(table 4) (finding, for violent crimes, that 3% of confessors went to trial as compared to 32% of nonconfessors); *see also* BALDWIN & McCONVILLE, *supra* note 196, at 19 (British data showing confessors more likely to plead guilty); SOFTLEY, *supra* note 195, at 87, 91 (same); MICHAEL ZANDER & PAUL HENDERSON, ROYAL COMM'N ON CRIMINAL JUSTICE, CROWN COURT STUDY 4 (1993) (same). From this fact, one might be tempted to argue that *Miranda*, by reducing the confession rate, might cause court backlog by increasing the number of trials. In my view, such an outcome is unlikely because of the dynamics of plea bargaining. Instead of increasing court backlog, *Miranda* is more likely simply to change the concessions necessary to induce pleas -- thus maintaining a roughly constant rate of trials.

n320 *Miranda*, 384 U.S. at 541 n.5 (White, J., dissenting) ("No reliable statistics are available concerning the percentage of cases in which guilty pleas are induced because of the existence of a confession or of physical evidence unearthed as a result of a confession. Undoubtedly the number of such cases is substantial.").

n321 Leo, *supra*, note 267, at 99.

n322 *See, e.g.*, Markman, *supra* note 23, at 948 (after confession suppressed in *Edwards v. Arizona*, Edwards received favorable plea bargain); *Miranda v. Jogger*, WALL ST. J., Feb. 1, 1991, at A10 (favorable plea given to nonconfessing defendant in celebrated case of attack on a Central Park jogger).

n323 Neubauer, *supra* note 319, at 109.

n324 Neubauer describes the non-property category as "crimes against the person," *id.* at 106, which were defined as "aggravated battery, death, rape, armed and unarmed robbery, narcotics, and indecent liberties with a minor." *Id.* at 104 n.***. For convenience, I will use the appellation "crimes of violence."

n325 *Id.* at 110 (table 4). Slightly more of those defendants who did not confess pled to a reduced charge -- 13% vs. 9% for confessors. *Id.*

n326 *Id.* (table 5). In addition, 45% of those who confessed pled to reduced charges, while 32% who did not confess did so -- a 13% difference. *Id.*

n327 NARDULLI ET AL., *supra* note 315, at 226.

n328 *Id.* at 237 (table 8.3) (statistically significant at the .01 level). The study found that, overall, defendants who confessed were 4% less likely to receive a count reduction. *Id.* at 236.

n329 *Id.* at 237 (table 8.3).

n330 *Id.* at 254 (table 8.13).

The observed effects of confessions in plea bargaining may have been understated in all the regression equations because of a possible multicollinearity problem. The equations tended to show substantial, statistically significant relations between the physical evidence and all forms of charge concessions. *Id.* at 237 (table 8.3),

254 (table 8.13). Physical evidence and confessions are probably strongly correlated, *see supra* note 214 and accompanying text (suspects more likely to confess when evidence against them is strong and confessions may lead to physical evidence), which means that multicollinearity might reduce the reported confession effect. *See generally* PETER KENNEDY, A GUIDE TO ECONOMETRICS 146-49 (1985) (discussing consequences of multicollinearity). Because the authors were not interested in quantifying a separate, confession effect, it is not clear what steps they took to assess this potential problem. However, while the actualprintouts of the regressions are no longer available, Professor Nardulli does not recall any particular multicollinearity problem. Letter from Peter F. Nardulli, Professor, Univ. of Illinois at Urbana-Champaign, to Paul G. Cassell, Professor, Univ. of Utah College of Law (Jan. 30, 1995) (on file with author).

n331 *Yale Project, supra* note 8, at 1608.

n332 *Id.*

n333 *Id.*

n334 Leo, *supra* note 145, at 293.

n335 *Id.* at 293.

n336 Cassell & Hayman, *supra* note 47 (reporting this result along with statistical significance tests). Other similar effects of confessions on plea bargaining results were also found. *Id.*

The Pittsburgh study contains information on guilty plea rates that, unfortunately, is incomplete for present purposes. The study reports that guilty pleas to indictments for all crimes rose from 22.1% before *Miranda* to 25.0% in the year after *Miranda*. Seeburger & Wettick, *supra* note 32, at 22 (table 11). This figure, however, tells us little about overall plea bargaining, because we do not know what happened in the remaining 75% of the cases after *Miranda*. For example, we do not know whether pleas to lesser charges or to misdemeanors increased after *Miranda*. Also, 70% guilty plea figures related to all Pittsburgh police units (not just the Pittsburgh Detective Branch, which followed *Miranda*) and otherunits in Allegheny County as a whole, which might not have been following *Miranda* in the year after the decision. *See* ALI REPORT, *supra* note 56, at 134; Markman, *supra* note 23, at 947. Finally, these guilty plea figures suffer the same problems as conviction rate figures. *See supra* notes 39-47 and accompanying text.

Information peripherally related to the role of confessions in plea bargaining comes from Neil A. Milner's study of two cities in Wisconsin, which found that convictions to lesser charges dramatically increased in Racine after *Miranda* but fell somewhat in Madison. NEIL A. MILNER, THE COURT AND LOCAL LAW ENFORCEMENT: THE IMPACT OF MIRANDA 218-19 (1971). Milner's data do not distinguish between conviction by trial and conviction by plea of guilty, however, and therefore are of little use for present purposes.

n337 *See e.g.*, VERA INST. OF JUSTICE, *supra* note 24, at 15; *Yale Project; supra* note 8, at 1609.

n338 ARTHUR I. ROSETT & DONALD R. CRESSEY, JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE 147, 149-50 (1976); *see also* U.S. SENTENCING COMMISSION, GUIDELINES MANUAL § 3E1.1 (1994) (authorizing sentence reduction for "acceptance of responsibility" and

listing among factors to be considered a defendant's "voluntary and truthful admission to authorities of involvement in the offense and related conduct"); *cf. Miranda*, 384 U.S. at 538 (White, J., dissenting) (confessing may "enhance the prospects for rehabilitation").

n339 *See* NARDULLI ET AL., *supra* note 315, at 242 (table 8.6) (no association between a confession and lower sentences in a regression of guilty plea cases); Gary D. LaFree, *Adversarial and Nonadversarial Justice: A Comparison of Guilty Pleas and Trials*, 23 CRIMINOLOGY 289, 302 (1985) (table 4), 303 (table 5), 305 (table 6) (no indication that confessions produce lower sentences in regression analysis of guilty pleas and sentence severity); Leo, *supra* note 145, at 293 (suspects who incriminated themselves more likely to receive punishment after conviction; suspects who waived rights more likely to receive punishment, although effect not statistically significant); Neubauer, *supra* note 319, at 110-11 (no evidence that, after controlling for relevant factors, those who confess receive lighter sentences); *see also Yale Project*, *supra* note 8, at 1609 (defense attorneys generally reported that sentence bargaining was more difficult when a defendant had confessed).

n340 It might be argued that, in view of plea bargaining, it is unfair to view the entire 24% as involving "lost" cases because, in some of these, the defendant might nonetheless be induced to plead guilty. An offsetting possibility, however, is the parallel possibility that in some of the 76% potentially "won" cases the prosecution might be induced to bargain the whole case away. I will assume that these two effects cancel each other, particularly in view of the fact that there are many more "won" cases to lose than "lost" cases to win.

n341 I use Neubauer's study rather than Nardulli et al.'s because of possible problems (for present purposes) in the Nardulli regression. *See supra* note 330. Using the larger figures from my study and from the Yale Project would produce a greater effect than calculated here.

n342 Neubauer found a 23% difference, but I have offset that by 4% to take account of the fact that 4% more nonconfessors than confessors (13% vs. 9%) plead guilty to reduced charges. Neubauer, *supra* note 319, at 110 (table 4).

n343 *Id.* (table 5). I have used the data from table 5 because Neubauer says they are the "best gauge" of the plea differential and because they produce a more conservative estimate of plea bargaining effects. *Cf. id.* (table 4).

n344 These figures are derived by multiplying *Miranda's* confession rate reduction (16.1%) by the observed plea bargaining effects.

n345 Arrests appear to be the proper figure for extrapolation because Neubauer's study appears to follow defendants "from the time of arrest." Neubauer, *supra* note 319, at 103.

n346 A plea to reduced charges does not necessarily prove that a shorter sentence will result, as the available studies have reached varying conclusions on the relation between charge of conviction and actual sentence. *Compare* WILLIAM F. McDONALD & JAMES A. CRAMER, PLEA-BARGAINING 126 (1980) (suggesting that sentence concessions are seldom awarded to defendants pleading guilty) and Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 757 n.97 (1980) (collecting evidence that reduced charges have little impact on sentence ultimately imposed) *with* Hyun J. Shin, Analysis of Charge Reduction and its Outcomes 58-91 (1972) (unpublished Ph.D. dissertation, State University of New York at

Albany) (finding that defendants pleading guilty receive sentence concessions that are somewhat offset by parole practices) and NARDULLI ET AL., *supra* note 315, at 244 (table 8.7) (finding that charge reductions affect sentencing dispositions).

n347 *See, e.g.*, Seeburger & Wettick, *supra* note 32, at 26 (generalizing from Pittsburgh data to the entire nation); *Yale Project*, *supra* note 8, at 1533 (arguing the New Haven data should be typical of the country). *See generally supra* notes 2-5 and accompanying text (collecting general pronouncements that *Miranda* has not harmed law enforcement).

n348 OTIS H. STEPHENS, JR., THE SUPREME COURT AND CONFESSIONS OF GUILT 174 (1973); *see* Barrett, *supra* note 306, at 25.

n349 A confounding problem in assessing the costs of the search and seizure exclusionary rule is the wide variation between cities in compliance with the Fourth Amendment. *See* Bradley C. Cannon, *Is the Exclusionary Rule in Failing Health? Some New Data and Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681, 703-25 (1974). To the extent that inter-city variation on *Miranda* compliance exists, it should produce an underestimation of *Miranda's* costs. If police fail to comply with *Miranda*, that will only obtain a confession that is suppressible later. Yet that later "lost confession" will not be reflected in a lower confession rate and, therefore, will never enter the cost equation.

n350 Witt, *supra* note 89, at 324 n.40.

n351 Cyril D. Robinson, *Police and Prosecutor Practices and Attitudes Relating to Interrogation as Revealed by Pre- and* Post-Miranda *Questionnaires: A Construct of Police Capacity to Comply*, 1968 DUKE L.J. 425.

n352 *Id.* at 466.

n353 *See* Van Kessell, *supra* note 7, at 118 (attributing lower Seaside City figures to, inter alia, "the fact that, since it confronts a less severe crime problem than the other cities studied, it has more resources to devote to the interrogation process").

n354 *See infra* notes 367-73 and accompanying text (discussing noncustodial "interviews" as a way of avoiding *Miranda's* restraints on "interrogation"). *But cf.* Cassell & Hayman, *supra* note 47 (reporting that police conduct noncustodial telephone interviews to save time). That such caseload pressures increase law enforcement incentives to plea bargain cases in large cities has been documented elsewhere. *See, e.g.*, JONES, *supra* note 314, at 192 (pleas higher in heavily populated states); 2 LaFAVE & ISRAEL, *supra* note 3, at 559 (plea pressures heaviest, for serious criminals, in busy urban courtrooms). *But see, e.g.*, MILLER ET AL., *supra* note 313, at 65 (rural prosecutors quicker to plead).

n355 *See infra* notes 439-48 and accompanying text.

n356 Robinson, *supra* note 351, at 441.

n357 *See supra* notes 183-85 and accompanying text (Table 1). Data from the District of Columbia and Los Angeles are not included because they are unreliable for the reasons discussed in Part II. Population data are for 1967 and come from the U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1969, at 19-20 (1969) (standard metropolitan statistical area), except for "Seaside City," for which the population figure comes from the author's description of the city. *See* Witt, *supra* note 89, at 322. The total population of New York is used for New York County and Kings County on the grounds that it more accurately reflects the urban pressures felt by New York City police and it makes no sense to subdivide population totals there on a county-by-county basis. Data from Chicago were included to provide a more substantial data base. *Cf. supra* note 185 (noting concerns about Chicago study).

n358 The relation was significant at the .02 level. The adjusted R<2> was .54.

n359 FED. BUREAU OF INVESTIGATION, *supra* note 299, at 190 (figures derived from table 12).

n360 *See, e.g.*, LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 405 (1983); Schulhofer, *supra* note 39, at 456.

n361 Green, *supra* note 155, at 16.

n362 LaFAVE & ISRAEL, *supra* note 3, § 6.5(c), at 484 n.30; *see* SAMUEL WALKER, SENSE AND NONSENSE ABOUT CRIME: A POLICY GUIDE 131 (3d ed. 1994) ("Suspects are likely to be more knowledgeable [about *Miranda* rights] today [than in the 1960s], but more recent studies have not been done."); *cf.* David Dixon et al., *Safeguarding the Rights of Suspects in Police Custody*, 1 POLICING & SOC'Y 115, 122 (1990) (finding rapid increase in requests for legal advice by juveniles in British city from 1984 to 1987 under new interrogation regime, due in part to the spread of information).

n363 *Poll Finds Only 33% Can Identify Bill of Rights*, N.Y. TIMES, Dec. 15, 1991, at 33; *see* WALKER, *supra* note 362, at 130 ("most kids on the street know about" *Miranda*).

n364 Criminals have particular incentives (avoiding prison) and information sources (criminal confederates) that might suggest they would be at least as well-informed as the general public. On the other hand, criminal suspects may be less intelligent than the general population. *See* JAMES Q. WILSON & RICHARD J. HERRNSTEIN, CRIME AND HUMAN NATURE 148-72 (1985).

n365 *See* WALKER, *supra* note 362, at 131 (citing Medalie et al., *supra* note 133); *see also* Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of* Miranda, 47 DENV. U. L. REV. 1, 14-16 (1970) (noting limited awareness of *Miranda* rights in 1969 sample of incarcerated suspects). *But cf.* William Hart, *The Subtle Art of Persuasion*, POLICE MAG., Jan. 1981, at 14 (reporting that experienced interrogators saw "no indication that today's suspects were more sophisticated than those of past years").

n366 *See* Griffiths & Ayers, *supra* note 132, at 312 (noting that refusal to make incriminating statements by draft evaders increased after they were given more information about their rights).

n367 KEVIN N. WRIGHT, THE GREAT AMERICAN CRIME MYTH 140 (1985); *see also* Van Kessell,

supra note 7, at 105-06. The same phenomenon has been alleged in Britain; *see, e.g.*, ANDREW SANDERS ET AL., ADVICE AND ASSISTANCE AT POLICE STATIONS AND THE 24 HOUR DUTY SOLICITOR SCHEME 56-66 (1989) (documenting police ploys to discourage requests for counsel under new interrogation rules).

n368 Schulhofer, *supra* note 39, at 457; *see* SIMON, *supra* note 318, at 193-207 (discussing ways in which police have adapted to *Miranda*); JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 58-59 (1993) (same); *cf.* David Dixon, *Politics, Research and Symbolism in Criminal Justice: The Right of Silence and the Police and Criminal Evidence Act*, 20 ANGLO-AM. L. REV. 27, 39-40 (1991) (discussing police learning to work with new interrogation regulatory regime in Britain).

n369 SKOLNICK & FYFE, *supra* note 368, at 58; Jerome H. Skolnick & Richard A. Leo, *The Ethics of Deceptive Interrogation*, CRIM. JUST. ETHICS, Winter/Spring 1992, at 5; *see, e.g.*, UVILLER, *supra* note 14, at 52 (giving example of New York City "interview" to avoid *Miranda*).

n370 WRIGHT, *supra* note 367, at 140.

n371 *See* Robinson, *supra* note 351, at 474 (86% of police departments in nationwide survey received advice about *Miranda* within one month of the decision).

n372 Miranda v. Arizona, 384 U.S. 436, 444 (1966). After the decision, some confusion remained as to whether "focus" was also a triggering event for the *Miranda* rules. *See* Kenneth W. Graham, Jr., *What is "Custodial Interrogation"?: California's Anticipatory Application of* Miranda v. Arizona, 14 UCLA L. REV. 59, 114 (1966) (discussing *Miranda*, 384 U.S. at 444 n.4).

n373 *See, e.g.*, 2 BLACK & REISS, *supra* note 183 (police gave advice of rights in only 3% of field encounters); Yale Kamisar, *"Custodial Interrogation" Within the Meaning of* Miranda, *in* CRIMINAL LAW AND THE CONSTITUTION -- SOURCES AND COMMENTARIES 335, 341 (Jerold H. Israel & Yale Kamisar eds., 1968) ("I think it is quite legitimate to read *Miranda* as encouraging the police to engage more extensively in pre-arrest, pre-custody, pre-restraint questioning.") (remarks from CLE conference on *Miranda* during the summer of 1966); Medalie et al., *supra* note 133, at 1361 (guidance given to D.C. police one month after *Miranda* noted that "the critical point is the time the arrest is made or the person's freedom of action is limited"); James R. Thompson, *What* Miranda *Requires*, PUBLIC MGMT., July 1967, at 191, 196-97 (training bulletin distributed to the Chicago Police Department on Sept. 23, 1966 noting noncustodial questioning possibilities); *see also* Yale Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORNELL L. REV. 436, 452 (1964) (describing police training in pre-arrest "interview" tactics in 1958).

n374 *See Yale Project*, *supra* note 8, at 1552.

n375 *See supra* notes 79-82 and accompanying text (describing pre-Miranda rulings in Philadelphia); *supra* notes 170-71 and accompanying text (same in Los Angeles); *see also* Neal Milner, *Comparative Analysis of Patterns of Compliance with Supreme Court Decisions*, 5 LAW & SOC'Y REV. 119, 128 (1970) (noting "anticipation" of *Miranda* by more professional police organizations).

n376 INBAU ET AL., *supra* note 212, at 24.

n377 Cassell & Hayman, *supra* note 47.

n378 *See supra* notes 139-44 and accompanying text (discussing failure to implement decision in D.C.); *supra* notes 116-26 and accompanying text (discussing failure to implement decision in New Haven); *see also* Leiken, *supra* note 365, at 30 (finding allegations that Denver police ignored requests for counsel in 1969).

n379 *See* Van Kessell, *supra* note 7, at 102 & n.532 (collecting evidence on this point); *see also* Cassell & Hayman, *supra* note 47 (finding consistent police compliance with *Miranda* in Salt Lake County in 1994); *cf.* Roger C. Schaefer, *Patrolman Perspectives on* Miranda, 1971 LAW & SOC. ORD. 81, 88 (finding both under- and over-compliance with *Miranda* by Minneapolis police officers in 1968).

n380 *See* BAKER, *supra* note 360, at 404-05 (describing training given to police on how to implement *Miranda*).

n381 *See, e.g.*, Leiken, *supra* note 365, at 10 (noting better information about and training in *Miranda* requirements in Denver in 1969 than in New Haven in 1966).

n382 *See generally* MILNER, *supra* note 336, at 224-32 (discussing relation between police professionalization and *Miranda*).

n383 *See* Markman, *supra* note 23, at 947; *see also* Gerald M. Caplan, Miranda *Revisited*, 93 YALE L.J. 1375, 1466-67 (1984) (reviewing LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS (1983)).

n384 For example, the New Haven project observed many police practices designed to "accommodate" *Miranda* that were in fact impermissible. In violation of *Miranda's* waiver requirements, detectives would give suspects their rights "then immediately shift to a conversational tone to ask, 'Now, would you like to tell me what happened.'" *Yale Project, supra* note 8, at 1552. In violation of *Miranda's* right to counsel requirements, when a suspect showed an interest in counsel "the police usually managed to head him off simply by not helping him to locate one." *Id.* In violation of *Miranda's* questioning cut-off rules, detectives would "coax" suspects into talking when they tried to end the questioning. *Id.* at 1555. Similarly, in New York, police did not always allow a suspect to invoke the right to silence. *See* VERA INST. OF JUSTICE, *supra* note 24, at 43.

n385 A pre-Miranda study in Detroit reported that the confession rate fell from 60.8% in 1961 to 58.0% in 1965. *See* Souris, *supra* note 166, at 255.

n386 Witt, *supra* note 89, at 325 (table 3).

n387 *Id.* at 326 (noting that fewer suspects were interrogated in 1968 than in earlier years).

n388 Van Kessell has suggested that Seaside City's lower drop in the confession rate (only 2%) when compared to other cities should be "attributed to the fact that, by the time of the 'Seaside City' study, police were

able to adapt their interrogation techniques to comply with *Miranda*." Van Kessell, *supra* note 7, at 118. The time-series development of the data makes this suggestion implausible.

n389 *See* Seeburger & Wettick, *supra* note 32, at 13 & n.36.

n390 *Id.*

n391 *Id.* at 13 n.36.

n392 *Id.* Another explanation is that the first sample included only "cleared" cases while the second sample included uncleared cases. *See* ALI REPORT, *supra* note 56, at 133.

n393 Week-by-week data from the Philadelphiastudy from June 19, 1966 to February 19, 1967 likewise show no discernable pattern. *Controlling Crime Hearings*, *supra* note 45, at 201.

n394 *See supra* notes 109-15 and accompanying text (discussing *Yale Project*, *supra* note 8, at 1573).

n395 *See* Markman, *supra* note 23, at 947 (concluding that the "assertion that this damage [to law enforcement] has been alleviated through the adjustment of police practices to *Miranda's* requirements is . . . unsupported by any empirical evidence").

n396 Neubauer, *supra* note 319, at 105 (table 2). This number may slightly overstate the number of incriminating statements obtained, because a few of the statements in the cases may not have been incriminating. *Id.* at 105 n.10.

n397 Leiken, *supra* note 365, at 19 (table 2). Leiken defined the term "confession" as "a statement made with the realization that it might be damaging." *Id.* at 12.

n398 LaFree, *supra* note 339, at 298.

n399 FEENEY ET AL., *supra* note 17, at 142 (table 15-1).

n400 The authors of the study give no definition for their category of "admitted being at the scene." In fact, a substantial number of these statements may not have been incriminating because the conviction rate for those who admitted being on the scene was not, generally speaking, significantly different than the conviction rate for those who made no statements at all. *See id.* at 142 (table 15-1). In an earlier study using a similar methodology, the authors reported that only 15% (3 out of 20) of such on-the-scene admissions were "essential" to the case. 2 FEENEY & WEIR, *supra* note 18, at 38.

n401 FEENEY ET AL., *supra* note 17, at 142 (derived from table 15-1).

n402 *Id.*

n403 Leo, *supra* note 145.

n404 *Id.* at 268 (table 7) (117 out of 182 suspects).

n405 Leo's category of "some incriminating information" was apparently expansively defined as embracing "implausible or contradictory denials that the detectives believed corroborated other evidence pointing to the suspect's guilt *or that could be used successfully to impeach a suspect's credibility . . . .*" *Id.* at 268 n.4 (emphasis added). Many things said by a suspect could be viewed by the detectives as potential "impeaching" information about credibility. Supporting the interpretation that some of these statements were not significantly incriminating are the facts that many of the suspects in Leo's sample (31%) were not even charged, *id.* at 273, and that prosecutors are particularly likely to charge suspects where they have strong incriminating statements. *See supra* notes 41-49 and accompanying text. Also supporting this interpretation is the lower (and relatively more objective) figure of 24.2% "confessions" in Leo's data, which corresponds roughly to the "confession" figures in other studies that suggest lower overall incriminating statement rates. *See, e.g.*, FEENEY ET AL., *supra* note 17, at 142; Cassell & Hayman, *supra* note 47. Leo's 76% ratio of incriminating statements to total statements is also considerably higher than reported in most other studies. Leo, *supra* note 145 (finding 76% of all statements to be incriminating). *See supra* notes 86-89 and accompanying text (collecting studies that support a 50% ratio).

n406 Leo, *supra* note 145, at 268 (table 7) (24.2% of suspects gave confessions, 17.6% gave partial admissions).

n407 Leo does not appear to claim that his statistics measure overall police success. *Id.* at 295-97 (drawing conclusions from his statistics but not claiming that his rate corresponds to other overall police confession rates). Others, however, have not given the study so limited a reading. *See, e.g.*, SLOBOGIN, *supra* note 5, at 6 (Supp. 1995) (concluding that Leo's confession rate is "comparable to pre-Miranda confession rates").

n408 First, Leo's sample consisted of cases in which police actually interrogated a suspect. Leo, *supra* note 145, at 262. Accordingly, the sample excludes the presumably significant fraction of cases where police never obtained a confession because they never interrogated. *See, e.g.*, FEENEY ET AL., *supra* note 17, at 143 (table 15-2) (finding that 18.5% of arrested burglary suspects in Jacksonville, Florida and 20.1% in San Diego, California are not interrogated); Cassell & Hayman, *supra* note 47 (finding that 21.0% of suspects were not interrogated in Salt Lake City). Second, Leo's study included only custodial interrogations. Yet police have, to some extent, shifted to noncustodial interrogations to avoid *Miranda. See, e.g.*, Jerome A. Skolnick & Richard A. Leo, *The Ethics of Deceptive Interrogation*, CRIM. JUSTICE ETHICS, Winter/Spring 1992, at 5. It appears that noncustodial interrogations are less productive than custodial interrogations. *See* Cassell & Hayman, *supra* note 47 (finding that noncustodial interrogations were less successful). Third, Leo only studied interrogation by detectives. *See* Leo, *supra* note 145, at 256-57, 456-57. It appears that detectives are more successful at extracting statements than are other police officers. *See* FEENEY ET AL., *supra* note 17, at 144 (table 15-3); Cassell & Hayman, *supra* note 47 (finding detectives more successful). Finally, as a measure of admissible confessions, Leo's figures must be reduced by a couple of percentage points to reflect cases in which police obtained inadmissible statements in violation of *Miranda* by continuing questioning after invocations of rights. *See Leo*, *supra* note 145, at 263. Adjusting only for these four factors so as to render Leo's study comparable to other confession studies produces an overall success rate of somewhere below 38.7%. *See generally* Cassell & Hayman, *supra* note 47, at app. B (explaining and defending these adjustments in greater detail).

n409 Almost a third of Leo's sample (60/182) consisted of videotapes of "interrogations performed" by two Bay-area police departments in cases that were no longer pending. Leo, *supra* note 145, at 452, 474 n.10. Neither department had a policy of necessarily storing videotapes. *Id.* at 474 n.10. It seems quite likely, therefore, that the videos on hand for academic analysis included only interrogations that "got off the ground," not interrogations where suspects promptly invoked their rights or were otherwise generally uncooperative. This would artificially increase the percentage of confessions Leo found in his sample.

n410 Cassell & Hayman, *supra* note 47.

n411 *Id.* 42.2% of suspects actually questioned give incriminating information. *Id.* About 4% more volunteered incriminating information that was relatively unimportant. Responding to the confession rate reported in our study, Professor Thomas claims it should be adjusted upwards to 54% for various reasons. *See* Thomas, *supra* note 105. We find his justifications for this adjustment unpersuasive. *See* Cassell & Hayman, *supra* note 47.

n412 Apart from the Bay area study discussed at *supra* notes 403-09 and accompanying text, the only recent rate above 50% is from Jacksonville, Florida (51.3%), which includes 18.4% of suspects who merely acknowledged being at the scene. Moreover, the statement rate in Jacksonville is much higher than data gathered simultaneously under identical methodology from San Diego. The reason for the difference appears to be that "the evidentiary standard for arrest and charge is considerably higher in Jacksonville." FEENEY ET AL., *supra* note 17, at 225. Jacksonville police apparently arrest only where there is "clear cause" while San Diego police may arrest where evidence is not as strong. If suspects are more likely to confess when the evidence against them is strong, as the empirical evidence suggests, *see supra* note 214 and accompanying text, one would expect the Jacksonville police to obtain more confessions. If this explanation for the high rates of confessions in Jacksonville is correct, the results in Jacksonville are generalizable only to jurisdictions that question a suspect following an arrest with quite strong evidence. In this respect, it may be that the lower San Diego results are more typical. *See, e.g.*, SIMON, *supra* note 318, at 448 (reporting the observation that Baltimore detectives too often "bring someone down and go at them in the interrogation room with no real ammunition").

n413 All of the data have been discussed previously in this Article, with the exceptions of Cities *A* and *B* from California, *see* Barrett, *supra* note 306, at 43-44; and Sacramento through Kings County, *see* Brief of the National District Atty's Ass'n, *supra* note 91, at 6a-7a (column for confessions/prosecutions). The data for Sacramento through Kings County are probably not as solid as other data recounted here, as the methodology used by the National District Attorneys Association is unclear.

To achieve some measure of consistency, Table 3 includes only studies that reviewed a range of criminal offenses and thus does not include the Oakland robbery study, 2 FEENEY & WEIR, *supra* note 18, at 38 (18% confession rate and 36% on-the-scene admission rate); the Chicago homicide study, *see supra* notes 165-67 and accompanying text; and a more recent study of homicide cases by *Newsday*, Thomas J. Maier & Rex Smith, *Reliance on Getting Confessions Tied to Abuses, Weakened Cases*, Dec. 7, 1986, at 5, 27 (data on high statement rates for homicide cases in Suffolk County and six other large suburban counties). The *Newsday* data also suffer from the problem that they are unclear whether they involved statements rather than incriminating statements. *See id.* at 27, 28 (data described both ways).

n414 *See generally* Cassell & Hayman, *supra* note 47 (arguing that data actually supports the conclusion that confessions fell after *Miranda*). *But cf. generally* Thomas, *supra* note 105 (responding to Cassell & Hayman and arguing that there is insufficient evidence to suggest that confession rates have changed at all since *Miranda*

). Even if the empirical evidence suggested that confession rates have now returned to pre-Miranda levels, proponents of the rebound hypothesis must also establish that any increase in confession rates is attributable to improved police abilities to minimize the effects of *Miranda* rather than to improved interrogation techniques generally or other factors. Put another way, if better police techniques have boosted confession rates since 1967, that does not disprove the thesis suggested here: that confession rates would increase still further if *Miranda's* restrictive requirements were eliminated.

n415 *See, e.g.*, Lippman, *supra* note 20, at 37.

n416 *See, e.g.*, Pennsylvania v. Muniz, 496 U.S. 582 (1990) (deciding whether "booking questions" require *Miranda* warnings).

n417 Rhode Island v. Innis, 446 U.S. 291, 304 (1980).

n418 KAMISAR ET AL., *supra* note 39, at 507 ("Almost everyone expected the so-called Burger Court to treat *Miranda* unkindly. And it did -- at first. But it must also be said that the new Court has interpreted *Miranda* fairly generously in some important respects."); UVILLER, *supra* note 14, at 207-08 (observing that "not withstanding some uneasiness with the *Miranda* doctrine, most courts have adhered to it firmly, even extending it" to other situations); Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 676 & n.11 (1992) (noting that the Burger Court extended the *Miranda* doctrine in several significant respects). *See generally* Stephen A. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 153 (1980) ("The differences between the Warren and the Burger decisions tend to be more at the margin than at the heart of the constitutional principles for which the Warren Court is remembered.").

n419 *See, e.g.*, Stansbury v. California 114 S. Ct. 1526, 1528-31 (1994) (*per curiam*); California v. Beheler, 463 U.S. 1121, 1123-26 (1983); Oregon v. Mathiason, 429 U.S. 492, 494-96 (1977) (*per curiam*).

n420 451 U.S. 477 (1981).

n421 KAMISAR ET AL., *supra* note 39, at 508.

n422 *Edwards*, 451 U.S. at 484-85.

n423 Ainsworth, *supra* note 4, at 103; *see, e.g.*, Minnick v. Mississippi, 498 U.S. 146 (1990); Arizona v. Roberson, 486 U.S. 675 (1988).

n424 *See infra* notes 623-30 and accompanying text.

n425 KAMISAR ET AL., *supra* note 39, at 508 (citing Rhode Island v. Innis, 446 U.S. 291 (1980)).

n426 467 U.S. 649 (1984).

n427 *See, e.g., The Supreme Court, 1983 Term*, 98 HARV. L. REV. 87, 140-51 (1984); Marla Belson, Note, *"Public Safety" Exception to* Miranda: *The Supreme Court Writes Away Rights*, 61 CHI.-KENT L. REV. 577 (1985); Mary M. Keating, Note, New York v. Quarles: *The Dissolution of* Miranda, 30 VILL. L. REV. 441 (1985).

n428 Daniel Brian Yeager, Note, *The Public Safety Exception to* Miranda *Careening Through the Lower Courts*, 40 U. FLA. L. REV. 989, 991 (1988).

n429 United States v. Ochoa-Victoria, 852 F.2d 573 (9th Cir. 1988); United States v. Brady, 819 F.2d 884 (9th Cir. 1987); United States v. Eaton, 676 F. Supp. 362 (D. Maine 1988); People v. Gilliard, 234 Cal. Rptr. 401 (Cal. Ct. App. 1987); People v. Cole, 211 Cal. Rptr. 242 (Cal. Ct. App. 1985); State v. Turner, 716 S.W.2d 462 (Mo. Ct. App. 1986); Ohio v. Moore, 1987 WL 16872 (Ohio Ct. App. 1987) (unpublished opinion); State v. Kunkel, 404 N.W.2d 69 (Wis. Ct. App. 1987).

n430 *See* Cassell & Hayman, *supra* note 47 (out of a sample of 173 interrogations, only 1 involved an arguable instance of public safety questioning).

n431 *Cf.* CRAIG D. UCHIDA ET AL., POLICE EXECUTIVE RESEARCH FOUND., THE EFFECTS OF *UNITED STATES V. LEON* ON POLICE SEARCH WARRANT PRACTICES (1987) (finding that good faith exception to the exclusionary rule had little practical day-to-day impact on the processing of criminal cases). Uviller offers the interesting suggestion that police tend to overestimate restrictions on their authority, *see* UVILER, *supra* note 14, at 79, which might explain why police are reluctant to move in directions suggested by favorable court rulings.

n432 *See generally* Thomas, *supra* note 29 (lamenting the lack of empirical data on confession rates); Cassell & Hayman, *supra* note 47 (agreeing with Thomas on this point); *see also generally* Thomas, *supra* note 105 (concluding that we must accept the hypothesis of a constant stream of confessions until we have more empirical evidence).

n433 Seeburger & Wettick, *supra* note 32, at 6-7. Sex crimes and auto larceny were artificially underrepresented in the sample. *Id.* at 7.

n434 *Controlling Crime Hearings*, *supra* note 45, at 200.

n435 *Id.* at 1120.

n436 Witt, *supra* note 89, at 323.

n437 *See Yale Project*, *supra* note 8, at 1537.

n438 *See Controlling Crime Hearings*, *supra* note 45, at 223 (Kings County study of "crimes such as homicide, robbery, rape, and felonious assaults"); Green, *supra* note 155, at 16 (Kansas City study of "suspects"); Seeburger & Wettick, *supra* note 32, at 26 n.51 (New Orleans study of "persons arrested").

n439 Seeburger & Wettick, *supra* note 32, at 11 (table 1). Separate data (not before-and-after data) gathered from detective's files over the summer of 1967 found the confession rate for murder to be higher than for other crimes (40% vs. 26.6% on average), but this is likely an anomaly caused by the tiny sample involved -- only two murder confessions. *Id.* at 13 (table 3).

n440 *Id.* at 11 (table 1). The explanation for the small decline for sex offenses may be that the confession rate for such crimes was by far the lowest pre-Miranda rate (only 21.9%) and therefore may not have had very far to fall under the *Miranda* rules.

n441 *See* BARRIE L. IRVING & IAN K. McKENZIE, POLICE INTERROGATION: THE EFFECTS OF THE POLICE AND CRIMINAL EVIDENCE ACT 1984, at 95 (1989).

n442 Cassell & Hayman, *supra* note 47 (47.1% of property offenders questioned successfully versus 35.2% violent offenders; sample size of 173; statistically significant only at 90% confidence level).

n443 Neubauer, *supra* note 319, at 105, 111-12. Neubauer found that, in property crimes, 56% of suspects confessed, while in nonproperty crimes, 32% confessed. *Id.* at 105 (table 2). The "non-property crimes" apparently included some nonviolent offenses, such as offenses involving narcotics and indecent liberties with a minor. *Id.* at 104 n. ***; *see also* THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 37 (1981) (finding that juvenile refusal-to-talk rate tended to be greater in cases involving offenses against persons than in property or possession cases).

n444 *See* Medalie et al., *supra* note 133, at 1414 (table E-2). The statement rate for identified offenses is auto theft 80%; larceny-theft 62%; housebreaking 58%; assault 57%; homicide 57%; drug offenses 50%; robbery 35%; sex offenses 33%; weapons 25%. *Id.* at 1415 (table E-2).

n445 VERA INST. OF JUSTICE, *supra* note 24, at 33, 43.

n446 Seeburger & Wettick, *supra* note 32, at 14 n.37. The D.C. study also found that suspects charged with property offenses are less likely to request counsel. Medalie et al., *supra* note 133, at 1416 (table E-3(2)).

n447 *See* MICHAEL McCONVILLE, ROYAL COMM'N ON CRIMINAL JUSTICE, CORROBORATION AND CONFESSIONS: THE IMPACT OF A RULE REQUIRING THAT NO CONVICTION CAN BE SUSTAINED ON THE BASIS OF CONFESSION EVIDENCE ALONE 32 (1993) (reporting that police success in obtaining confessions is strongly associated with offense type, ranging from 68.0% for taking without consent, 65.7% for theft, 64.8% for burglary, 62.5% for drug offenses, down to 39.0% in offenses involving personal violence, 36.8% in criminal damage cases, and 23.9% in public order offenses); Barry Mitchell, *Confessions and Police Interrogation of Suspects*, 1983 CRIM. L. REV. 596, 602 (76% confession rate for property crimes, but only 64% for crimes of violence); Stephen Moston et al., *The Incidence, Antecedents and Consequences of the Use of the Right to Silence During Police Questioning*, 3 CRIM. BEHAV. & MENTAL HEALTH 30, 37 (1993) (right of silence used in about 23% of serious cases, but only 8% of trivial cases). *But see* BALDWIN & McCONVILLE, *supra* note 196, at 25-26 (no consistent relationship found). The British data also suggest that suspects request counsel more often in more serious cases. *See* DAVID BROWN, DETENTION AT THE POLICE STATION UNDER THE POLICE AND CRIMINAL EVIDENCE ACT 1984, at 22 (1989); ANDREW SANDERS ET AL., ADVICE AND ASSISTANCE AT POLICE STATIONS AND

THE 24 HOUR DUTY SOLICITOR SCHEME 30 (1989).

n448 *Yale Project*, *supra* note 8, at 1647.

n449 SIMON, *supra* note 318, at 198-99. Simon suggests that the impact of *Miranda* is thus limited to professionals. *Id.* at 199. To make his point, Simon reports the following story:

> In the late 1970s, when men by the names of Dennis Wise and Vernon Collins were matching each other body for body as Baltimore's premier contract killers and no witness could be found to testify against either, thing got to the point where both the detectives and their suspects knew the drill:
>
> Enter room.
> Miranda.
> Anything to say this time, Dennis?
> No, sir. Just want to call my lawyer.
> Fine, Dennis.
> Exit room.

Id. at 198.

n450 Neubauer, *supra* note 319, at 105 (table 2).

n451 *Id.* at 105 (table 2).

n452 *Id.* at 104 (table 1).

n453 *Yale Project*, *supra* note 8, at 1644.

n454 *Id.* (figures derived from table A) (statistically significant at the .05 level); *see also* GRISSO, *supra* note 443, at 37 (stating that for juveniles, "refusal to talk tended to increase with the number of prior felony referrals at the time of interrogation"); Hart, *supra* note 365, at 14, 16 (reporting that successful interrogators find that "professional criminals are . . . hard to question" and that "even the most finely honed tactics often fail"; "if they're professionals, they pretty much know . . . not to say word one").

n455 Leo, *supra* note 145, at 277.

n456 *See* ROYAL COMM'N ON CRIMINAL JUSTICE, REPORT 51 (1993) (reporting that police found experienced criminals less likely to answer questions); SOFTLEY, *supra* note 195, at 69, 75 (observing that suspects with a criminal record are significantly more likely to exercise right to silence and to request counsel); Moston et al., *supra* note 447, at 38 (table 4) (finding that 21% of suspects with criminal history stayed silent as compared with only 9% of suspects without). *But cf.* Moston et al., *supra*, note 447, at 39 (table 7) (interaction of legal advice with criminal history complicates relationship). A prior record effect is reported in a 1968 Denver study. *See* Leiken, *supra* note 365, at 20-21 (finding that suspects with nine or more previous arrests were slightly less likely to confess and that suspects with more than one prior felony conviction were slightly less likely to confess). However, the samples involved in reaching this conclusion are so small as to make this

conclusion extremely fragile.

n457 Cassell & Hayman, *supra* note 47 (finding no difference and speculating that failure to find such an effect might stem from a broad definition of "prior record").

n458 VERA INST. OF JUSTICE, *supra* note 65, at 138 (finding that "the adult criminal justice system may not be catching in its net the kind of criminal citizens worry about most -- the violent stranger").

n459 *See supra* notes 272-74 and accompanying text.

n460 *See supra* Table 2 (excluding Kings County and New Orleans estimates as too high and excluding Salt Lake County estimate for other reasons).

n461 *See infra* note 472.

n462 *See, e.g.*, Kenneth R. Kreiling, *DNA Technology in Forensic Science*, 33 JURIMETRICS J. 897 (1993); M.A. Farber, *Key Fiber Evidence in Atlanta Case Could be Focus of Long Legal Battle*, N.Y. TIMES, July 1, 1981, at A15.

n463 *See* PETER W. GREENWOOD ET AL., THE CRIMINAL INVESTIGATION PROCESS 144 (1977).

n464 *Cf.* WALKER, *supra* note 362, at 140-42 (collecting empirical evidence suggesting that improvements in detective work do not change the crime clearance rate).

n465 FEENEY ET AL., *supra* note 17, at 155 (of 400 robbery cases, 3 involved fingerprints; of 419 burglary cases, 8 involved fingerprints; of 66 assault cases, 3 involved fingerprints); GREENWOOD ET AL., *supra* note 463, at 154 (table 10-3) (less than 2% of burglary cases solved through fingerprints); VERA INST. OF JUSTICE, *supra* note 65, at 82 (only 1 of 20 burglary defendants apprehended through fingerprint match). *See generally* WALKER, *supra* note 362, at 142 ("In reality . . . fingerprints rarely solve crimes.").

n466 *See, e.g.*, FLOYD FEENEY ET AL., ARRESTS WITHOUT CONVICTION: HOW OFTEN THEY OCCUR AND WHY -- FINAL REPORT -- APPENDIX VOLUME C-45 (1983) (table C-16-12).

n467 BALDWIN & McCONVILLE, *supra* note 196, at 19.

n468 *Id.* at 19.

n469 MICHAEL McCONVILLE, CORROBORATION AND CONFESSIONS: THE IMPACT OF A RULE REQUIRING THAT NO CONVICTION CAN BE SUSTAINED ON THE BASIS OF CONFESSION EVIDENCE ALONE 14 (1993); *see also* JOHN BALDWIN & TIMOTHY MOLONEY, ROYAL COMM'N ON CRIMINAL JUSTICE, SUPERVISION OF POLICE INVESTIGATION IN SERIOUS CRIMINAL

CASES 55 (1992) (observing that special forensic techniques rarely employed); IRVING, *supra* note 194, at 116-17 (reporting that police officers believe that forensic evidence rarely solves cases).

n470 *See Yale Project*, *supra* note 8, at 1588 & n.180.

n471 *See* PAULINE MORRIS, ROYAL COMM'N ON CRIMINAL PROCEDURE, POLICE INTERROGATION: REVIEW OF LITERATURE 13 (1980) (Research Study No. 3); Richard H. Kuh, *The "Rest of Us" in the "Policing the Police" Controversy*, 57 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 244, 245 (1966); Van Kessell, *supra* note 7, at 129; *see also* Leo, *supra* note 267, at 99 (officer explained that "getting a confession makes the investigator's job a lot easier, and his work more efficient. If he gets a confession (or even good admissions) he doesn't have to spend hours tracking down witnesses, running fingerprints, putting together line-ups, etc.").

n472 *See, e.g.*, Escobedo v. Illinois, 378 U.S. 478, 488-89 (1964) ("a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation") (citing STAFF OF SENATE COMM. ON JUDICIARY, 81ST CONG., 1ST SESS., REPORT OF SUBCOMMITTEE TO INVESTIGATE ADMINISTRATION OF THE INTERNAL SECURITY ACT (Comm. Print Feb. 25, 1956) and noting "false confessions obtained during the Stalin purges of the 1930s").

n473 Jonathan Rubinstein, *Just Adding More Police is a Cop-Out*, SAN DIEGO UNION-TRIB., Mar. 7, 1994, at B5.

n474 SIMON, *supra* note 318, at 192.

n475 *See id.* at 75; *see also* IRVING, *supra* note 194, at 116.

n476 *Cf.* PETER W. GREENWOOD, THE NEW YORK CITY RAND INST., AN ANALYSIS OF THE APPREHENSION ACTIVITIES OF THE NEW YORK CITY POLICE DEP'T 31 (1970) (recounting conflicting data on the workload-affects-case-success hypothesis).

n477 Leo, *supra* note 145, at 373.

n478 SIMON, *supra* note 318, at 453.

n479 *Id.* at 456.

n480 *Id.* at 458.

n481 *See Witness Intimidation Called Growing Problem*, N.Y. TIMES, Aug. 7, 1994, at A13. *See generally* Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1410 (collecting sources on problem of witness intimidation).

n482 *See* Hart, *supra* note 365, at 15 (reporting that experienced, expert interrogator in Albuquerque believes "'the importance of interrogation is increasing because it's getting harder and harder to get witnesses to testify'").

n483 *See generally* GEORGE P. FLETCHER, WITH JUSTICE FOR SOME (1995); Skolnick & Leo, *supra* note 369, at 9.

n484 *See supra* Table 2 (confessions necessary in 61.0% of confession cases in Salt Lake County in 1994; studies in the 1960s found confessions necessary in 26%).

n485 *See supra* notes 433-38 and accompanying text.

n486 Souris, *supra* note 166, at 263-64.

n487 Seeburger & Wettick, *supra* note 32, at 15 (table 4).

n488 BALDWIN & McCONVILLE, *supra* note 196, at 33.

n489 Neubauer, *supra* note 319, at 106.

n490 *See* FORST ET AL., *supra* note 48, at 23, 25 (tables 3.3, 3.5) (physical evidence available in 65% of nonviolent property offenses, 50% of robbery offenses, and 32% of other violent offenses). However, Forst and his colleagues also report that two lay witnesses are available for slightly more robberies and other crimes of violence than for property crimes. *Id.* at 23 (table 3.3) (48% for robbery, 39% for other violent offenses, 36% for nonviolent property offenses).

n491 William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903, 1932 (1993) (citing U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 546 (table 5.53) (Timothy J. Flanagan & Kathleen Maguire eds., 1991)).

n492 *Id.*

n493 Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1394 (1983); *see* Davies, *supra* note 6, at 630 ("The exclusionary rule itself generates no cost beyond the implicit tradeoff in the Fourth Amendment between the apprehension of criminals and the preservation of civil liberties.").

n494 *But see* Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 793-95 (1994) (suggesting difficulties with this position).

n495 417 U.S. 433 (1974).

n496 *Id.* at 443-44.

n497 *Id.* at 446; *see* Withrow v. Williams, 113 S. Ct. 1745, 1752-53 (1993) (collecting numerous cases describing *Miranda* rights as "'prophylactic' in nature").

n498 For further explanation of this point, see generally GRANO, *supra* note 23, at 173-98; Paul G. Cassell, *The Costs of the* Miranda *Mandate: A Lesson in the Dangers of Inflexible, "Prophylactic" Supreme Court Inventions*, 28 ARIZ. ST. L.J. (forthcoming 1996).

n499 *See infra* notes 511-19 and accompanying text.

n500 Of course, even isolated instances of coerced confessions should be strongly condemned.

n501 NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW-ENFORCEMENT 3 (1931); *see also* EMANUEL H. LAVINE, THE THIRD DEGREE: A DETAILED AND APPALLING EXPOSE OF POLICE BRUTALITY (1930); Note, *The Third Degree*, 43 HARV. L. REV. 617 (1930).

n502 297 U.S. 278 (1936).

n503 Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME, LAW & SOC. CHANGE 35, 52 (1992) ("Although *Miranda* is the most famous confession case, it was *Brown* that exercised the greatest influence on coercive practices . . . .").

n504 Leo, *supra* note 267, at 97.

n505 Leo, *supra* note 503, at 49.

n506 *See* Hart, *supra* note 365, at 8 ("'Ironically, . . . even more credit [for reducing brutality] should go to the authors of interrogation manuals [than to the courts]. They convinced cops that not only was violence bad, but that there was no need to resort to it.'") (quoting University of Michigan law professor Yale Kamisar).

n507 *See generally* THOMAS J. DEAKIN, POLICE PROFESSIONALISM: THE RENAISSANCE OF AMERICAN LAW ENFORCEMENT (1988) (discussing the professionalization of American police forces); ROBERT M. FOGELSON, BIG-CITY POLICE 219 (1977) ("Most departments had been pretty much transformed in the thirty-years or so since the Wickersham Commission report of 1931.").

n508 Leo, *supra* note 267, at 38.

n509 *Id.* at 51.

n510 Leo, *supra* note 145, at 357 (citing American Bar Foundation Study Documents, Univ. of Wisconsin, Madison, Criminal Justice Library).

n511 FRED P. GRAHAM, THE SELF-INFLICTED WOUND 22 (1970); *see* Fred E. Inbau & James P. Manak, Miranda v. Arizona -- *Is it Worth the Cost?*, PROSECUTOR, Spring 1988, at 31, 36.

n512 Miranda v. Arizona, 384 U.S. 436, 447, 448 (1966); *see also id.* at 450, 499 (Clark, J., dissenting) ("The examples of police brutality mentioned by the Court are rare exceptions to the thousands of cases that appear every year in the law reports.").

n513 PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 93 (1967); *see* JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR 48 (1968); Leo, *supra* note 503, at 52.

n514 *Controlling Crime Hearings*, *supra* note 45, at 350, 351.

n515 *See supra* notes 116-26 and accompanying text.

n516 *Yale Project*, *supra* note 8, at 1549.

n517 GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 326 (1991). Professor Gerald M. Caplan has suggested that "before *Miranda*, charges of physical force, questioning in relays, and sustained incommunicado detention were common; after *Miranda*, they became far less frequent. . . . [*Miranda*] curbed the police in their historic excesses . . . ." Caplan, *supra* note 383, at 1382-83. He acknowledges that "this observation cannot be documented by reference to particular studies," but asserts that it "does not seem controversial." *Id.* at 1383 n.38. For the reasons given in this Article, Caplan's opinion is controversial; indeed, given the empirical evidence collected here, it is incorrect. The timing on this scenario fails, as it attributes changes in police behavior that were occurring well before *Miranda* (and perhaps continuing at times distant from *Miranda*) to the decision itself.

n518 WAYNE R. LaFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 386 (1965); *see also* Barrett, *supra* note 306, at 42 (reporting California data in 1960 that most interrogations lasted under two hours).

n519 *Yale Project*, *supra* note 8, at 1558.

n520 Saul M. Kassin & Lawrence S. Wrightsman, *Confession Evidence*, *in* THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 67, 77 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985).

n521 Such challenges are rarely made today and even more rarely granted. *See supra* notes 15-19 and accompanying text (discussing small numbers of motions to suppress).

n522 *See* Younger, *supra* note 175, at 256 (table I) (reporting that prosecutors rejected 2 out of 202 requests

for complaints because statement "not admissible due to *Dorado*," the California predecessor to *Miranda*).

n523 *Id.* at 257 (2 of 139 confessions not received). These two were rejected for reasons other than the *Dorado* requirements, *id.*, suggesting that they may have been rejected because of voluntariness concerns.

Tangentially related data come from Harry Kalven and Hans Zeisel's famous jury study, which found that there was a "disputed confession" in as many as 20% of tried cases. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 173 (1966). However, because the study involved contested court trials, it would not reflect the presumably substantial number of cases in which uncontested confessions led to guilty pleas. Moreover, a "disputed" confession is not necessarily the same thing as a coerced confession. *See id.*

n524 Miranda v. Arizona, 384 U.S. 436, 505 (1966) (Harlan, J., dissenting).

n525 *See* Rosenberg & Rosenberg, *supra* note 4, at 78 ("A nationwide epidemic of ruthless police interrogation could be eradicated by distributing small printed cards to the alleged culprits and instructing that the contents be read to apprehensive suspects."); Evelle J. Younger, *Prosecution Problems*, 53 A.B.A. J. 695, 698 (1967) ("*Miranda* will not affect the brutal or perjurious policeman -- he will continue to extract confessions without reference to the intonations ofthe Supreme Court; and when he testifies, he will simply conform his perjury to the latest ground rules.").

n526 *See* White, *supra* note 2, at 13.

n527 Leiken, *supra* note 365, at 22 (finding that defendants claimed, after *Miranda*, that police had made promises or threats to get confessions).

n528 MILNER, *supra* note 336, at 227.

n529 OLP PRE-TRIAL INTERROGATION REPORT, *supra* note 13, at 98.

n530 *Id.; cf.* George C. Thomas, III & Marshall D. Bilder, *Aristotle's Paradox and the Self-Incrimination Puzzle*, 82 J. CRIM. L. & CRIMINOLOGY 243, 278 (1991) (noting the paradoxical quality of the *Miranda* debate in which the decision's defenders frequently argue that it has had little effect).

n531 *See, e.g.*, BOTTOMS & McCLEAN, *supra* note 197, at 115, 16 (94% British admission rate among defendants pleading guilty; only 4% claimed that police forced them to confess); IRVING, *supra* note 194, at 133, 148 (65% British confession rate with observers present; no physical violence of any kind observed and no formal complaints of maltreatment); IRVING & McKENZIE, *supra* note 441, at 93-94 (64% British admission rate with observers present despite "virtual elimination" of persuasive questioning tactics under new reform rules); MILLER, *supra* note 207, at 38, 65 (71.6% Canadian confession rate with videocameras running and short periods of questioning; no cases of police misbehavior on tape and "if anything, police questioning appears to be excessively careful to avoid all possible suggestions of force, threats, inducements, or the creation of an atmosphere of oppression"; allegations of misconduct before taping not a major problem); SOFTLEY, *supra* note 195, at 80, 85 (61% British confession rate with observers present; in many cases, no special tactics noted; police never resorted to use or threat of physical violence and psychological pressure not extreme).

n532 One other reason for doubting that the disappearance of coercion affected confession rates is that the interrogation literature suggests that coercion may actually hinder police efforts to obtain confessions. INBAU ET AL., *supra* note 212, at 5 (explaining that verbal or physical abuse of a suspect "can severely hinder a subsequent interrogation by a competent interrogator"); Hart, *supra* note 365, at 10 (reporting that expert FBI interrogator believes "'when an interviewer starts getting aggressive and shouting, most people clam up. . . . Taking a hard, forceful line often creates more barriers'"); *cf.* O. JOHN ROGGE, WHY MEN CONFESS 198 (1959) ("The KGB looks upon direct physical brutality as an ineffective method of obtaining the compliance of the prisoner. Its opinion in this regard is shared by police in other parts of the world.") (internal quotation omitted).

n533 Note that the claim is limited to the argument that the confession rate drops found in the before-and-after studies from 1966 to 1967 are not explained by a reduction in coerciveness. One could believe that police interrogation has generally become less coercive over the last several decades and still accept this claim.

n534 *See, e.g.*, Ellis, *supra* note 222, at 848; *cf.* George C. Thomas III, *An Assault on the Temple of* Miranda, 85 J. CRIM. L. & CRIMINOLOGY 807, 814 (1995) (calling for more research on this question).

n535 To be useful for public policy purposes, the claim would have to be that *Miranda* has some special effect in preventing the conviction of *innocent* defendants, not just defendants generally, as making prosecution more difficult always might help some innocent person avoid conviction. *See* SIDNEY HOOK, COMMON SENSE AND THE FIFTH AMENDMENT 32-33 (1957); *see also* Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 331 (1991).

n536 *See infra* notes 577-86 and accompanying text (discussing value of videotaping in protecting innocent persons).

n537 *See infra* notes 636-45 and accompanying text (advancing this argument).

n538 *See, e.g.*, GUDJONSSON, *supra* note 203.

n539 *Id.* at 228.

n540 *Cf. Yale Project, supra* note 8, at 1611 (reporting that "most detectives claim an innocent man has never confessed in New Haven"). Again, this is not to suggest that any such case is anything other than a great tragedy.

n541 *See* GUDJONSSON, *supra* note 203, at 232 (noting common personality factor of false confessors of "good trust of people in authority"); Gisli H. Gudjonsson, *One Hundred Alleged False Confession Cases: Some Normative Data*, 29 BRIT. J. CLINICAL PSYCHOL. 249, 249 (1990) (finding alleged false confessors highly suggestible and compliant).

n542 *See, e.g.*, GUDJONSSON, *supra* note 203, at 252 (discussing case of Peter Reilly, who did not exercise his *Miranda* right to a lawyer because "I hadn't done anything wrong"); Roger Parloff, *1993: False*

Confessions, AM. LAW., Dec. 1994, at 33, 34 (reporting that suspect who would later give false confession waived rights because "I had nothing to hide"). *See generally* Corey J. Ayling, Comment, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 WIS. L. REV. 1121, 1194-98 (arguing that *Miranda* rules have limited utility in preventing false confessions).

n543 GUDJONSSON, *supra* note 203, at 226.

n544 Note, *Voluntary False Confessions: A Neglected Area in Criminal Administration*, 28 IND. L.J. 374, 380 n.26 (1953).

n545 Skolnick & Leo, *supra* note 369, at 3, 8.

n546 Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 57 (1987) (table 6).

n547 *See* Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988).

n548 Bedau & Radelet, *supra* note 546, at 57.

n549 Skolnick & Leo, *supra* note 369, at 10 (citing C. Ronald Huff et al., *Guilty Until Proven Innocent: Wrongful Conviction and Public Policy*, 32 CRIME & DELINQ. 518, 523 (1986)).

n550 Huff and his colleagues' "conservative" estimate is based on a survey of judges, prosecutors, and others familiar with the Ohio and American criminal justice systems, in which most of the respondents indicated that the number of wrongful convictions in the United States was more than "never" and "less than one percent." Huff, *supra* note 549, at 523 (table 2). From these data, Huff and his colleagues simply attached the value of .5% (one in 200) to the estimated number of wrongful convictions. Of course, the range covered by the response "less than one percent" extends as low as .0001% (one in a million). Huff and his colleagues offer no good reason for estimating the value to be .5% rather than .0001%. Indeed, the only specific estimate of a total number of wrongful convictions came from a judge in Ohio who, based on his familiarity with all of the state's major cities, suggested that he had the "strong suspicion that each year in Ohio, at least one or two dozen persons are convicted of crimes of which they are innocent." *Id.* at 522. Assuming that a "strong suspicion" standard is appropriate here, one can combine a conservative estimate of a "dozen" wrongful convictions each year in Ohio with the fact that approximately 3.6% of all index crimes are committed in Ohio, *see* FED. BUREAU OF INVESTIGATION, *supra* note 299, at 60-62 (table 4), to suggest that approximately 333 (12 x (1/3.6%)) wrongful convictions occur around the country each year.

n551 The error rate can be derived using the methodology of Huff and his colleagues, *see* Huff et al., *supra* note 549, at 523, as follows: total 1993 arrests for index offenses = 2,848,400, *see* FED. BUREAU OF INVESTIGATION, *supra* note 299, at 217; conviction rate = 50%; total convictions, therefore, are 1,424,200. Dividing wrongful convictions (350) by total convictions produces an error rate of .02%. The error rate would be about four times lower if one used total arrests rather than arrests for only index crimes.

n552 Eyewitness identification was found to be the major factor, responsible for nearly 60% of the cases of wrongful conviction in their data base. Huff et al., *supra* note 549, at 524. Police error was the next most important factor, but they offered no examples of error corresponding to confessions. *See id.* at 528-29. "False confessions" were mentioned briefly at the end of the catalogue of causes of errors as a factor which is "either less prevalent or about which less is known." *Id.* at 533; *see also* Arye Rattner, *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, 12 LAW & HUM. BEHAV. 283, 286 (1988). *But cf.* RUTH BRANDON & CHRISTIE DAVIES, WRONGFUL IMPRISONMENT: MISTAKEN CONVICTIONS AND THEIR CONSEQUENCES 47 (1973) (finding false confessions to be the leading cause of wrongful imprisonment after misidentification in Britain).

n553 For example, even making the dubious assumption that false confessions fell ten-fold after *Miranda*, that would mean roughly 350 fewer false confessions (35 false confessions x 10-fold decrease) out of a total number of roughly 100,000 lost cases from *Miranda*.

One other indirect suggestion of the relative infrequency of false confessions comes from a study of 229 Icelandic prisoners, which found that none of the 229 had made a false confession with regard to the offense for which they were currently serving a sentence. Gisli H. Gudjonsson & Jon F. Sigurdsson, *How Frequently Do False Confessions Occur? An Empirical Study Among Prison Inmates*, 1 PSYCHOL. CRIME & LAW 21, 23 (1994). Among these prisoners with extensive records and "frequent previous contacts with police," *id.* at 24, 27 (12%) claimed to have made a false confession during a police interview at some point in their criminal careers. *Id.* at 23. In another study in Iceland, none of 74 prisoners claimed to have made a false confession. Gudjonsson & Petursson, *supra* note 214, at 298. These small figures for false confessions come from an "inquisitorial legal system." Gudjonsson & Sigurdsson, *supra*, at 25.

n554 Stuntz, *supra* note 491, at 1931.

n555 *Id.* It should be noted that Stuntz believes that some of the *Miranda* rules, such as the waiver rule, also help innocent suspects. *See id.* at 1948.

n556 *See* Witt, *supra* note 89, at 328 (table 5) (finding no significant change in ability of suspects to clear themselves after *Miranda*).

n557 *See* Van Kessell, *supra* note 7, at 129 (advancing similar argument).

n558 *See supra* Table 3 (pre-Miranda confession rates might be around 60%).

n559 *See supra* notes 183-85 and accompanying text (reliable studies suggest 16% drop in confession rate).

n560 *Cf. Yale Project*, *supra* note 8, at 1586 (suggesting that 2 of 90 suspects (2%) were believed by the study's authors to be innocent).

n561 The bigger haystack problem is not refuted by the fact that the hypothetical prosecutor will save time from the 3.8% of all cases that will no longer be prosecutable because of *Miranda*. To begin, the prosecutor must spend time culling the unprosecutable cases. Moreover, the pool of nonconfessors might shrink from 55 to 51, leaving more cases without confessions to wade through than before *Miranda*. Finally, the prosecutor will

likely need to spend more time in assembling cases against the nonconfessors. *See supra* note 319 (suspects more likely to go to trial when they have not confessed).

n562 Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 680 (1968); *see* Akhil R. Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 861-62 (1995) (advancing this position with respect to current Fifth Amendment interpretations); Dripps, *supra* note 62, at 716 (advancing this position with respect to the Fifth Amendment in general); Erwin N. Griswold, *The Right to be Let Alone*, 55 NW. U. L. REV. 216, 223 (1960) (conceding that "it was a mistake" to attempt to defend the Fifth Amendment on the ground that it protects the innocent). *But see* Schulhofer, *supra* note 535, at 330-33 (arguing that the Fifth Amendment helps innocent persons).

n563 The low percentage is derived by using all cases in the criminal justice system as the denominator. One might reasonably argue that, from the perspective of criminal justice reform, the proper focus is not on all cases in the system, but rather only on those cases that cannot be successfully prosecuted. Because about half of all cases today "fail" for one reason or another, *see* FORST ET AL., *supra* note 48, at 167 (figure 1), *Miranda* is responsible for 7.6% of the failed cases in the system.

n564 *See supra* notes 292-346 and accompanying text.

n565 United States v. Leon, 468 U.S. 897, 908 n.6 (1984) (citing Davies, *supra* note 6, at 621).

n566 *Id.*

n567 Compare 3.8% lost cases from *Miranda* with 0.6% to 2.35% lost cases from the exclusionary rule.

n568 *See generally* Cassell, *supra* note 481, at 1376-85 (considering the crime victim's perspective).

n569 *See* OLP PRE-TRIAL INTERROGATION REPORT, *supra* note 13, at 125-27 (describing the case of Ronnie Gaspard).

n570 *See* David Clifton, *Unsolved Murders Reach 13 in 1994: Grief Goes On When Killers Go Unpunished*, SALT LAKE TRIB., Jan. 2, 1995, at D1.

n571 Caplan, *supra* note 383, at 1384-85.

n572 *Cf.* Supplemental Brief for the United States as Amicus Curiae, Supporting Reversal [on reargument] at 3, Illinois v. Gates, 462 U.S. 213 (1983) (No. 81-430) ("The freeing of even one guilty defendant by virtue of an irrational rule may exact a greater cost than society should be expected to bear.").

n573 Nor does this Article attempt to address broader issues of interpreting Fifth Amendment self-incrimination principles. For thoughtful discussions of these issues, see Amar & Lettow, *supra* note 562; OLP PRE-TRIAL INTERROGATION REPORT, *supra* note 13, at 107-17.

n574 ALI REPORT, *supra* note 56, at 11-15; AMERICAN LAW INST., A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 130.4 (1975); *see also* Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in* CRIMINAL JUSTICE IN OUR TIMES 85-86 (A.E. Dick Howard ed., 1965).

n575 *See, e.g.*, CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION 85 (1993); OLP PRE-TRIAL INTERROGATION REPORT, *supra* note 13, at 105; Phillip E. Johnson, *A Statutory Replacement for the* Miranda *Doctrine*, 24 AM. CRIM. L. REV. 303 (1986); George Dix, *Putting Suspects' Confessions on Videotape*, MANHATTAN LAW., Apr. 25, 1989, at 12; Leo, *supra* note 145, at 401-14; *see also* Jonathan I.Z. Agronsky, *Meese v. Miranda: The Final Countdown*, A.B.A.J., Nov. 1, 1987, at 86, 90 (reporting that "experts on both extremes of the political spectrum were enthusiastic about the idea of videotaping confessions").

n576 *See supra* notes 524-30 and accompanying text.

n577 WILLIAM A. GELLER, U.S. DEPT. OF JUSTICE, POLICE VIDEOTAPING OF SUSPECT INTERROGATIONS AND CONFESSIONS: A PRELIMINARY EXAMINATION OF ISSUES AND PRACTICES -- A REPORT TO THE NATIONAL INSTITUTE OF JUSTICE 115-19 (1992); Ingrid Kane, Note, *No More Secrets: Proposed Minnesota State Due Process Requirement that Law Enforcement Officers Electronically Record Custodial Interrogation and Confessions*, 77 MINN. L. REV. 983, 1011 (1993) (calling for recording of interrogations because suspects "would be afforded more protection from physical and psychological abuse"); Comment, *Let's Go to the Videotape: A Proposal to Legislate Videotaping of Confessions*, 3 ALB. L.J. SCI. & TECH. 165, 175-76 (1993) (collecting evidence that videotapes help control police brutality); Duncan Campbell, *Videos of Interviews "Would Help Police,"* GUARDIAN (London), Dec. 9, 1991, at 8 (reporting that videotaped suspects believed opportunities for abuse were reduced); *see also* Frederick C. Foote, Note, *Self-Incrimination Issues in the Context of Videotaping Drunk Drivers: Focusing on the Fifth Amendment*, 10 HARV. J.L. & PUB. POL'Y 631, 638 (1987) (describing interrogated suspect who looked into the camera and said "I guess I can't accuse you guys of police brutality").

n578 *But see* J.A. BARNES & N. WEBSTER, POLICE INTERROGATION: TAPE RECORDING 44 (1980) (reporting that international survey found that "challenges to the authenticity of recordings of police interrogations seldom, if ever, arise" and tamper-proof security devices are available); GELLER, *supra* note 577, at 119 ("We found not a single allegation in any jurisdiction we visited that police or prosecutors had intentionally tampered with recorded videotapes . . . ."); GRANT, *supra* note 207, at 75 (reporting that two-year Canadian study of videotaping found no allegations of tampering with tapes); Comment, *supra* note 577, at 179 ("most recorders are now equipped with an internal time/date stamp" and "noticeable breaks in the continuity of the tape may lead to questions concerning what happened during the gaps").

n579 *See* Rosenberg & Rosenberg, *supra* note 4, at 102 n.205 (asserting, without empirical or other support, that a "recording requirement is too easily subject to circumvention, permitting officials to coerce the suspect before capturing an ostensibly voluntary account on film or tape"). *But see* GELLER, *supra* note 577, at 117 (only a "few" claims of coercion before or after videotaping in Kansas City); GRANT, *supra* note 207, at 42, 77 (two-year Canadian study of videotaping found that allegations of police misconduct about the period before taping have "not turned out to be a major problem in court to date" and in the few allegations of off-camera "rehearsals" the courts did not find a problem with the taped confession; few challenges to statements overall).

n580 *See, e.g.*, SKOLNICK & FYFE, *supra* note 368, at 266 ("To the degree possible, we should routinely videotape police conduct during those occasions where propensities to excessive force are most likely to occur: [e.g.,] . . . interrogation . . . ."); Yale Kamisar, *Foreward:* Brewer v. Williams -- *A Hard Look at a Discomfiting Record*, 66 GEO. L.J. 209, 243 (1977) (concluding that without recording the *Miranda* "temple" is "a house built upon sand"); Leo, *supra* note 145, at 410 (concluding after field research on police interrogation and extensive review of the literature on police brutality that "the video-taping of custodial interrogations will reduce police improprieties during interrogation"); *see also* BRANDON & DAVIES, *supra* note 552, at 64 (recommending recording of confessions to avoid wrongful convictions).

n581 *See, e.g.*, Miller v. Fenton, 796 F.2d 598 (3d Cir. 1986); *see also* Caplan, *supra* note 184, at 1475 (recording "would provide an accurate record by which the judiciary could evaluate the police pressure on the suspect"); *cf.* G. Daniel Lassiter & Audrey A. Irving, *Videotaped Confessions: The Impact of Camera Point of View on Judgments of Coercion*, 16 J. APPLIED SOC. PSYCHOL. 268 (1986) (finding that camera point of view is important in evaluating coercion).

n582 *See, e.g.*, Arthur E. Sutherland, Jr., *Crime and Confession*, 79 HARV. L. REV. 21, 31-32 n.28 (1965) (noting reversal of conviction in case involving confession where "the persistent questioning in the strong voices of the two policemen, the low-pitched responses of the weary prisoner asserting his innocence over and over, his final surrender of will, all emerge convincingly from the sound-record").

n583 *See* Kamisar, *supra* note 580, at 238-40. In Australia, because of allegations of police "verballing" (that is, fabricating verbal confessions), the High Court recently held that police must record all confessions or the jury will receive a cautionary instruction suggesting police testimony may be unreliable. McKinney v. R., 65 A.L.R. 241 (Austl. 1991). *See generally* BRADLEY, *supra* note 575, at 111; ROYAL COMM'N ON CRIMINAL JUSTICE, REPORT 60-61 (1993) (discussing the admissibility of interrogations that have not been tape-recorded).

n584 *See* LAWRENCE S. WRIGHTSMAN & SAUL M. KASSIN, CONFESSIONS IN THE COURTROOM 134-35 (1993) (describing efforts to use examination of tape of confession to demonstrate that it was false); Gisli Gudjonsson, *The Psychology of False Confessions*, NEW L.J., Sept. 18, 1992, at 1277 ("As police behaviour becomes more controlled and better monitored by improved procedures, including tape recording, then more attention is likely to be placed on the identification of individual vulnerabilities when disputing the reliability of confession statements . . . .").

n585 *See* Parloff, *supra* note 542. I will not discuss the false confession of a fourth person, who appeared to be motivated to obtain publicity.

n586 *Id.* at 38. To the same effect is Philip Weiss, *Untrue Confessions*, MOTHER JONES, Sept. 1989, at 20, 20 ("The police made just one mistake: they turned on a tape recorder during Sawyer's sixteen-hour interrogation. Were it not for that recording, Sawyer would have stayed a nobody, good-bye kind of guy . . . who looked like he sure might have killed somebody and had even said as much.").

n587 Videotaping may also allow more effective presentation of the prosecution's case. *See* UVILLER, *supra* note 14, at 186-87; Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509, 543 n.181 (1992).

n588 GELLER, *supra* note 577.

n589 *Id.* at 54 (figure derived from table 1).

n590 *Id.* at 108 (figure 21).

n591 *Id.* at 107 (figure 20).

n592 *Id.* at 109, 110, 119-23, 125, 148, 149.

n593 *Id.* at 82-83; *see also* BARNES & WEBSTER, *supra* note 578, at 45 (finding costs for nationwide police recording in Britain minimal provided that routine transcription of the tapes is avoided); GRANT, *supra* note 207, at 76 (finding that cost of less than 1% of police force vehicle budget will finance force-wide videotaping system).

n594 GELLER, *supra* note 577, at 152; *cf.* BARNES & WEBSTER, *supra* note 578, at 42, 47 (describing survey results of American police departments that record police interrogations as conveying the impression that advantages outweighed disadvantages; some indication that suspects were inhibited from talking by recording).

n595 GELLER, *supra* note 577, at 103.

n596 *Id.* at 70; *see also id.* at 99-103 (discussing police concerns about discretionary videotaping becoming mandatory).

n597 CODE OF PRACTICE ON TAPE RECORDING (1988), *in* ZANDER, *supra* note 202, at 429. *See generally* ZANDER, *supra* note 202, at 124-32 (discussing the Code of Practice on Tape Recording).

n598 ROYAL COMM'N ON CRIMINAL JUSTICE, REPORT 26 (1993).

n599 *See generally* CAROLE F. WILLIS ET AL., THE TAPE-RECORDING OF POLICE INTERVIEWS WITH SUSPECTS: A SECOND INTERIM REPORT 34-35, 73 (1988) (discussing the effects of taping on obtaining confessions).

n600 David Dixon, *Politics, Research and Symbolism in Criminal Justice: The Right of Silence and the Police and Criminal Evidence Act,* 20 ANGLO-AM. L. REV. 27, 46 (1991). This confirms the conclusion reached by other observers that the recent decline in the confession rate in Britain is attributable to other aspects of the interrogation regulatory regime. *See, e.g., supra* note 203 and accompanying text.

n601 GRANT, *supra* note 207, at 28.

n602 *Id.* at 80. The study reported that "only a small minority refuse 'on camera' to be videotaped (4.8%)."

Id. at 73-74. The "refusal-to-be-taped" figure of 4.8% may be artificially deflated because it is derived by taking suspects who refused to be taped and dividing by *all* suspects, including suspects who were never asked to give a taped statement. *Id.* at 32. The proper measure for such a figure is the number of suspects who refused to be taped divided by the number of suspects asked to give a taped statement. This calculation generates a more worrisome 12.1% (69/569) refusal-to-be-taped rate. *See id.* at 32 (figure derived from table 1). It is not clear from the report whether suspects were interviewed after they refused to be taped.

Also cutting against the study's conclusion is the higher incriminating statement rate in the "control" city of Oakville -- 87.0% -- vs. 71.6% in Burlington with videotaping. *Id.*(figures derived from Table 1). However, an alternative explanation for the higher Oakville rate is that police interviewed far fewer suspects overall -- 59% vs. 71% in Burlington. *Id.* at 31. Perhaps the suspects who were interviewed in Oakville were those against whom the police had stronger cases and who were, therefore, more likely to confess. *See supra* note 214 and accompanying text.

n603 VERA INST. OF JUSTICE, *supra* note 71, at 53.

n604 Cassell & Hayman, *supra* note 47 (finding questioning successful 60% of the time for recorded interrogations, 45% for nonrecorded interrogations).

n605 Stephan v. State, 711 P.2d 1156, 1158 (Alaska 1985); *see also* Mallott v. State, 608 P.2d 737, 743 n.5 (Alaska 1980). Minnesota recently required taping as well. State v. Scales, 518 N.W.2d 587, 591-93 (Minn. 1994). Other states have rejected such a state constitutional requirement. *See, e.g.*, State v. Kekona, 886 P.2d 740, 746 (Haw. 1994); Jimenez v. State, 775 P.2d 694, 695-97 (Nev. 1989); State v. Villareal, 889 P.2d 419, 427 (Utah 1995).

n606 Parloff, *supra* note 542, at 38 (quoting Chief Judge Alexander Bryner of the Alaska Court of Appeals).

n607 *Id.*

n608 GELLER, *supra* note 577, at 107 (figure 20).

n609 INBAU ET AL., *supra* note 212, at 176-78 (citing LUPPO PRINS, SPECIAL STUDY FOR THE MEMBERS OF THE AUSTRALIASIAN FORCES: SCIENTIFIC AND TECHNICAL AIDS TO POLICE INTERVIEW-INTERROGATION (1983)). *But see* ARTHUR S. AUBRY, JR. & RUDOLPH R. CAPUTO, CRIMINAL INTERROGATION (3d ed. 1980) (recommending recording).

n610 GELLER, *supra* note 577, at 64-65 (finding that 4% of police agencies that videotape confessions do so covertly).

n611 Moran v. Burbine, 475 U.S. 412, 433 n.4 (1986); *see also* Kamisar, *supra* note 11, at 150 (stating that striking a balance "is the way *Miranda's* defenders -- not its critics -- have talked about the case for the past twenty years").

n612 *See* Robinson, *supra* note 351, at 482 (reporting that after *Escobedo* but before *Miranda* 90% of police

and prosecutors said they advised suspects of their right to silence).

n613 Sidney E. Zion, *Prosecutors Say Confession Rule Has Not Harmed Enforcement*, N.Y. TIMES, May 18, 1966, at 27.

n614 *Id.* The right to counsel warning presumably involved counsel at arraignment, not appointed counsel during interrogation.

n615 Sidney E. Zion, *Advice to Suspect Found Police Aid*, N.Y. TIMES, Feb. 28, 1966, at 18.

n616 Miranda v. Arizona, 384 U.S. 436, 483 (1966). The *Miranda* Court went on to equate the limited FBI practice of warning of rights with the *Miranda* requirements -- an equation that was clearly wrong. *See* GRAHAM, *supra* note 511, at 181-82 (noting that "important differences" made *Miranda* "far more generous"); OLP PRE-TRIAL INTERROGATION REPORT, *supra* note 13, at 39-40 (calling FBI practice "basically different"); *see also Miranda*, 384 U.S. at 521 (Harlan, J., dissenting).

n617 After *Escobedo*, Detroit police gave the following warning to suspects in custody once the investigation began to focus on them: "'I am Detective . . ., and I wish to advise you that you have a constitutional right to refuse to make any statement. You do not have to answer any questions which are put to you, and anything you do say may be used against you in a Court of Law in the event of prosecution. You are further advised that you have a right to counsel.'" *See* Souris, *supra* note 166, at 255 n.15.

n618 *Id.* at 255. The *Yale Law Journal* recounting of the study, *see supra* notes 238-41 and accompanying text (noting conflicting versions of study), reports a rise in confessions after *Escobedo*, noting that "confessions were given in 64.7 percent of the 2,620 completed prosecutions in 1961, and 65.6 percent of the 2,234 prosecutions in 1965 completed at the time of the survey." *Yale Project*, *supra* note 8, at 1641.

n619 *See* Seeburger & Wettick, *supra* note 32, at 8; *see also* Commonwealth v. Negri, 213 A.2d 670 (Pa. 1965) (holding that confession not admissible unless suspect has been warned of the right to remain silent and the right to counsel).

n620 *Yale Project*, *supra* note 8, at 1569.

n621 *See supra* notes 78-85 and accompanying text.

n622 *See supra* notes 191-210 and accompanying text.

n623 *See* ALI REPORT, *supra* note 56, at 140 (77% of suspects did not execute waiver of rights form in New Orleans, as inferred from number of suspects who executed form); VERA INST. OF JUSTICE, *supra* note 71, at 76 (68.3% of suspects in a survey of all 22 different precincts in New York City asserted right to silence or their *Miranda* right to counsel); James Ridella, Miranda *One Year Later -- The Effects*, PUB. MGMT., July 1967, at 183, 187 (64% of suspects did not execute waiver of rights form in New Orleans, as inferred from number of suspects who executed form); VERA INST. OF JUSTICE, *supra* note 71, at 40 (58.9% of suspects in

a six-month survey of one New York precinct in which all interrogations were recorded asserted right to silence or right to counsel); Seeburger & Wettick, *supra* note 32, at 13 n.37 (42.8% of suspects in Pittsburgh "refused to talk"; study describes these suspects as invoking their "constitutional right to remain silent"; figure includes 26.6% of suspects who "requested counsel"); *Controlling Crime Hearings*, *supra* note 45, at 201 (40.7% of suspects in Philadelphia "refused to give a statement after the *Miranda* warnings"); Medalie et al., *supra* note 133, at 1361 n.55, 1367 (three of seven suspects (42.9%) in D.C. refused to sign *Miranda* waiver forms); *id.* at 1372 (29 of 85 defendants -- 34% -- in D.C. requested counsel after police began partial compliance with *Miranda*); *id.* at 1366 n.68 (30.6% of suspects in D.C. informed the police at some point in the process that they did not wish to talk or to continue to talk); Leiken, *supra* note 365, at 19 (28% of suspects in Denver did not make a statement to police) (figure derived from table 2); *Yale Project*, *supra* note 8, at 1571 n.135 (18 of 81 -- 22.2% -- suspects in New Haven asked to see a lawyer or a friend); *id.* at 1566 (23 out of 127 -- 19.5% -- suspects in New Haven who were questioned "refused to talk" (figure derived from table 12 by dividing suspects who refused to talk by suspects questioned, which was obtained by subtracting those "not questioned from total interrogations"); FEENEY ET AL., *supra* note 17, at 143 (17.8% of burglary suspects in San Diego refused to answer questions); *Yale Project*, *supra* note 8, at 1578 (10 of 81 -- 12% -- suspects in New Haven whose conduct could be analyzed invoked right to silence); Seeburger & Wettick, *supra* note 32, at 14 n.37 (17% of suspects in Chicago claimed either their right to remain silent or their right to counsel) (figure derived by implication from numbers of suspects claiming "neither their right to remain silent nor their right to counsel"); Witt, *supra* note 89, at 325 (8.7% of suspects in Seaside City refused to talk); Neubauer, *supra* note 319, at 104 (4.4% of suspects in Prairie City refused to sign custodial interview form acknowledging only that they understood their rights; in 25.4% of cases, no further information was available); 2 FEENEY & WEIR, *supra* note 18, at 134 (3 of 71 -- 4.2% -- robbery suspects refused to answer questions); FEENEY ET AL., *supra* note 17, at 143 (4.0% of burglary suspects in Jacksonville, Florida refused to answer questions); *see also* GRISSO, *supra* note 443, at 36 (9.4% of juveniles referred to police for felonies refused to talk; refusal rate increased with age, reaching 12-14% for 15- and 16-year-olds); *id.* at 185 (5.6% of parents advised children to assert right to silence during interrogation; 2.3% advised children to assert right to counsel).

n624 The wide variance in the percentages is probably explained, in part, by the fact that some studies report figures on suspects who refused to waive their rights while others report suspects who simply declined to make a statement. Of course, refusing to waive rights and refusing to talk about an offense are separate matters, but the studies often fail to distinguish between the two.

n625 Leo, *supra* note 145, at 262.

n626 Cassell & Hayman, *supra* note 47. If suspects who were never given *Miranda* warnings and suspects who invoked before police were successful are included, 12.1% of all suspects in the sample invoked their rights.

n627 *See, e.g.*, Seeburger & Wettick, *supra* note 32, at 13 n.37.

n628 *See supra* note 267.

n629 *See supra* notes 300-11 and accompanying text.

n630 Indirect support for the conclusion that the right to counsel in particular is responsible for confession rate reductions comes from a post-Miranda survey of police officers in Tennessee and Georgia, which found that

42% identified the right to counsel as the warning most likely to interfere with their investigation -- more than any other warning. *See* Otis H. Stephens et al., *Law Enforcement and the Supreme Court: Police Perceptions of the* Miranda *Requirements*, 39 TENN. L. REV. 407, 425 (1972) (table VIII). Similarly, the 1967 Vera Institute report on monitored interrogations found that suspects most frequently asked questions about the right to counsel warning. VERA INST. OF JUSTICE, *supra* note 24, at 29.

n631 *Cf.* OLP PRE-TRIAL INTERROGATION REPORT, *supra* note 13, at 107-10 (suggesting modified warnings); Johnson, *supra* note 575, at 304 (same).

n632 *See also* Johnson, *supra* note 575, at 308-09 (advancing similar recommendation).

n633 *See* MILNER, *supra* note 336, at 228.

n634 Continued persistence to convince a suspect to change his mind will, at some point, render a confession involuntary and thus inadmissible under Fifth Amendment principles. Other approaches to handling the problem of continued police pressure could also be considered. *See, e.g.*, Johnson, *supra* note 575, at 305, 310 (proposing that police be allowed to "make a pitch" for cooperation to a reluctant suspect but not engage in a "prolonged campaign of wheedling, coaxing, and nagging").

n635 *Cf.* 18 U.S.C. § 3501 (1988) (restoring the pre-Miranda voluntariness test for admissibility of confessions in federal cases).

n636 *See generally* Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 487-501 (1992) (noting creation of "inflexible constitutional boundaries" by the Court).

n637 Miranda v. Arizona, 384 U.S. 436, 467 (1966).

n638 *See* BRADLEY, *supra* note 575, at 29; OLP PRE-TRIAL INTERROGATION REPORT, *supra* note 13, at 61. This probably was a result of the fact that *Miranda's* author, Chief Justice Warren, did not really agree with allowing alternatives and thus hedged the language, which had been suggested by other Justices. *See* OLP PRE-TRIAL INTERROGATION REPORT, *supra*, at 61 (citing BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT -- A JUDICIAL BIOGRAPHY 53-57, 589-93 (1983)).

n639 OLP PRE-TRIAL INTERROGATION REPORT, *supra* note 13, at 99.

n640 *See supra* notes 202-04 and accompanying text (British reforms); *supra* note 206 and accompanying text (Canadian reforms); LAW REFORM COMM'N OF CANADA, WORKING PAPER 32: QUESTIONING SUSPECTS (1984) (same); *supra* note 583 (Australian reforms).

n641 Mark Berger, *Legislating Confession Law in Great Britain: A Statutory Approach to Police Interrogations*, 24 U. MICH. J. L. REF. 1, 64 (1990).

n642 *Miranda*, 384 U.S. at 467 ("It is impossible for us to foresee the potential alternatives for protecting

the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities.").

n643 *Id.* at 524 (Harlan, J., dissenting).

n644 *Id.* at 542 (White, J., dissenting).

n645 *Id.* at 542-43 (White, J., dissenting).

* [Editors' Note: Professor Stephen J. Schulhofer has written a reply to this Article, which follows immediately. Professor Cassell's rejoinder to Professor Schulhofer will appear in the next issue of the *Northwestern University Law Review*.]