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DIALOGUE ON MIRANDA: POLICE INTERROGATION IN THE 1990S: AN EMPIRICAL STUDY OF THE EFFECTS OF MIRANDA

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SUMMARY:

... *Miranda v. Arizona* is the Supreme Court's most famous criminal law decision, spelling out the requirements for police interrogation of criminal suspects. ... D quantifies the effect on police questioning of such factors as the strength of the evidence against a suspect, prior criminal record, tape recording, race, gender, and type of police officer. ... The result of questioning was "successful" when the police: (1) obtained a written confession; (2) obtained a verbal confession; (3) obtained an incriminating statement; or (4) locked a suspect into a false alibi. ... Drawn from this case, the *Beheler* warning consists of telling a suspect that he is not under arrest and is free to leave during the "interview." ... However, in all likelihood, an interrogation involving a confession or incriminating statement takes longer than an interrogation where the suspect has little to say. ... Thus, under Professor Thomas's view of the world, the critical subject for empirical inquiry should be not simply *whether* the confession rate fell after *Miranda* but *why* it fell -- in other words, to what degree that reduction stems from eliminating unconstitutional coercion or from prophylactic overkill preventing otherwise constitutional questioning techniques. ... The adjusted 38.7% confession rate derived from

Professor Leo's data is almost indistinguishable from our 33.3% rate. ...

TEXT:
[*839] [*840] INTRODUCTION

Miranda v. Arizona n1 is the Supreme Court's most famous criminal law decision, n2 spelling out the requirements for police interrogation of criminal suspects. Among other things, the decision required police officers to deliver warnings to suspects about their right to remain silent and to obtain a waiver of these rights before beginning any custodial interrogation. From the day the Court issued its decree in 1966, questions loomed about the new rules' effects on police questioning. In the immediate wake of the decision, a handful of researchers attempted to provide answers with empirical studies. n3 But interest in the subject quickly waned, and research in the last couple of decades has been virtually nonexistent.

In this "empirical desert," n4 we have little knowledge about what police interrogation looked like shortly after *Miranda*, much less what it looks like today. How many suspects waive their *Miranda* rights? How many confess? How important are confessions to the outcome of prosecutions? Even the most informed observers can offer little beyond speculation on these fundamental subjects. A few careful scholars have recognized the pressing need for more research in this area. Perhaps the best example [*841] comes from the preceding article by Professor George Thomas, subtitled "A Plea for More (and Better) Empirical Evidence" on *Miranda*. n5 There, Professor Thomas explains that "by the mid-1970s, the issue of *Miranda*'s real-world effect seemed to disappear. . . . [This issue] should be at the core of the debate about *Miranda*." n6 More often, however, legal academics have not been as careful as Professor Thomas and have simply made broad claims about our knowledge of police interrogation. For example, one of the nation's leading hornbooks on criminal procedure reports that "defendants given the warnings seldom request counsel" and that "about as many confessions are obtained by giving the *Miranda* rights as were gotten before the *Miranda* decision." n7 Other prominent academics have proffered similar opinions. n8 Often these assertions have been in service of the position that *Miranda* has not harmed the investigation and prosecution of criminal cases. Equally often, these claims are couched in vague language that, upon closer inspection, says little. For instance, take the statement that suspects seldom request counsel. Do they request counsel in 1% of all cases? In 30%? No one knows the answer.

This ignorance about police questioning has important public policy ramifications. The Supreme Court now characterizes the *Miranda* requirements not as a constitutional command but rather as a "prophylactic" rule. n9 Under this view, *Miranda* rests on cost-benefit analysis in which its costs in reducing the effectiveness of police interrogation are assayed against its benefits in protecting suspects from abuses. n10 Given that the entire [*842] doctrine now rests on a pragmatic foundation, it is curious to discover that virtually nothing is known about the decision's real world effects. Without practical information, how can the Court say whether the balance struck with the *Miranda* rules was (or remains) the right one?

To shed light on these important questions, we conducted a study in Salt Lake County, Utah, a large urban area. We gathered information on police questioning and suspects' confessions n11 in a sample of more than 200 cases in the summer of 1994. This Article presents our data on such subjects as the frequency of waivers of rights and confessions, police compliance with *Miranda*, and the role of confessions in the outcome of prosecutions. Part I briefly reviews the existing literature, which supports Professor Thomas's conclusion that we know little about confessions. Part II sets forth the methodology used in this survey. Part III reports our specific findings. Part III.A assesses the extent to which police question suspects, obtain waivers of *Miranda* rights, and gain incriminating statements. We found that a surprisingly large number of suspects (about 21%) are never questioned, that a substantial fraction of suspects (about 16%) invoke their *Miranda* rights, and that only about 33% of all suspects give confessions. The 33% confession rate we found is lower than the rates reported in studies done before *Miranda* and conducted in countries that do not follow the *Miranda* requirements, suggesting that *Miranda* has reduced the confession rate. n12 Part III.B examines the frequency with which police question suspects outside the *Miranda* regime in noncustodial and other settings, finding that police have shifted to noncustodial questioning to some extent and that other exceptions to *Miranda* are quantitatively unimportant. Part III.C reviews police compliance with the *Miranda* rules, finding compliance to be high.

Part III.D quantifies the effect on police questioning of such factors as the strength of the evidence against a suspect, prior criminal record, tape recording, race, gender, and type of police officer. Part III.E analyzes the effect of confessions on the ultimate outcome of criminal cases, concluding that confessions make it significantly more likely that a prosecutor will file charges and that the defendant will be convicted of those charges as filed. Part IV assesses the importance of these findings for the on-going debate about the wisdom of the *Miranda* requirements. [*843] It concludes by expanding on Professor Thomas's plea for additional research on *Miranda* and explaining how the *Miranda* decision, despite the promises of the Court and its defenders, has yet to be empirically justified as the proper balance between the competing interests of criminal suspects *and* society at large.

I. PREVIOUS EMPIRICAL RESEARCH ON POLICE QUESTIONING

A dearth of empirical research on police interrogations is no recent phenomenon. When the Supreme Court began to consider new restrictions on questioning in the 1960s, it had amazingly little empirical information to draw upon. In the late 1950s, the American Bar Foundation conducted field research in several cities, but presented little quantitative analysis. n13 The first hard data on the subject was published in 1962 by Professor Edward L. Barrett, Jr., who studied police practices in two California cities. n14 Unfortunately his study contained summary information only on the length of interrogations and the frequency of confessions. n15 Thus, it is not surprising that the briefs in *Escobedo v. Illinois*, n16 a 1964 case involving a general challenge to the Court's jurisprudence on police questioning, contained no references to empirical studies. n17 Apart from a passing reference to Barrett's study, n18 the *Escobedo* opinions are likewise devoid of empirical citations.

The Court's opaque ruling in *Escobedo* (suggesting that once police have begun to "focus" on a suspect they cannot deny him access to his attorney n19) created a great deal of interest in -- and uncertainty about -- the law governing police questioning. It did not, however, generate much new [*844] information on police questioning. n20 Two years later, one commentator noted, "With all the hundreds of thousands of foundation and government dollars that are being spent these days on what is known as 'the crime problem,' I find it incomprehensible that some dribbles have not been spent upon a dispassionate survey concerning the significance of police interrogation." n21

In 1966, as the participants in the *Miranda* case prepared to file their briefs, they had little empirical information to draw upon. To solve this problem, the National District Attorney's Association asked prosecutors in large cities to collect information on the prevalence of confessions and their importance in obtaining convictions. The Association reported its results in a forty-five-page appendix to its amicus brief in the case. n22 The ACLU countered with a brief that relied heavily on police interrogation "manuals." n23

The police interrogation manuals became the centerpiece of what realworld support there was for the majority opinion in *Miranda*. The Court's opinion did cite the famous 1931 Wickersham report on police abuse n24 and anecdotal examples of police misconduct. n25 But aside from a passing nod acknowledging, "a gap in our knowledge as to what in fact goes on in the interrogation rooms," n26 the decision rested on the supposed representativeness of police manuals -- not scholarly investigation. n27 This led Justice [*845] Harlan to complain in dissent that the Court's decision lacked "the vast advantage of empirical data." n28

Miranda sparked a brief flurry of interest in police interrogation, as both proponents and opponents of the decision sought to bolster their positions. Perhaps the most famous study was published by the editors of the *Yale Law Journal*, who camped out in the New Haven police department during the summer after the decision and reported on the interrogations they observed. n29 A short postscript to the study assessed the use of *Miranda* warnings in the questioning of draft protestors at Yale. n30 Other academic researchers conducted post-*Miranda* analysis of police case files to determine the "before-and-after" prevalence of confessions in Pittsburgh, n31 the District of Columbia, n32 and pseudonymous "Seaside City" (a suburb of Los Angeles). n33 Prosecutors undertook similar surveys in New York County, n34 Philadelphia, n35 Los Angeles, n36 Brooklyn, n37 New Orleans, n38 Kansas City, n39 and Chicago. n40

Apart from these before-and-after assessments, only a few other studies on confessions were done in the wake of *Miranda*, although they did not involve before-and-after assessments. In 1967, the Vera Institute surveyed [*846] police interrogation practices in Manhattan. n41 In the same year, Neal Milner analyzed the impact of *Miranda* on police attitudes in four Wisconsin cities. n42 In 1968, David W. Neubauer gathered statistics on the role of confessions in prosecutions in Midwestern "Prairie City." n43 In 1969, law student Lawrence S. Leiken gathered information from prisoners in Denver on whether they had given statements to police. n44

The best reading of these older studies is that confession rates fell substantially after *Miranda*, as one of the present authors has argued at length elsewhere. n45 Professor Thomas, however, concludes that we must accept the "null hypothesis that *Miranda* has made no statistically significant difference in the confession rate." n46 His conclusion stems from just four studies -- New Haven, District of Columbia, Denver, Seaside City -- which in his view outweigh the contrary finding of a fifth study in Pittsburgh, which reported a significant decline in confessions after *Miranda*. n47

In reaching his conclusion, Professor Thomas may have been led astray on several points. The New Haven study, contrary to the conclusions of its authors, reveals a substantial 16.0% drop in admissible confessions after *Miranda*. n48 The D.C. study cannot be regarded as a true test of the [*847] *Miranda* procedures because the police there, at the time of the study, did not follow the most important *Miranda* requirements. n49 Moreover, contrary to Professor Thomas's reading, when the study's data is reanalyzed to compare suspects who received some *Miranda* warnings compared with those who did not, one finds that confessions fell after *Miranda*. n50 The Denver study also sheds no light on the harmful features of *Miranda*. n51 And the Seaside City study is anomalous in several respects. n52

Professor Thomas also possibly overlooks several studies showing harmful effects from *Miranda*. In particular, Professor Thomas fails to consider the assessments from New York County, Philadelphia, New Orleans, Kansas City, Brooklyn, and Chicago, all of which suggest that [*848] *Miranda* had an inhibiting effect on suspects. n53 The findings of these studies are consistent with other bodies of data: a comparison of low confession rates in this country after *Miranda* with higher rates in Britain and Canada; n54 the drop in violent crime clearance rates that accompanied the imposition of the *Miranda* rules; n55 and reports of police officers about the harmful effects of the new rules. n56 A broader view of the data also raises questions about Professor Thomas's tentative "conjecture" that *Miranda* warnings had a "double-effect" of simultaneously encouraging suspects to talk to police while discouraging admissions of guilt. n57

Regardless of how the earlier studies are interpreted, however, we share Professor Thomas's concern with the lack of research on critical *Miranda* issues since then. As Professor Thomas points out, in about 1970, interest [*849] in the subject of confessions died. n58 Virtually no empirical studies on police interrogations have been published since. Only a few haphazard statistics on confessions are available, typically gathered for other purposes (such as research on plea bargaining). n59 The only recent study on interrogation is one by Professor Richard A. Leo in the San Francisco Bay Area. n60 His innovative research involved observing more than 100 interrogations by detectives and provides an unparalleled source of modern information about police tactics and methods. Because of the study's narrow focus on station house interrogation by detectives, however, it provides no information on the broader course of police questioning (or nonquestioning) in cases outside the station-house by officers other than detectives. n61

The lack of data in this country should be contrasted with Britain, where an extensive quantitative literature on police questioning developed in recent years. Several Royal Commissions on Criminal Justice have supported research on the subject, n62 and researchers have compiled statistics on many aspects of British police questioning. n63

As the thirtieth anniversary of *Miranda* draws near, then, research on its effects appears long overdue. As Professor Thomas concisely explains in the concluding paragraph of his article, "We need more empirical evidence. What we have so far raises more questions than it answers." n64

[*850] II. SOURCES OF DATA AND METHODOLOGY

To answer some of the questions, we undertook an empirical survey of confessions and their importance. We selected the Salt Lake County District Attorney's Office for the research because of its proximity and because of the willingness of the prosecutors in the office to allow the study. n65 Salt Lake County has been the site of previous criminal justice research, which found that it was quite typical in its processing of criminal cases. n66 Because single-area studies raise questions of generalizability, it may be useful to set forth information about the county.

Salt Lake County is a primarily urban and suburban area comprised of Salt Lake City and several other cities and incorporated areas. The residents of the county total 725,956, virtually all of whom live in what the Census Bureau classifies as "urban" (that is, other-than-rural) areas. n67 About 10% of the population is of Hispanic origin or minority race. n68 The County is policed by various law enforcement agencies, including the Salt Lake City Police Department, the Salt Lake County Sheriff's Office, and various other smaller city police departments.

While there might be a tendency to think of Salt Lake County as a pastoral area free from the ravages of crime, the county in fact has crime rates similar to other areas. n69 In 1993, 17,789 FBI "index" crimes (murder, rape, robbery, aggravated assault, arson, burglary, vehicle theft, and larceny) were reported in Salt Lake County, resulting in a crime rate of 55.9 per 1000 population, n70 just slightly above the national average of 54.8. n71 Within the county, Salt Lake City proper has a higher crime rate than [*851] other cities of similar size n72 and, in contrast to other areas, crime increased in 1994. n73 Like other urban areas, Salt Lake County has a developing gang problem. n74 Salt Lake County's crimes, however, are less often violent than the national average. n75

We collected the basic data for the study by attending "screening" sessions held at the Salt Lake County District Attorney's office during a six-week period in the summer of 1994. n76 Prosecutors in the District Attorney's Office screen all felony cases for prosecutive merit. Misdemeanors are reviewed by a separate section, located in a separate office building. Our sample was drawn from the felony screening process. n77

Through the gracious consent of the District Attorney's Office, researchers n78 were allowed to attend all screenings unless the case raised some special sensitivity. The screening session is a forty-five-minute interview by the prosecutor of the police officer concerning the evidence supporting the filing of charges. Screenings take place soon after the officer completes investigation of the case. For suspects in custody, the screening takes place on the next working day.

During the screening session, the researchers filled out survey forms regarding relevant case characteristics. n79 Over the summer, the researchers were allowed to observe all but four screenings out of more than two hundred they went to attend. n80 Overall, the researchers estimate that they attended approximately 70%-80% of the screenings held during the six-week period. n81 The main reason they missed screenings was simultaneous scheduling. When faced with a conflict, the researchers went first [*852] to screenings for crimes of violence and last to screenings for drug offenses. n82 The researchers also may have missed a few unscheduled "special" screenings for high profile cases and a few other screenings for child abuse n83 and small drug cases. n84 As a result, the sample of cases drawn here should generally reflect the caseload of the District Attorney's Office, with the exception that high profile, child abuse, and narcotics cases may be underrepresented.

There were 219 suspects in our sample. Most (86.8%) were male. n85 Most (70.2%) had prior records. n86 The age of the suspects ranged from 18 n87 to 63, with the median around 24. The racial composition of the sample was: white (68.2%); Hispanic (23.9%); African-American (6.0%); and other (2.0%). n88

The most serious charge under consideration during the screening is indicated on Table 1. Most of the charges were property crimes while the balance were violent crimes. n89

Table 1 -- Charges Considered Against Suspect

Charge	No.	%
VIOLENT CRIMES	91	41.6%

Murder	3	
Attempted Murder	4	
Robbery	9	
Kidnapping	1	
Felony Assault	19	
Sex Crime-Adult Victim	12	
Sex Crime-Child Victim	6	
Child Abuse	2	
Drugs	15	
Fleeing/Escape	9	
Weapons	5	
Arson	3	
Other	3	
PROPERTY CRIMES	128	58.4%
Theft	49	
Burglary	35	
Auto Theft	18	
Larceny/Forgery	24	
Other	2	
TOTAL	219	100.0%

[*853] [*854] III. THE INTERROGATION PROCESS AND ITS OUTCOMES

The subparts below report our findings on various aspects of police interrogation. Before doing that, it may be useful to set out our plan of attack. In each subpart, we set out the existing literature on the particular subject, describe our finding on the question at hand, and finally draw our (admittedly more subjective) conclusions from the data.

A. The Frequency of Questioning, Waivers, and Confessions

1. Questioning and Nonquestioning

One important issue that has not been the subject of much empirical study is the frequency with which suspects are questioned. Not every person who is arrested will be questioned. n90 In our sample, police questioned 79.0% of the suspects. n91 This means that a surprisingly large percentage (21.0%) were not questioned.

Our 1994 data that a significant proportion of suspects are never questioned, read in conjunction with older studies, support the hypothesis that questioning rates have declined somewhat since *Miranda*. n92 Our results parallel a 1979 study of police practices in two cities, which found that police never questioned 18.5% of arrested burglary suspects in Jacksonville, Florida, and 20.1% of such suspects in San Diego, California. n93 However, older studies from around the time of *Miranda* suggest that almost every suspect was questioned then. The Pittsburgh study found that, at least for cases handled by the Detective Branch, virtually all suspects were questioned. n94 Likewise, the Seaside City study reported data for cases in which suspects were "actually arrested and incarcerated," n95 [*855] finding that in such cases officers failed to question suspects in only 2% of pre-*Miranda* cases. n96 Two California cities in 1961 had confession rates of 58% and 88%, n97 implying interrogation rates in excess of these figures. In Philadelphia in 1964,

an estimated 90% of arrested suspects gave statements, n98 implying an interrogation rate in excess of 90%. Similarly, in Brooklyn, only 10% of suspects for serious crimes refused to give statements, n99 implying that police were questioning more than 90%. The New Haven study found that detectives questioned all but two of 90 suspects (97.8%) over the summer of 1966, at a time when New Haven police appeared to be following pre-*Miranda* operating procedures. n100 The only clear exception to the older studies reporting a very high questioning rate appears to be the 1967 Washington, D.C. study, which reported that only 55% of suspects were interrogated before *Miranda*. n101

Of course, even if interrogation rates have declined over time, a remaining question would be whether this is due to *Miranda*. n102 Here the data directly on point are quite limited. However, the only two studies to address this question specifically report lower interrogation rates after *Miranda*. In Seaside City, the interrogation rate dropped from 98% before *Miranda* to 92% after; in the District of Columbia, the interrogation rate apparently went from 55% before *Miranda* to 48% after. n103

[*856] Given that the only data on point suggest lower interrogation rates after *Miranda*, it is useful to try and identify mechanisms that might cause this to happen. More generally, one would think that police would interrogate every suspect, especially in view of the fact that a suspect is "the most knowledgeable and unimpeachable source of information about his past conduct." n104 Why is it that police fail to question so many suspects?

To shed light on these subjects, we collected information on why police failed to interrogate suspects (as reported by the officer at screening). Our data are contained in Table 2. As can be seen, in two cases (4.9% of the nonquestioning cases), the reason for not questioning was a belief that the suspect would invoke *Miranda*. n105 In two other cases (4.9% of the nonquestioning cases), the police cited the fact that a suspect had an attorney as the obstacle to questioning, a reason that has a possible connection with *Miranda*. n106 Our data thus confirm what is suggested in the earlier studies: that some suspects will not be questioned due to *Miranda*. n107

[*857] The most often-given reason for nonquestioning was that a suspect's whereabouts was unknown at the time police screened the case. In many of these cases, it appeared that officers sought the filing of charges because they wanted an arrest warrant for a hard-to-locate suspect entered into the law enforcement computer system. When the suspect was later picked up (as he inevitably would be, for a minor traffic violation or some other scrape with the law), the warrant would pop up and the suspect would be detained. Because we drew our sample at the initial screening, it was possible that police later interviewed some of these suspects when they were apprehended. To collect data on such interviews, we attempted to follow up with the screening officer to determine if police later interrogated. If so, we noted the results and moved the suspect into our "questioned" category. While it is possible we missed a few of these post-screening interrogations, the officers also reported that such interrogation was frequently difficult. In many cases, the investigating officer (the only one with sufficient information to effectively question a suspect) could not be informed of the arrest in a timely fashion. n108 In others, the suspect would receive routine assignment of counsel before questioning was possible, a reason for not questioning that might be attributable to *Miranda*. n109

The second most common reason for failure to question was the officer's belief that the case against the suspect was overwhelming. One possible conclusion to be drawn is that police agencies should be more diligent in attempting to obtain incriminating statements. It is likely that prosecutors, faced with the task of ultimately obtaining convictions, would be less sanguine about the assumption that so many cases were "over-whelming." Moreover, in a few cases the officer pled the press of "other business" or assumed unproductiveness as reasons for not questioning. n110 These reasons can also be read to support Professor Thomas's suggestion [*858] that how badly police want a confession is an important variable in the confession equation. n111

In sum, our data fit the trend of lower interrogation rates after *Miranda* and suggest that *Miranda* has played at least some role in that drop.

Table 2 -- Reasons for Not Questioning Suspects (N=46; 5 unavailable)

Reason	No.	%

Suspect's Whereabouts Unknown	14	34.1%
Overwhelming Case	11	26.8%
Suspect Intoxicated	7	17.1%
No Opportunity Given Press of Business	2	4.9%
Belief Suspect Would Invoke Miranda	2	4.9%
Suspect Already Had an Attorney	2	4.9%
Questioning Thought Unproductive	1	2.4%
Suspect in Rehabilitation Program	1	2.4%
Suspect Injured	1	2.4%
TOTAL	41	100.0%

2. Invocations of *Miranda* Rights

One of the most important questions about the *Miranda* regime is how often suspects invoke their *Miranda* rights, preventing any police questioning. A suspect can claim *Miranda* rights in two ways. First, he can refuse at the start of an interview to waive his rights (including the right to [*859] remain silent and the right to counsel), thus precluding any interview. Second, even if he initially waives his rights, he can assert them at any point in the interview. n112 If a suspect asserts *Miranda* rights, police questioning must stop. The effect of these questioning cutoff rules is important, because it appears that most of *Miranda*'s harms stem from the cutoff rules, not the more famous *Miranda* warnings. n113

Surprisingly very little information is available on such a fundamental subject. The previously published evidence on invocations has been collected elsewhere. n114 The evidence, although generally quite dated, suggests that about 20% of all suspects invoke their *Miranda* rights.

We gathered data on how often and in what ways suspects asserted their *Miranda* rights. Table 3 shows that of suspects given their *Miranda* rights, 83.7% waived them. n115 Reflecting the practices of the local law enforcement agencies, virtually all of these waivers were verbal rather than written. At the same time, 16.3% invoked their rights. Of the twenty-one suspects who invoked their rights, nine invoked their right to an attorney (two even before *Miranda* warnings could be read n116), six invoked their right not to make a statement, and six either refused to execute a waiver or otherwise invoked their rights. For these purposes, a suspect who partially waived his rights (that is, agreed to talk about some charges but not others), was classified as waiving his rights. n117

[*860] Table 3 -- Invocation of Rights

Suspect's Response to Miranda Rights	No.	%
WAIVED	108	83.7%
Throughout	103	79.8%
Changed Mind Later	5	3.9%
INVOKED	21	16.3%
Asked for Attorney	9	7.0%
Invoked Right to Silence	6	4.7%
Refused to Waive/Other	6	4.7%
TOTAL	129	100.0%

As also shown in Table 3, five suspects who initially waived their rights changed their minds later and invoked their rights during the interview. Of these five suspects, three asked for an attorney during the interview (two after giving incriminating statements, one after giving a denial with an explanation), and two asserted their right to remain silent during the interview (one after giving a flat denial, one after giving a denial with an explanation). Thus, three of these five suspects invoked their rights before successful police interrogation. If these three are added to suspects who invoked their rights initially, then a total of 18.6% of the suspects in our sample who were given *Miranda* rights invoked them before police succeeded in obtaining incriminating information. The percentage viewed as invoking their rights shrinks slightly if we add to the suspects given *Miranda* warnings those who were never given the warnings. If these suspects are added in, then 12.1% of all the suspects in our sample who were questioned invoked their rights before police were successful in interrogation. n118

[*861] One characterization issue was how to treat suspects who were interviewed several times, invoking their rights in one interview, but not in another. We had five such cases, four involving invocations in the second interview, one in the first. We included three of these cases in our "invoked" list because that seemed to describe the course of questioning more accurately. n119 We thought the other two cases were best treated as not having been asked for a waiver of rights. n120

Finally, in none of our cases did the police continue questioning a suspect after an invocation of *Miranda* rights. This finding has considerable importance in the on-going debate about *Miranda*'s scope. The Court crafted a limitation to the *Miranda* rule in 1971, holding that prosecutors could use statements obtained in violation of *Miranda* for impeachment. n121 Because of this exception, prestigious academic commentators have advanced the suggestion that police would deliberately flout *Miranda* to obtain impeaching statements. n122 We found no evidence that this was occurring. n123

Determining whether the frequency of invocation of rights we found is "high" or "low" is a matter of judgment that will not be pursued at [*862] length here. It bears noting, however, that a 12.1% invocation of rights figure has substantial public policy implications. If our figure is typical of the nation as a whole, then each year approximately 300,000 criminal suspects for FBI index crimes invoke their rights before successful police questioning. n124

3. Confessions, Incriminating Statements, and Denials

Perhaps *the* critical issue in the debate over *Miranda* is how often today suspects confess or otherwise make incriminating statements. Surprisingly little information is available on this subject, despite frequent definitive pronouncements that many suspects still confess. n125 In this subsection, we first explain our methodology for classifying "confessions," "incriminating statements," and "denials." We then report our findings and conclude that our confession rate is lower than the rate that prevailed before *Miranda*. We end with a brief discussion of other purposes for interrogation besides obtaining incriminating statements.

a. Classifications

We gathered detailed information on the frequency of confessions, incriminating statements, denials, and other results of police questioning. While categorizing statements is always difficult, n126 we divided the outcomes into "successful" and "unsuccessful" categories -- looking at the results from law enforcement's point of view. n127 The result of questioning was "successful" when the police: (1) obtained a written confession; (2) obtained a verbal confession; (3) obtained an incriminating statement; or (4) locked a suspect into a false alibi.

[*863] A written or verbal "confession" was "any substantial acknowledgment by the suspect that he or she committed the crime." n128 Simply put, the suspect had to say in essence "I did it." For example, in one case police questioned a suspect about the theft of various checks. He admitted cashing the checks for two female friends and acknowledged that he knew they were stolen. We classified this statement as a confession. A "confession" could include statements in mitigation. In the example above, we classified the suspect's statements as a confession even though he

said that "the women were using me" and that he had derived no money from the crime.

Our next category was for "incriminating statements." Because this category is somewhat subjective and because its scope makes a critical difference in determining the scope of police success statistics, it is worth explaining in detail. An "incriminating statement" was "any statement that tends to establish guilt of the accused or from which with other facts guilt may be inferred or which tends to disprove some anticipated defense." n129

We found that such statements generally occurred in one of three situations. First, a suspect might give a statement that linked him to the crime or crime scene without admitting his guilt. For example, in an attempted homicide case the police asked the suspect if a certain car, known to have been involved in the crime, was his. He responded that it was, but denied any involvement in the crime. As another example, a suspect was questioned about the theft of a gun. He admitted having the gun and acknowledged that he thought the gun was stolen. However, he denied stealing the gun. We classified these statements as "incriminating."

A second kind of incriminating statement was a partial admission of guilt. For example, in one case involving a burglary, a suspect admitted being in the house unlawfully, but said he was there because of something the victim had done to his girlfriend, not to steal anything. We classified these statements as "incriminating."

Third, a suspect might make statements to the police that tended to call into question his truthfulness or make him appear suspicious. For example, in one case an officer suspected a car was stolen and pulled over the suspect. The officer asked the suspect certain questions concerning his license, registration, and his relationship to the car. The suspect was visibly shaken by the questions and gave stammering and sometimes contradictory answers. We classified these statements as "incriminating."

[*864] After confessions and incriminating statements, the final category of "successful" outcomes was for a suspect who was "locked into a false alibi." This category was for a suspect who gave statements that committed him to a scenario and the prosecution had substantial evidence that the scenario was untrue. n130 In evaluating our classifications of statements, it should be noted that we classified some "on the fence" statements as "incriminating" when they might have legitimately been classified as denials of some type. n131

On the other side of the coin, an interrogation was "unsuccessful" when the police obtained from the suspect: (1) a "flat denial"; (2) a "denial with explanation"; or (3) "other," unincriminating statements.

A "flat denial" was the statement "I didn't do it" or "I don't know what you're talking about" and essentially nothing else. n132

A "denial with explanation" involved a suspect who denied the crime and provided "additional statements regarding circumstances surrounding the offense, an alibi, or mitigating version." n133 These were possibly the most difficult statements to classify, because many denials with [*865] explanation, expansively viewed, might have somehow connected the suspect to the crime scene or called into question his truthfulness, making it an "incriminating" statement. We used this category for statements by defendants denying involvement in the crime, but involving more than the simple statement "I didn't do it." We also used the category for suspects' statements whose primary import was not to assist police in proving their case but rather in describing the suspects' actions in a way that involved no criminal wrongdoing. In close cases where the researchers were unsure whether to catalog a statement as "incriminating" or as a "denial with explanation," they relied on the view of the police officer and prosecutor screening the case.

The most common denial with explanation was a statement by a suspect claiming authorization to do what would have been a crime without the authorization. In particular, in a number of cases suspects caught in possession of "stolen" goods said that the goods were legitimately obtained. For example, a woman was caught leaving the victim's home with a television in her hand. She told police that the victim allowed her to take the television to pay off a debt. The main effect of this statement was to deny an essential element of the offense of theft. n134 Along the same lines, in several stolen vehicle cases, suspects stopped in stolen cars denied knowing that the car was stolen or claimed to have

recently purchased the car. n135 A related kind of statement came from suspects claiming authority to be where they were. For example, police caught a suspect in a home not his [*866] own. In response to the police question "What are you doing here?," the suspect said he had been told he could go in. The main thrust of the statement was to deny an element of the offense of burglary. n136 We classified all of these statements as "denials with explanations." These statements themselves did not add anything to what the police already knew and could readily prove. To the contrary, the statements were all likely to be the centerpiece of a defense to the charges. Of the forty denials with explanation, roughly fourteen were of this type.

The next most common denial with explanation occurred in sex crimes, where suspects admitted sex acts but said there was consent. For example, a suspect accused of rape said that the victim had "come on to him" and that they had consensual sex. This statement denied an essential element of the crime n137 and, again, would likely be featured by the defense, not the prosecution. Roughly nine cases fit this description. n138

The remaining denials with explanations could not be conveniently categorized. We give a few examples so that the reader can get the flavor of this category. In three cases, suspects in assault cases said they were fighting only to defend themselves. (Two of the suspects were arrested in the same case for fighting with each other.) In an attempted homicide case, a suspect admitted being with the shooter (a fact that was never in doubt -- both the car and another person in the car were identified as being at the scene), but claimed he did not shoot anyone and that he did not know the shooter was going to fire at the victim. In a child abuse case, a father claimed that burn marks on his son's arms were not, as police alleged, cigarette burns, but rather accidental burns from a camping trip. After an arrest for a drug deal, two suspects each claimed that they had never seen the other suspect before. All of these statements were not helpful to police and therefore classified as denials with explanation, [*867] consistent with the earlier studies. n139 In the real world of criminal prosecutions, the difference between the usefulness of such denials with explanation, as compared to incriminating statements, is probably quite substantial. n140

The catch-all category for "other" statements involved declarations that were not incriminatory and could not be otherwise categorized. The few statements in this category typically involved incoherent or rambling [*868] remarks from suspects. An example would be a suspect who, when responding to questions by police, gave answers that were nonsensical or unresponsive to the questions asked (usually because of intoxication).

About one out of every ten suspects was questioned more than once. n141 For purposes of statistical analysis in this study, we categorized all suspects by the most fruitful result of questioning. For example, if the suspect gave a denial in the first interview but a confession in the second, he was categorized as "confessing" rather than "denying." By including only the greatest result in multiple interviews, we may have given a slightly exaggerated impression of police effectiveness.

b. Findings

The number of incriminating statements and denials we found are shown in Table 4. Overall, 9.5% of the suspects invoked their rights, 33.3% were successfully questioned, 36.1% were questioned unsuccessfully, and 21.0% were not questioned. n142 Because some might argue that only suspects who were in fact questioned should be included in determining a confession rate, n143 we also report percentages for only those suspects who were questioned. As can also been seen in Table 4, of all police interviews, 12.1% produced an immediate invocation of *Miranda* rights, 42.2% were successful, and 45.7% were unsuccessful. It should also be noted that, however measured, our "success" rate is artificially inflated because of the point at which our sample was drawn. We sampled cases from screening sessions where police officers believed they had gathered sufficient evidence for prosecution. As a consequence, our sample excludes a significant number of cases that police thought were too weak to warrant prosecution -- including cases that were too weak because of an unsuccessful out-come of police questioning. n144 We heard from police officers that many [*869] cases were "prescreened" and never made it to the prosecutor's office for review. Police officers knew that these cases were simply insufficient to trouble taking to the prosecutor's office.

Table 4 -- Results (N=219 overall; 173 for those questioned)

		Questioned Only	Overall
	No.	%	%
INVOKED RIGHTS	21	12.1%	9.5%
SUCCESSFUL	73	42.2%	33.3%
Written Confession	5	2.9%	2.3%
Verbal Confession	42	24.3%	19.2%
Incriminating	26	15.0%	11.9%
Locked into False Alibi	0	0.0%	0.0%
UNSUCCESSFUL	79	45.7%	36.1%
Flat Denial	34	19.7%	15.5%
Denial w/Explanation	40	23.1%	18.3%
Other	5	2.9%	2.3%
NOT QUESTIONED	46		21.0%
TOTAL	219	100.0%	100.0%

We also gathered more specific data on what suspects actually said during questioning. As also shown in Table 4, of all suspects, 21.5% gave written or verbal confessions, while 11.9% provided incriminating statements. None of the interrogations locked the defendant into a false alibi. While it has been suggested that a noticeable number of suspects tie [*870] themselves to an unlikely story, n145 to our knowledge no one has tried to quantify the prevalence of this outcome. Our quantitative data suggests that this outcome is not as important as these previous qualitative assessments have suggested.

We also examined whether suspects for particular types of crimes were more likely to confess. The limited previous research on this issue, from studies conducted in the 1960s, suggests that suspects are less likely to confess to violent crimes than to property crimes. n146 Our data trend in this direction; as shown in Table 5, police were less successful in interrogating suspects for crimes of violence than for property crimes, although the result is not statistically significant at the conventional 95% confidence level. n147

Table 5 -- Questioning Result by Type of Crime

Type of Crime	Invoked Rights		Questioning Successful		Questioning Unsuccessful		Total	
	No.	%	No.	%	No.	%	No.	%
Violent Crime	9	12.7%	25	35.2%	37	52.1%	71	100.0%
Property Crime	12	11.8%	48	47.1%	42	41.2%	102	100.0%
Total	21	12.1%	73	42.2%	79	45.7%	173	100.0%

[*871] c. Comparison with Pre-*Miranda* Confession Rates

Although our success rate is inflated, it is lower than success rates found in this country before *Miranda*, suggesting

that *Miranda* has hampered law enforcement efforts to obtain incriminating statements. In an earlier article, one of the present authors collected the available pre- and post-*Miranda* information on confession rates in this country. n148 Although broad generalizations are hazardous, that evidence suggests that interrogations were successful, very roughly speaking, in about 55% to 60% of interrogations conducted before the *Miranda* decision. For example, the earliest academic study in this country reported confession rates of 88.1% and 58.1% in two cities in California in 1960. n149 Similarly, a 1961 survey in Detroit reported a 60.8% confession rate, which fell slightly to 58.0% in 1965. n150 In New Haven, the confession rate was about 58%-63% in 1960. n151 These figures deserve special attention in calculating a pre-*Miranda* confession rate, n152 because they avoid the problem of anticipatory implementation of *Miranda* in various jurisdictions. In particular, confession rates after June 1964 might be dampened by the Supreme Court's *Escobedo* decision, which led some police to adopt *Miranda*-style warnings even before the decision. n153 Other commentators have agreed that the pre-*Miranda* confession rate was at least 55% to 60%. n154 Our 33.3% overall success rate (and even our 42.2% questioning success rate) is [*872] well below the 55%-60% estimated pre-*Miranda* rate and, therefore, is consistent with the hypothesis that *Miranda* has harmed the confession rate.

In his carefully-argued rejoinder to our Article, Professor Thomas spends most of his time discussing this conclusion, contending that confession rates have not changed since *Miranda* -- a conclusion he labels the "steady-state" hypothesis. In support of this hypothesis, he makes an extensive series of elaborate adjustments to our "confession rate," arguing that our confession rate is actually 54%, within the pre-*Miranda* range. n155 However, these adjustments are, at least for purposes of comparing to the pre-*Miranda* data, inappropriate.

Professor Thomas's adjustments begin from the major premise that the earlier studies apply only to custodial interrogation. n156 Thomas then asserts that we have compared our apples (a study with both custodial and noncustodial interrogations) to these oranges (studies of just custodial interrogation). Agreeing with our intuitively-appealing finding that noncustodial interrogations are less successful in obtaining confessions (as we discuss below n157), Thomas concludes that, for comparison purposes, our figures need to be adjusted upwards from 42% to 48% by excluding noncustodial interrogations. n158

We compared apples to apples. The pre-*Miranda* studies we relied upon generally appear to include both custodial *and* noncustodial interrogations. For example, the District of Columbia study involved defendants "who had been subjected to arrest procedures." n159 Of course, suspects who were arrested could include suspects arrested after a noncustodial interview. Likewise, the Seaside City study involved suspects who "were actually arrested and incarcerated," n160 a pool that therefore would include those arrested and incarcerated after noncustodial interviews. The closest Professor Thomas comes to supporting his assertion is with the Pittsburgh study, where the authors reported that "the questioning occurs at the time the suspect is taken into custody." n161 But whether they were simply [*873] describing the standard practices of the Pittsburgh Detective Branch n162 or only a limitation of the study to custodial interrogations is unclear. To be compared directly to these studies, our figures should be adjusted -- at most -- by looking at "arrested" suspects, an adjustment that does not make much of a difference. n163

In addition, our rough estimate of a 55%-60% pre-*Miranda* confession rate rests on a much broader limited universe of studies than Thomas discusses. In particular, our estimate rests on a comparison to twenty pre-*Miranda* confession rates that have been collected elsewhere. n164 It is readily apparent that many of these studies simply examined cases in which charges had been filed, regardless of whether the suspect was interrogated in custody, outside of custody, or even not at all. For example, a New York County study involved confessions "used in presenting cases to [the] grand jury." n165 That methodology would pick up all confessions, regardless of whether they were derived from custodial or noncustodial interrogations. Similarly, the Brooklyn study involved all suspects for particular crime categories, regardless of whether they were interrogated in custody or out. n166 It may be the case that, due to *Miranda*, fewer of our interrogations were custodial than in the earlier studies. n167 But for Thomas to establish incomparability, he needs to show that noncustodial interrogations were positively excluded from these studies, something he has not done. Using both custodial and noncustodial interrogation, as we have done, is therefore the best way to assure consistency with the pre-*Miranda* studies.

While Professor Thomas has failed to establish inconsistency with the earlier studies, the implication of his minor premise -- that noncustodial interrogations should be excluded because they are less effective n168 -- is important. If the minor premise is true, then to prove that the confession rate [*874] is lower today, one need only establish that (other things remaining equal) police have shifted to more noncustodial interrogations since *Miranda*. That police have so shifted is supported by a considerable body of evidence, including the recommendations of the leading police interrogation manual, n169 reports from those who have observed police in action, n170 court cases suggesting intentional noncustodial interviews, n171 and academic commentators. n172 If this body of evidence is believed, n173 then [*875] *Miranda* has reduced the confession rate and the only subject left for discussion is how much it has done so.

On the subject of comparing apples to apples, we believe that Professor Thomas has introduced some oranges into the equation. In revising our confession rate, Professor Thomas considers only the number of confessions obtained from those suspects *actually questioned*, excluding those who were never questioned. Because 21% of the suspects in our sample were not questioned, n174 this exclusion inflates our confession rate substantially from 33% to 42%, the starting point for Professor Thomas's calculations. n175 But here Thomas is quite clearly comparing apples to oranges. So far as we can tell, *all* of the pre-*Miranda* studies included suspects who were not questioned in the sample from which their confession rates were determined. n176 Thus, for purposes of comparing our confession rate to pre-*Miranda* rates, all of his calculations start from a base line that is far too high. n177

In a last attempt to show that our 33.3% incriminating statement rate is too low, Professor Thomas points to other recent studies. However, our incriminating statement rate fits comfortably with this data. In particular, a 1979 National Institute of Justice study of Jacksonville, Florida and San Diego, California, reported confession rates of 32.9% and 20.3% and, throwing in statements admitting being at the scene, overall statement [*876] rates of 51.3% and 36.6%. n178 A 1977 study of six cities reported a "confession" rate of 40.3% in all cases. n179 A study by Professor Leo in the California Bay Area reported an overall interrogation success rate of 63.8%. Because it is so much higher than all the other studies, Leo's figure seems anomalous. It turns out, as we explain in more detail in Appendix B, n180 that the figure is inflated (for purposes of comparing to other studies) because of three important factors: It includes only suspects who were in fact interrogated; it includes only interrogations performed in stationhouse custody; and it includes only interrogations by experienced detectives. n181 Adjusting for these factors produces an incriminating statement rate of 37.0%, not far from ours. Clearly, caution is appropriate in drawing conclusions from a single study. But because our confession rate and, properly read, all the other recently-reported confession rates fall well below the estimated pre-*Miranda* confession rate of 55%-60%, the inference that *Miranda* has depressed the confession rate seems quite reasonable.

d. Comparisons with Confession Rates in Other Countries

A different route to the same conclusion is to compare our success rate with rates in other countries that do not follow the *Miranda* requirements. The available evidence suggests that British and Canadian confession rates without *Miranda* are in excess of 60%, sometimes substantially [*877] so. n182 Comparing such rates to our 33.3% rate also suggests that the American *Miranda* rules have an inhibiting effect on suspects.

In his reply, Professor Thomas suggests that this methodology cannot be accepted because the United States, Britain, and Canada do not "share a core of relevant characteristics," at least in so far as police interrogation practices are concerned. n183 We thought agreement existed that these countries could be compared generally. With respect to criminal practices in general, Warren Court defenders have long trotted out comparative analysis when it served their purposes. n184 Similarly, Craig Bradley devotes much his recent book, *The Failure of the Criminal Procedure Revolution*, to comparing American practices to, among others, British and Canadian practices. n185 With respect to police questioning in particular, the instructiveness of comparative research often has been recognized. Professor Van Kessel, in perhaps the leading article on American and British interrogation practices concludes that "English and American systems have the same common core" which should allow for profitable comparisons. n186 This is not simply academic musing without grounding in the real world. The *Miranda* rules were created, in part, based on

overseas analogies. Chief Justice Warren's opinion argued that foreign jurisdictions [*878] followed comparable rules with no ill effects. n187 More recently, Justice O'Connor observed that "the learning of [England and certain other countries] was important to development of the initial *Miranda* rule. It therefore should be of equal importance in establishing the scope of the *Miranda* exclusionary rule today." n188

Professor Thomas amplifies his comparability concern with a list of purported differences between this country and Canada and Britain which must be "quantified and explained" before any foreign comparisons can be accepted. n189 This challenge leaves us feeling a little like Dorothy in the *Wizard of Oz*, who is told she must bring back the broomstick of the Wicked Witch of the West before her request will be considered. Just as the Wizard never thought Dorothy would return, we doubt whether Professor Thomas really expects us to be able to "quantify" such variables as America's allegedly "more skeptical attitude toward authority in general." n190 But let us take a stab at answering the one objection he raises that is subject to quantification: America's higher violent crime rate (and hence, given lower confession rates for violent crimes, n191 possibly lower confession rates overall). This should pose no obstacle for comparisons of confession rates studies. One need not hold constant the proportion of violent crimes overall, n192 but only the proportion of violent crimes in the confession study samples. Such an adjustment could not possibly begin to explain the substantially lower confession rate in Salt Lake County. Our questioning success rate for property crimes is 47%, n193 well below that reported in British and Canadian studies including both property and violent crimes. This suggests that, far from remaining in a "steady state" after *Miranda*, the American confession rate has fallen.

[*879] It is important, however, to make one final point about Thomas's "steady-state" hypothesis. Despite the billing, it is not a "steady-state" theory at all. Instead, Professor Thomas concedes that data from our study and other sources support the conclusion that after *Miranda* "more suspects invoke their right to remain silent," resulting in some lost confessions among this group. n194 In Thomas's view, however, the overall confession rate has remained the same because, among the remaining suspects, more make incriminating statements than before *Miranda*. n195 This is no simple "steady state" theory. Instead, truth in labeling would suggest a different moniker: the "more-invocations-offset-by-more-incriminating-statements" theory.

Unpacked in this fashion, a problem emerges: If lost confessions result because more suspects invoke after *Miranda*, then a true "steady-state" theory would suggest fewer confessions -- unless someone can demonstrate the offsetting more-incriminating-statements part of the equation. Here the burden of proof quite clearly rests on Professor Thomas, and he candidly admits that he has not proven his theory. n196 Moreover, the causal mechanism for this offset would be a curious one. Thomas suggests that *Miranda* created an "incentive to tell more of the truth. The *Miranda* warnings might make suspects believe they can avoid being prosecuted only if they tell a story close enough to the truth that the police will be fooled into letting them go. But those stories will often turn into incriminating statements." n197 Proving this unique theory will, we think, require empirical proof that seems unlikely to develop. The specific data to date on this point seem to undercut Thomas's theory, not support it. n198 And, while academics and researchers have been exploring why suspects confess for some time, no one has heretofore suggested that the "incentive to tell more of the truth" is a significant factor. n199

A true "steady-state" theory, therefore, supports our conclusion: Because *Miranda* prevents police from obtaining some confessions (through [*880] its waiver and questioning cut-off rules), police obtain fewer confessions overall.

4. Other Results from Interrogations

Our data also suggest that interrogation is useful for law enforcement for collateral reasons other than obtaining incriminating statements. n200 Of suspects questioned, 13.9% gave "other information" that was useful to law enforcement, n201 a figure that likely understates the true extent of the ancillary results police derive from questioning. n202

Our data on collateral purposes for interrogation shed light on a subject that has been generating great academic commentary of late -- the extent to which police officers question suspects to obtain "fruits" of crimes. Professor Yale

Kamisar, in a recently published debate with Professor Akhil Reed Amar and Renee B. Lettow, appears to argue that "a principal purpose -- if not the primary purpose -- of interrogation is to obtain information such as the location of physical evidence." n203 The notion that a secondary purpose of interrogation (finding fruits) would be more important to police than the primary purpose (obtaining incriminating statements) seems questionable, and we found no evidence to support it. n204 Examining the cases involving "other information," police rarely [*881] obtained incriminating fruits. The most common type of other information (found in five cases) was a statement implicating an accomplice. n205 In three cases, police recovered stolen property as the result of interrogation, but their primary concern seemed to have been restitution for victims rather than building cases for prosecution. In two cases, the police recovered a weapon through interrogation, although even here it is not clear if the primary police motivation was to strengthen a case against the interrogated suspect with this fruit. n206 In view of this data, it seems hard to argue that finding fruits is a "principal" purpose of interrogation.

B. Questioning Inside and Outside the *Miranda* Regime

One question that has not been the subject of any substantial empirical research is the extent to which police questioning falls inside or outside the *Miranda* regime and whether this makes any difference to ultimate outcomes. This section reviews various types of police questioning not covered by *Miranda*, specifically noncustodial questioning and public safety questioning. It also discusses volunteered statements that police obtain without questioning.

1. Noncustodial Questioning

The *Miranda* rules cover only "custodial" interrogation. n207 Evidence suggests that police have adjusted to *Miranda* by shifting to noncustodial "interviews" to skirt *Miranda*'s requirements. n208 In talking to police officers, the researchers found some anecdotal evidence supporting this view. In a few screenings, officers (mostly from one large department) referred to giving suspects a "*Beheler*" warning, as in "I gave him *Beheler*." This is a reference to the Supreme Court's decision in *California v. Beheler*, n209 which held that a suspect was not in custody when he "voluntarily agreed to accompany police to the station house [and] the [*882] police specifically told [him] that he was not under arrest." n210 Drawn from this case, the *Beheler* warning consists of telling a suspect that he is not under arrest and is free to leave during the "interview." This sophisticated approach suggests that at least some police forces know the difference between custodial and noncustodial interrogations and structure their investigations accordingly.

On the other hand, in a few cases in our sample it appeared that officers *Mirandized* when not required to do so. One department, the Special Victims Unit (which handled primarily sex offenses), apparently had a policy of *Mirandizing* every noncustodial interviewee. n211 One possible reason was provided by a prosecutor: "It doesn't hurt with our Supreme Court, because they may well find it to be custodial setting where no other reasonable person would find it to be custody." The prosecutor's observation has a basis in the Utah case law. In a muddled series of opinions, the Utah Supreme Court has possibly held that the standards for determining "custody" in Utah are more defendant-protective than under federal law. n212

To date, no one has quantified how often police interview in noncustodial settings. n213 In our sample, 69.9% of the interviews were [*883] custodial while 30.1% were noncustodial. n214 Of the noncustodial interviews, 40.3% were at the scene, 26.9% were field investigations, and 32.7% were arranged interviews (that is, interviews where police officers had previously contacted the suspects to set up an interview time). n215

Even if police are able to avoid *Miranda*'s requirements by conducting various noncustodial interviews, the question would remain whether such interviews are less effective in obtaining incriminating information. We found that police were less successful in noncustodial interviews, as noted in Table 6 n216 -- a result that was statistically significant. n217 One hypothesis to account for this difference might be that police officers more frequently question suspects in custody for presumptively more dangerous crimes of violence and therefore might try harder to get a confession. n218 In our sample, however, property offenders were slightly more likely to be interviewed in custody: 72.5% of the interviews with property suspects were in custody as compared to 66.2% of the interviews with violent

suspects. n219

Table 6 -- Questioning Result by Custodial Status

Kind of Questioning	Questioning Successful		Questioning Unsuccessful		Total	
	No.	%	No.	%	No.	%
Custodial	58	56.9%	44	43.1%	102	100.0%
Noncustodial	15	30.0%	35	70.0%	50	100.0%
Total	73	47.7%	79	51.6%	152	100.0%

[*884] An interesting side note is a technique used by some detectives for speedy noncustodial interviews. In six cases in our sample, the investigating detective simply called the suspect on the telephone -- a clearly noncustodial interview! Setting aside one anomalous interview involving an innocent suspect, n220 in two of the remaining five cases the detective succeeded in obtaining a verbal confession. Indeed, in one case, the detective not only obtained a confession but even convinced the suspect in Oregon to come back to Utah and surrender himself. All of the telephone interviews involved property crimes, especially small thefts and larcenies. Why do detectives resort to mere telephone interviews? One detective said, "I make telephone interviews whenever I can. I'm way too busy to talk to them in person."

A conclusion that might be drawn from our data is that police have adapted to *Miranda* to some extent by shifting to noncustodial interviews. However, the value of that tactic appears to be mitigated by the lower success rates of noncustodial interviews. Also, the very fact that police have tried to shift suggests, contrary to the view of some defenders of *Miranda*, n221 that interrogating police officers believe the *Miranda* rules are harmful to their efforts.

2. Public Safety Questioning

In various decisions since 1966, the Supreme Court has created exceptions to the *Miranda* doctrine. Critics of these decisions have suggested that the exceptions dramatically scale back the *Miranda* regime. n222 For example, after the Court's 1984 decision recognizing a "public safety" exception to *Miranda*'s requirements, n223 articles proclaimed the "dissolution" of *Miranda* n224 because the exception "carv[ed] a gaping hole." n225

[*885] We made an effort to determine the extent to which such exceptions play a part in everyday law enforcement. With respect to public safety questioning, only one of 173 suspects was even arguably questioned without *Miranda* warnings in such circumstances, and even that case probably did not fall under the *Miranda* requirements. n226 The Court also recently held that "routine booking" questions were not subject to the *Miranda* requirements. n227 Our sample contained no instances of statements being obtained through such questioning. This finding that the *Miranda* exceptions are rarely used n228 supports the suggestion made elsewhere that *Miranda* has not been modified in ways likely to result in significantly more successful police questioning. n229

3. Volunteered Statements

Another way in which police officers obtain statements outside the *Miranda* requirements is from suspects "volunteering" incriminating information. In *Miranda* itself, the Court held that "volunteered statements of any kind are not barred by the Fifth Amendment . . . ." n230 Suspects who volunteer statements, even without the benefit of *Miranda* warnings or waivers, can find those statements used against them in court. n231

In our study, 19 of 217 of suspects (8.8%) volunteered statements without any prompting or questioning by the officers. Thirteen of these suspects volunteered incriminating information (four verbal confessions and five incriminating statements), while an additional six volunteered denials of some type. Perhaps the most interesting aspect of these unbidden statements is that, for nine of the thirteen suspects, the volunteered statement was the only

incriminating statement available to police. In one case, for [*886] example, police saw a person throwing rocks at a window. They chased him and saw him throw something into some bushes. After police caught the suspect, they found a gun in the bushes. On his way to the station, the suspect received his *Miranda* rights and invoked them. Later the suspect volunteered that he had bought the gun on the streets and was carrying it for his protection. He was charged with carrying a concealed weapon.

What made the thirteen suspects volunteer incriminating statements to police? While our small numbers make meaningful statistical significance tests impossible, it appeared these volunteered statements might be associated with three factors: strong evidence, violent crimes, and prior criminal records. Turning first to strength of the evidence, of the thirteen suspects volunteering incriminating statements, we had data on the strength of the evidence for nine. n232 For eight of these nine, the strength of the evidence was strong or overwhelming -- a good indication that the suspects thought they had nothing to lose from volunteering information. Turning next to violent versus property crimes, ten of the thirteen suspects (76.9%) volunteering incriminating statements were involved with violent crimes (as compared to 41.6% involved with violent crimes in the overall sample). n233 Finally, ten of the thirteen suspects (76.9%) volunteering incriminating statements had prior criminal records (as compared to 69.1% in the overall sample). n234

One interesting aspect of volunteered statements is that some suspects who invoked their rights had a hard time remaining quiet. We found six suspects who invoked their rights at some point during the questioning also volunteered statements to police. Three of these suspects invoked their rights immediately after being read explanations of *Miranda* and later voluntarily gave one sentence statements to police explaining their behavior. n235 In one case, the suspect volunteered a denial with explanation even before *Miranda* was read; he then received his *Miranda* rights, gave a brief denial with explanation, and invoked his rights. In the final two cases, the suspects invoked their *Miranda* rights during the interviews and subsequently gave volunteered statements to police that matched the information they gave before invoking.

[*887] Suspects who were unsuccessfully questioned but later volunteered incriminating statements presented a categorization issue for us: Should they be treated as "successful" or "unsuccessful" outcomes to police questioning? Because our study was designed to answer questions about police questioning, we followed the latter course and categorized these suspects by what happened during questioning, not by what they volunteered. We were fortified in this view by the fact that the volunteered statements were generally viewed as unimportant in the processing of the cases -- in seven of these nine cases the statements were regarded as either unnecessary or relatively unimportant. n236 Because others might disagree with this categorization, we have also included as Appendix C to this Article a list of the cases involving volunteered statements and the important factors associated with them. This will allow anyone unsatisfied with our categorization to assess what difference it makes. We have also highlighted the difference that this categorization makes in a few places where it seemed particularly salient. n237

C. Police Compliance with *Miranda*

A critical question about the *Miranda* rules is whether police obey them. The empirical evidence from the late 1960s suggests that, at least immediately following *Miranda*, police compliance varied widely. n238 Although little research has been conducted since then, the prevailing view now seems to be that police adhere to the *Miranda* requirements. n239 This section sets forth the evidence we gathered on this issue, which supports the same conclusion.

[*888] 1. Researcher Impressions of Police Compliance

The qualitative impression of the researchers was that police almost always followed the *Miranda* requirements. n240 It appeared that officers generally read *Miranda* warnings and waivers from a card. n241 For example, Salt Lake City police carry a laminated card which reads:

(Front side)

Miranda Warning

1. You have the right to remain silent.

2. Anything you say can and will be used against you in a court of law.

3. You have the right to talk to a lawyer and have him present with you while you are being questioned.

4. If you cannot afford to hire a lawyer, one will be appointed to represent you before you answer any questions, if you wish.

5. If you wish to answer questions now without contacting a lawyer or without a lawyer present, you have the right to stop answering questions at any time. n242

[*889] (Back side)

Waiver

After the warning and in order to secure a waiver, the following questions should be asked and an affirmative reply secured to each question.

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

2. Having these rights in mind, do you wish to talk to us now?

Although the researchers were instructed to pay close attention to identifying possible *Miranda* violations, at most three arguable cases of noncompliance (out of a sample of 173 questionings) were discovered, with only one case of clear noncompliance.

The only clear case of *Miranda* noncompliance involved a suspect who stole a $ 300 trailer. He was arrested by an inexperienced police officer, who questioned the suspect at the scene without reading him *Miranda* warnings. The suspect denied having stolen the trailer, claiming he had bought it. This outcome made the probable *Miranda* violation a moot point because there was no incriminating information for the prosecution to use. The suspect later pled guilty to a misdemeanor theft charge.

Turning next to the two arguable cases of noncompliance, one suspect equivocated a bit before waiving his rights. A suppression motion was filed, and the court found the waiver valid. In another case, a suspect said he did not want to invoke his *Miranda* rights but also did not want to talk "in formal terms." Police continued to talk to him (presumably "informally"), and he admitted his involvement with a stolen social security check. No charges were filed because the government had been reimbursed. Our data thus support the emerging consensus that police play by the *Miranda* rules.

2. Motions to Suppress

Because our study rests on information gathered at police-prosecutor screening sessions, one might argue that our methodology would automatically miss information about police misconduct. After all, cops and [*890] prosecutors are not likely to swiftly admit wrongdoing, particularly in the presence of an outside researcher. But our initial impression of police compliance was confirmed by the later paucity of motions to suppress the statements police obtained. Previous studies have found that motions to suppress under *Miranda* are rare and successful motions even rarer. n243

In our sample, of cases in which police obtained incriminating statements and charges were filed, defendants filed

suppression motions in 4.8%. n244 All three of the suppression motions alleged only that police committed a technical *Miranda* violation, not that they coerced an "involuntary" confession under more general Fifth Amendment doctrine. n245 The allegations involved disputes over when *Miranda* "custody" began, n246 with one dispute also involving the validity of the waiver. n247 All three motions were denied. Our data thus support earlier findings that successful *Miranda* suppression motions are rare. n248

[*891] 3. Length and Timing of Questioning

Another way of examining police conduct is to review the length of police interrogation. It might be that police obtain confessions only by protracted questioning. n249 There is very limited American data on how long interrogations last. The 1960 study of two California cities found that most interrogations by detectives lasted less than an hour. n250 The 1967 Vera Institute Study in Manhattan found that 95% of the interrogations (all of which were recorded) took less than twenty minutes. n251 The 1993 Bay Area study found that most interrogations lasted less than an hour. n252

To gather data on length of questioning, the researchers asked the officer screening the case to estimate how long the questioning of a suspect lasted. Because the officers were estimating interrogation length, our data on this point should be considered particularly "soft." n253 Nonetheless, as shown in Table 7, most suspects appear to have been questioned only thirty minutes or less. Table 7 also reveals a very modest (statistically insignificant) correlation between length of questioning and questioning success. n254 However, in all likelihood, an interrogation involving a confession or incriminating statement takes longer than an interrogation where the suspect has little to say. Even with a statistically significant association, it would be difficult to say that lengthy interrogations produce confessions. In fact, causality might run the other way -- confessions might produce lengthy interrogations. [*892]

Table 7 -- Questioning Result by Length of Questioning

(N = 173; 87 unavailable)

Length of Questioning	Questioning Successful		Questioning Unsuccessful		Total	
	No.	%	No.	%	No.	%
</= 5 Minutes	6	33.3%	12	66.7%	18	100.0%
6-10 Minutes	11	40.7%	16	59.3%	27	100.0%
11-15 Minutes	5	62.5%	3	37.5%	8	100.0%
16-30 Minutes	15	68.2%	7	31.8%	22	100.0%
31-60 Minutes	4	40.0%	6	60.0%	10	100.0%
> 60 Minutes	1	100.0%	0	0.0%	1	100.0%
Total	42	48.8%	44	51.2%	86	100.0%

One point from the data seems unassailable, however. The overwhelming majority of interrogations are quite limited in duration. Of eighty-six interrogations for which data were available, only eleven extended beyond thirty minutes and only one of these extended beyond an hour. This suggests that extended incommunicado questioning is exceedingly rare, if it exists at all.

To get another handle on interrogation coerciveness, we also collected data on the times of the day when police questioned suspects. For cases in which data were available, n255 most interrogations occurred during the daytime. There was no obvious pattern between late night interrogation and interrogation success.

D. Factors Bearing on the Success of Questioning

While the confession literature contains much speculation about variables that might relate to police success in questioning, surprisingly [*893] little hard data exist. This subpart reviews several factors that might be thought to make a difference to police success.

1. Strength of the Evidence

One hypothesis is that police are more likely to obtain a confession when they have considerable evidence against a suspect. A correlation between the evidence the police have and their success in interrogations has been reported in the one American study on this point. n256 Suspects confronted with significant evidence against them presumably see little reason for denying the allegations. n257

We found a relation between strength of the evidence and successful questioning in our survey. We collected data on the strength of the evidence against the suspect at the time of the questioning. The researchers classified the strength of the evidence as "overwhelming," "strong," "moderate," "weak," or "nonexistent" based on their overall assessment of the case. The police were more successful as the evidence strengthened, as shown in Table 8. n258 This may explain why police frequently confront suspects with the evidence against them. The 1993 Bay Area study found that police did this in 85% of all cases, making it the most common interrogation tactic (other than appealing to a suspect's self interest). n259 The 1967 Vera study in Manhattan found that police [*894] confront suspects with the available evidence with "great frequency." n260 Our data suggest that this tactic is a successful one. n261

Table 8 -- Questioning Result by Strength of Evidence

(N = 173; 30 unavailable)

Strength of Evidence	Invoked Rights		Questioning Successful		Questioning Unsuccessful		Total	
	No.	%	No.	%	No.	%	No.	%
Overwhelm.	3	33.3%	5	55.6%	1	11.1%	9	100%
Strong	12	16.7%	34	47.2%	26	36.1%	72	100%
Moderate	4	9.3%	18	41.9%	21	48.8%	43	100%
Weak	0	0.0%	5	26.3%	14	73.7%	19	100%
Total	19	13.3%	62	43.4%	62	43.4%	143	100%

Our data also suggest a complicating issue for Professor Thomas's hypothesis that "how much the police think they need a confession" is an important factor in explaining whether a confession is obtained. n262 If such an effect exists, its empirical confirmation may be obscured by the fact that suspects confess more often when the evidence is overwhelmingly against them. Disentangling these two effects promises to be quite difficult.

[*895] 2. Prior Criminal Record

Frequently it is argued that suspects who are wise to the ways of the system are less likely to confess. n263 The available empirical evidence, mostly from the 1960s, supports this hypothesis. n264

To test this hypothesis, we gathered data on suspects' criminal records. For our purposes, we defined a "criminal record" as a previous adult arrest, including a misdemeanor arrest. A prior arrest probably, though not necessarily, meant that a suspect had previously received *Miranda* warnings. The alternative measure of criminal record -- previous conviction -- was impractical because of the difficulties in collecting such data. n265

Our survey found that suspects with a prior criminal record were slightly more likely to invoke their *Miranda* rights, as shown in Table 9, although the small sample size means the result is not statistically significant. n266 As to those who did not invoke, there was virtually no difference in whether police were successful. One possible way of

reconciling our failure to find any prior record effect with contrary studies is our definition of "criminal record," which included misdemeanor arrests that might not have involved delivery of the *Miranda* warnings. As a result, it is possible [*896] our "prior record" category was too expansive to capture the effect of a serious criminal record. n267

Table 9 -- Questioning Result by Prior Record

(N = 173; 8 unavailable)

Prior Record	Invoked Rights		Questioning Successful		Questioning Unsuccessful		Total	
	No.	%	No.	%	No.	%	No.	%
Record	16	14.0%	49	43.0%	49	43.0%	114	100.0%
None	5	9.8%	22	43.1%	24	47.1%	51	100.0%
Total	21	12.7%	71	43.0%	73	44.2%	165	100.0%

3. Recording

A pressing question in the debate over *Miranda* is whether the recording of interrogations affects the confession rate. Several commentators have argued that *Miranda* should be largely replaced by a requirement that police audiotape or videotape interrogations. n268 Others have argued that *Miranda* should not be replaced, but rather supplemented by such a rule. n269 Such proposals have received relatively little attention, however, because of concerns from law enforcement agencies that a recording would inhibit suspects. n270

The available empirical evidence on whether taping affects suspects is quite limited. A massive 1993 National Institute of Justice study of [*897] police videotaping reported only qualitative assessments of this issue. n271 Of the police agencies surveyed (which selectively videotaped interrogations), 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. n272 While these figures suggest that videotaping was not deleterious to questioning efforts, the study did not report any hard numbers on suspects' willingness to talk.

The only published American data on suspects' volubility while being taped come from the 1967 Vera Institute study in Manhattan. The study compared audiotaped police interrogations in one New York City precinct with standard interrogations in other comparable precincts. Police obtained more admissions in the taped interrogations. n273 Studies from Britain and Canada also suggest that videotaping does not harm confession rates. n274 However, a study from Tasmania, Australia concluded that taping was an "inhibiting factor in the interrogation of suspects." n275 Based on the Tasmanian study, the leading American police interrogation manual recommends *against* taping interrogations. n276

To shed light on the controversy over taping, we collected data on whether interviews were recorded. Some police agencies in Salt Lake County record interrogations, although the decision of when to record is left to the discretion of the individual officer. n277

[*898] Our data suggest that recording does not inhibit confessions. Table 10 shows that officers obtained statements as frequently when the interviews were recorded than when they were not. n278 It should be noted that our data on recording do not come from a "controlled" sample -- that is, the cases in the recording category may not have been randomly distributed. It is possible that police agencies more often tape interviews in cases involving particular types of crimes n279 or victims, n280 and that this biased the percentage of "successful" outcomes we observed in the recording category. In particular, it may be possible that the police particularly wanted confessions in the cases that they were taping. If police are more often successful when interrogating seriously, as Professor Thomas suggests, n281 and if police more often tape interrogations when they are serious, then our methodology could produce a spurious correlation between recording and interrogation success. At the very least, however, our data provide no support for the

suggestion that recording inhibits suspects.

Table 10 -- Effect of Recording on Questioning

(N = 173; 31 unavailable)

Questioning Recorded?	Invoked Rights		Questioning Successful		Questioning Unsuccessful		Total	
	No.	%	No.	%	No.	%	No.	%
Yes	1	5.0%	12	60.0%	8	40.0%	20	100.0%
No	19	15.6%	55	45.1%	67	54.9%	122	100.0%
Total	20	14.1%	67	47.2%	75	52.8%	142	100.0%

[*899] To our knowledge, no one has published data on whether the recording of interrogations increases the likelihood of suspects' invoking their rights. It is plausible that the recording equipment itself could serve as a reminder to the suspect that statements could be used again later, and would therefore inhibit the suspect from talking at all. The effect of recording on invocations is also shown in Table 10. Again, we found nothing suggesting that recording has an inhibiting effect. n282

The fact that outcomes of recorded interrogations look about the same as unrecorded interrogations has an important implication about police perjury. If misrepresentations about obtaining waivers and confessions are widespread, one would expect to find different results when police actions are recorded. n283 Our data suggest, therefore, that police do not lie with any frequency about obtaining waivers or confessions, contrary to intimations to that effect advanced by some academics. n284

4. Gender and Race

One relatively unexplored subject is whether gender or race produce any differences in confession rates. Turning first to gender, to our knowledge, there is no existing American data on whether gender plays any role in interrogation outcomes. n285 While some police investigators have suggested that women are harder to question successfully, n286 we found a trend suggesting that women were more likely to confess, as shown in Table [*900] 11, although the small number of women in our sample renders the result statistically insignificant at the conventional level. n287

Table 11 -- Questioning Result by Gender

Gender	Invoked Rights		Questioning Successful		Questioning Unsuccessful		Total	
	No.	%	No.	%	No.	%	No.	%
Male	18	12.0%	60	40.0%	72	48.0%	150	100.0%
Female	3	13.0%	13	56.5%	7	30.4%	23	100.0%
Total	21	12.1%	73	42.2%	79	45.7%	173	100.0%

Turning next to race, only limited research has been done. In 1967 the New Haven study found whites and African-Americans were equally likely to confess. n288 In 1969, the Denver study found that Spanish-Americans were more likely to make statements and give confessions than whites or African-Americans. n289 One British study found no racial difference in willingness to make statements. n290

Our data on race are shown in Table 12. Because most of the suspects in our sample were white, we have insufficient data to have a [*901] realistic chance of detecting any variations. Our limited data suggest no significant racial differences. n291

Table 12 -- Questioning Result by Race

(N = 173; 14 unavailable)

Race of Suspect	Invoked Rights		Questioning Successful		Questioning Unsuccessful		Total	
	No.	%	No.	%	No.	%	No.	%
White	14	13.0%	51	47.2%	43	39.8%	108	100.0%
Afr.-Am.	1	11.1%	3	33.3%	5	55.6%	9	100.0%
Hispanic	6	15.8%	15	39.5%	17	44.7%	38	100.0%
Other	0	0.0%	2	50.0%	2	50.0%	4	100.0%
Total	21	13.2%	71	44.7%	67	42.1%	159	100.0%

5. Patrol Officers and Detectives

One other factor that might bear on the success of interrogation is the type of officer who interrogates. It might be that those most familiar with interrogation tactics are more successful. Some data suggesting this conclusion comes from a National Institute of Justice study, which found that in both Jacksonville, Florida and San Diego, California, detectives obtained a higher percentage of confessions than did patrol officers. n292

In Salt Lake County, both patrol officers and detectives interview suspects. Patrol officers generally handle the questioning of arrested suspects for less serious felonies. Detectives generally handle the questioning of suspects for more serious crimes and for crimes involving investigation. In a "jail case" (a case in which the suspect is being held in jail), detectives will typically move quickly to interview a suspect before arraignment and the assignment of counsel. In other cases, detectives may move more slowly.

[*902] We found that detectives were more successful at obtaining statements than were patrol officers, as shown in Table 13. n293 One possible interpretation of this data is that detectives are more skilled in interrogation techniques and are, accordingly, more successful in questioning. An alternative explanation for our finding is that detectives typically interview suspects at a different point in the process from patrol officers. Detectives might be more likely to interview a suspect in custody than a street officer would. Since custodial interviews are more often successful, n294 this might explain our finding. To test this hypothesis, we compared success rate by type of officer, limited to custodial interrogations only. n295 Controlling for this difference by examining custodial interrogations only, the trend toward greater detective success remained, but the result was not statistically significant (perhaps because of the smaller sample size). n296

Table 13 -- Questioning Result by Officer Type

Officer	Invoked Rights		Questioning Successful		Questioning Unsuccessful		Total	
	No.	%	No.	%	No.	%	No.	%
Patrol	11	13.8%	25	31.3%	44	55.0%	80	100.0%
Detective	10	11.0%	47	51.6%	34	37.4%	91	100.0%
Other	0	0.0%	1	50.0%	1	50.0%	2	100.0%
Total	21	12.1%	73	42.2%	79	45.7%	173	100.0%

[*903] 6. Multiple Interviews

One other factor that might bear on police success was whether a suspect was questioned more than once. While this might seem like an obvious tactic, no research has been done in this country on the frequency of multiple interviews. n297

We found that police interviewed 9.2% of the questioned suspects in our sample (sixteen in all) more than once. n298 All sixteen suspects were given *Miranda* rights at some point. Fifteen of the sixteen suspects were charged with the crimes for which they were being questioned. n299

The most interesting aspect of the sixteen multiple interviews was their effect on police success in questioning. In four, the police obtained a better result in the second interview, n300 a finding that tends to corroborate Professor Thomas's suggestion that police interest in obtaining a confession is an important variable. Part of the success in later interviews might be attributed to different questioners: Often the original interrogator was a patrol officer, while the second, more successful interrogator was a detective. n301 In seven multiple interviews, the second interview did not [*904] change the result of the first. n302 In one instance, the second interview actually yielded a poorer result. In this particular case, the suspect provided incriminating statements to the police in the first, non-custodial (and thus non-*Mirandized*) interview. During the second, custodial interview, the suspect received *Miranda* warnings and gave a denial with explanation. Finally, four of the suspects invoked their *Miranda* rights to preclude questioning during a second interview. n303

To determine what kinds of cases might prompt police to conduct a second interview, we examined whether multiple interviews were more often found for crimes of violence or for suspects with criminal records. The percentages of multiple interviews in these categories corresponded almost exactly to the overall percentages in our sample.

Finally, we found no suggestion that police have used multiple interviews to circumvent *Miranda's* requirements. This theoretical possibility arises because of the Supreme Court's ruling in *Oregon v. Elstad*, n304 which held that where police first obtained a confession from a suspect in violation of *Miranda* and then followed it up with a properly *Mirandized* confession, the second confession was admissible. Academic critics of the decision argued that it gave police "the power to reduce *Miranda* to a virtual nullity by routinely withholding the warnings until after the suspect gives the desired information." n305 In none of our cases did police employ this tactic.

E. Confessions and the Outcomes of Criminal Prosecutions

In the ongoing debate over *Miranda*, a critical issue is whether confessions are important in determining the outcome of criminal cases. In the *Miranda* opinion itself, the Court stated in vague terms that there had [*905] been "overstatement of the 'need' for confessions." n306 Since then, critics of *Miranda* have responded that confessions are often necessary to convict criminals; defenders of the decision respond that confessions are only rarely needed. n307

To shed light on this debate, we collected data on confession importance in three ways. First, we asked prosecutors for their assessment of the importance of confessions. Second, we evaluated whether confessions affected prosecutors' decisions to file charges. Finally, we quantified the effect of confessions on the ultimate outcomes of cases that were filed. Each of these measures suggested that confessions play a significant role in obtaining convictions.

1. Prosecutors' Assessments of Confession Importance

Some limited empirical work on the question of importance of confessions is available, with studies suggesting that confessions are needed to convict in about 23 to 26% of criminal cases, n308 although some have argued for a lower figure. n309 A possible flaw in these earlier studies is that they have generally rested on academic assessments of the utility of confessions to criminal prosecutions. It might be argued that professors underpredict how often confessions are needed to see a case through to conviction in the hurly-burly world of criminal prosecutions. It is interesting that in the two studies reporting police assessment of confession importance along with academic assessment, the police thought confessions were [*906] more often needed. n310 Also, much of the data on confession importance are now

quite dated. In view of the suggestions that the criminal justice system today is more hostile to police and prosecutors, n311 research into the role of confessions is even more imperative.

To obtain an assessment of confession importance, we decided to ask prosecutors directly. After all, prosecutors are perhaps in the best position to know how confessions affect the prosecution of criminal cases. To collect our data, at the conclusion of a screening involving statements from a suspect, the researcher asked the screening prosecutor: "What role (if any) do you think the confession/statement will play in obtaining a conviction?" n312 Using terminology from the *Yale Law Journal* study of interrogations, n313 the researcher asked the prosecutor to categorize the statements as "essential," "important," "not important," or "not necessary." Following the *Yale Law Journal*, responses in the first two categories were combined into an interrogation "necessary" category while the last two were combined into an interrogation "unnecessary" category.

Our data on the importance of confessions appear in Table 14. n314 As can be seen, in 61.0% of cases with incriminating statements the prosecutors identified the statements as necessary for conviction, that is, as either essential or important in obtaining a favorable outcome. This figure is considerably higher than figures provided in other studies, which supports either (or both) of the hypotheses advanced earlier: that those familiar with the vagaries of the criminal justice system think confessions are more important than academics, and that the difficulty of obtaining convictions in the criminal justice system has increased in recent decades. [*907]

Table 14 -- Importance of Confessions

(N=73; 14 unavailable)

	No.	%
NECESSARY	36	61.0%
Essential	13	22.0%
Important	23	39.0%
NOT NECESSARY	23	39.0%
Relatively Unimportant	21	35.6%
Unnecessary	2	3.4%
TOTAL	59	100.0%

2. Relation of Confessions to Filing Charges

To see whether the prosecutors' overall assessments of the importance of confessions were accurate, we also gathered quantitative information on the effect of confessions on the processing of criminal cases. The first opportunity for a confession to influence the disposition of a criminal case is the prosecutor's decision whether to even file charges. While prosecutorial charging decisions are widely recognized as a critical juncture in the criminal justice process, n315 American research on the relationship between interrogation outcome and the filing of criminal charges is quite limited. n316

[*908] We found prosecutors were more likely to file charges in cases in which they had incriminating statements, as shown in Table 15. Prosecutors filed charges in 87.5% of the cases in which they had such statements, as compared to 81.0% when suspects invoked their rights, 78.3% when suspects were not questioned, and 74.0% when questioning was unsuccessful. n317 Our study may miss some of the effects of incriminating statements on charging. We assessed only the effect of confessions on the prosecutor's decision of *whether* to file charges, not on the decision of *what* charges to file. It is possible that the absence of a confession in a case led prosecutors to file reduced charges.

Table 15 -- Relation of Statements to Filing Charges

(N=219; 3 unavailable)

Questioning Result	Whether Charges Filed					
	Filed		Not Filed		Total	
	No.	%	No.	%	No.	%
Invoked Rights	17	81.0%	4	19.0%	21	100.0%
Questioning Successful	63	87.5%	9	12.5%	72	100.0%
Questioning Unsuccessful	57	74.0%	20	26.0%	77	100.0%
Never Questioned	36	78.3%	10	21.7%	46	100.0%
Total	173	80.1%	43	19.9%	216	100.0%

[*909] Our finding that confessions affect the decision to charge has an important implication for the debate about *Miranda's* effects. Some scholars have argued that *Miranda* had no adverse effect on law enforcement because, it is said, conviction rates did not decline after *Miranda*. n318 In response, it has been argued that prosecutors would screen out cases weakened by *Miranda* before filing charges, which would preclude any finding of a conviction rate decline. n319 Our findings support the response, suggesting that prosecutorial screening may mask *Miranda's* adverse effects on conviction rates.

3. Relation of Confessions to Ultimate Outcomes

Intuitively one would think that confessions would have a profound effect on processing of the criminal cases. After all, a confession is powerful evidence of guilt that would allow prosecutors to force favorable dispositions to such cases. The limited previous research on this subject suggests this conclusion. n320

Our data support the intuition. Defendants who confessed were more likely to be convicted -- and more likely to be convicted of more serious charges -- than those who did not. n321

Before turning to our specific data, it is important to explain the various possible outcomes to criminal cases in Salt Lake County. A case could go to trial, where a defendant would be convicted or acquitted. But, as is probably true in most jurisdictions in this country, most cases in our sample were resolved before trial in various ways. Prosecutors could dismiss charges before trial, the most favorable outcome for a defendant. The next most favorable pre-trial outcome for a defendant is to enter a plea in abeyance. Under such a plea, a defendant enters a plea of guilty, but [*910] charges are dropped if the defendant does not commit any new criminal offenses within a set period of time. n322

Other pre-trial outcomes involve plea bargains, which hinge on the offense penalty structure. Utah follows the typical approach of dividing felonies into various classes: first degree, second degree, and third degree. n323 Each class of offense is associated with a possible penalty range. n324 Utah follows an essentially indeterminate sentencing scheme, under which actual sentences within the penalty range are determined by a parole board. n325 Defendants convicted on multiple counts generally serve concurrent sentences.

As a result of this penalty structure, the level of the offense of conviction -- not the number of convictions -- is the primary concern in plea bargaining. Although the District Attorney's Office has no hard-and-fast plea bargaining guidelines, n326 a common plea offer in an otherwise unexceptional case was to reduce the charges by one level. For example, a prosecutor might offer a defendant charged with burglarizing a dwelling (a second degree felony) a plea

bargain to burglarizing a building (a third degree felony). n327

[*911] For plea bargains, we categorized the outcome based on the relation between the level of the most serious charge filed against a defendant and the level of the most serious charge to which he pled guilty. For example, a plea to a charge reduced from a first degree to a second degree felony was classified as a "Plea-1," to a third degree felony as "Plea-2," and so on. Other researchers studying plea bargaining have adopted similar approaches. n328

With this terminology in mind, the effect of questioning success on ultimate outcomes is shown in Table 16. Defendants whom police successfully questioned were less likely to receive concessions in plea bargaining. Of suspects whom police successfully questioned, 30.6% pled to charges at the same level as 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. n329 Along the same lines, defendants whom police successfully questioned were generally less likely to have charges dropped. Of suspects whom police successfully questioned, 9.6% either had charges dismissed or entered pleas in abeyance, as compared to 7.7% for suspects who invoked, 30.2% for suspects unsuccessfully questioned, and 21.6% for suspects not questioned. n330 It is also interesting that three of the five trials in our sample involved suspects for whom questioning was unsuccessful. n331

Table 16 -- Relation of Statements to Outcomes

(N=172; 12 unavailable)

Result of Questioning	Outcomes							
	Dismissed		Abeyance		Plea-3		Plea-2	
	No.	%	No.	%	No.	%	No.	%
Invoked Rights	1	7.7%	0	0.0%	0	0.0%	1	7.7%
Questioning Successful	3	4.8%	3	4.8%	0	0.0%	5	8.1%
Questioning Unsuccessful	15	28.3%	1	1.9%	1	1.9%	8	15.1%
Not Questioned	6	16.2%	2	5.4%	1	2.7%	4	10.8%
Total	25	15.2%	6	3.6%	2	1.2%	18	10.9%

Table 16 -- Relation of Statements to Outcomes

(N=172; 12 unavailable)

Result of Questioning	Outcomes									
	Plea-1		Plea-0		Convicted		Acquitted		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%
Invoked Rights	9	69.2%	2	15.4%	0	0.0%	0	0.0%	13	100%
Questioning Successful	30	48.4%	19	30.6%	2	3.2%	0	0.0%	62	100%
Questioning Unsuccessful	20	37.7%	5	9.4%	2	3.8%	1	1.9%	53	100%
Not Questioned	20	54.1%	4	10.8%	0	0.0%	0	0.0%	37	100%
Total	79	47.9%	30	18.2%	4	2.4%	1	0.6%	165	100%

[*912] [*913] A subject of recent interest is the outcome of cases of suspects who invoked their rights. n332 The small number of suspects in our sample who invoked their *Miranda* rights makes it difficult to say much or report meaningful statistical significance tests about their dispositions compared to other categories of suspects. n333 Suspects who invoked their rights appeared to be less likely to be convicted as charged than suspects who gave incriminating statements (15.4% vs. 30.0%), although this result was not statistically significant. n334 Those who invoked also appeared less likely to have charges dismissed or to enter pleas in abeyance than those who were questioned unsuccessfully, although again this result lacked statistical significance. While this might indicate that those who invoke do not benefit from their invocations, an alternate explanation is possible. Although we did not have complete data on the criminal records of those who invoked their rights, it appeared that the records were generally substantial. n335 If prosecutors more aggressively prosecute those with serious criminal records (as seems likely n336), and if the suspects who invoke generally have more serious records, n337 then simply looking at the outcomes of those cases without controlling for criminal record may fail to discover any effect that the [*914] invocation of rights has in producing less successful prosecutions. n338 Because of our incomplete data on the seriousness of prior record, we could not analyze this issue.

A final way of assessing the importance of confessions to outcomes is to look at the difference in the overall conviction rate, comparing those who confessed with those who did not. This incorporates the effects of confessions on both the charging process and the adjudication process. As shown in Table 17, in our survey, when police successfully questioned a suspect, that suspect was likely to be convicted of some charge in 78.9% of the cases; when they unsuccessfully questioned a suspect, that suspect was likely to be convicted in only 49.3% of the cases. n339 The difference in the rates for successful versus unsuccessful questioning is therefore 29.6%. n340 Comparing suspects whom police successfully questioned with all other suspects (that is, adding those who invoked and those who were not questioned to those who were unsuccessfully questioned) the conviction difference is 22.2% (78.9% vs. 56.7%), a statistically significant difference. n341

[SEE TABLE IN ORIGINAL]

[*915] [*916] One question that might be asked about all these differentials is whether they are explained by the factual innocence of defendants, rather than the role of confessions. Presumably innocent defendants are both less likely to confess and less likely to be convicted. Studies on confessions almost invariably ignore this issue, simply assuming that the suspects were in fact guilty. n342

While exact quantification of guilt is impossible, it seems unlikely that innocent suspects make much difference in our figures. We had only one clear case of a suspect who was innocent. n343 This is unsurprising, as in cases of clear innocence, police would not be seeking to have prosecutors file charges. Indeed, our sample probably has fewer innocent suspects than other studies because we drew from cases that police had "pre-screened" for prosecutorial merit. n344 As to the other cases, it is perhaps enough to note the generally accepted wisdom that almost all defendants who are charged are in fact guilty. n345

In sum, our data suggest that police questioning plays an important role in the ultimate disposition of criminal cases.

IV. IMPLICATIONS FOR THE CONTINUING CONTROVERSY OVER *MIRANDA*

Although our survey presents data on many aspects of police interrogation, it still leaves many questions unanswered. Throughout we have highlighted questions that we think future researchers can profitably explore. On all of the subjects we investigated, it is possible that Salt Lake [*917] County might not be comparable to other jurisdictions. Moreover, our small sample size meant that we could detect only the most substantial variations in the way various factors affect questioning. Most of our findings are consistent with the limited earlier research, but we also report a few disparate results. n346 Further research in the area of police interrogation is the only way to illuminate these issues.

While our study has these limitations, it may be useful to generalize from our findings (coupled with other available research) to more universal conclusions about the on-going debate over *Miranda's* real world effects. n347 In recent cases, the Court has attempted to calibrate the *Miranda* rules by weighing costs and benefits. n348 Taken on these pragmatic terms, n349 it is fair to ask whether the Court's balance is the right one. To honestly answer that question requires empirical evidence of *Miranda's* effects -- evidence that our study begins to supply.

Turning first to society's interests, significant concern remains that *Miranda* has seriously hampered the prosecution and conviction of criminals. The frequency of confessions in our 1994 sample appears to be much lower than the frequencies in samples drawn before *Miranda*. Only 33.3% of all of the suspects in our sample gave incriminating statements; only 42.2% of the suspects who were questioned gave incriminating statements. n350 Of suspects asked for waivers of *Miranda* rights, 16.3% declined to give them, thereby completely preventing any police questioning, no matter how restrained or reasonable. n351 An indication that the possibility of invocations was a real concern to police was their shift in some cases to [*918] noncustodial interviews, which obviated the need to secure *Miranda* waivers but also appeared to reduce police success. n352

Our data also suggest that *Miranda's* lost confessions would not have gilded already golden prosecution cases. Rather, the absence of confessions appears to make an important difference in the real world processing of criminal cases. Our survey supports the conclusion that if police can obtain an incriminating statement from a suspect, that suspect is more likely to be convicted on more serious criminal charges. On the other side of the coin, if police are unsuccessful, it appears the suspect is more likely to "walk." n353

Further research on *Miranda's* costs is undoubtedly warranted. Perhaps the most pressing area is the frequency of confessions. On this point, our study suffers from a lack of pre-*Miranda* data in Salt Lake County. We can only infer by looking to other jurisdictions, both domestic and foreign, that our 33.3% confession rate is lower than prevailed before *Miranda*. To shed light on this question, it might be interesting to return to a jurisdiction where pre-*Miranda* data are available and see what the confession rate looks like today. But the general thrust of our study, reviewed in light of other data, n354 seems clear: *Miranda* imposes costs on society by reducing the number of confessions and, consequently, the success of criminal prosecutions.

Given these tangible costs, what compensating benefits has *Miranda* provided? Professor Thomas's approach to this issue is worth noting. Making a virtue out of vice, he concludes that any demonstrated adverse effect on confessions is evidence either that *Miranda* is needed to prevent unconstitutional coercion or to treat suspects equally. n355 In his view, a *Miranda*-induced drop in the confession rate simply means that coercion disappeared or that suspects who were previously unaware of their rights now had that information. But, respectfully, this view is too simple.

[*919] Turning directly to the coercion argument -- the only one subject to a real empirical test n356 -- a drop in the confession rate would appear to be evidence that *Miranda* reduced pressure in the interrogation room. But the critical question for the *Miranda* debate is whether the lower confession rate stems from eliminating coercion that the Constitution forbids or from pressure that it permits. The Court now admits that the "prophylactic" *Miranda* doctrine "sweeps more broadly than the Fifth Amendment" n357 and is "overbroad in that its application excludes some statements made during custodial interrogations that are not in fact coercive." n358 A suspect has no legitimate interest under the Constitution in avoiding confessing; rather, a suspect is entitled to be free from unconstitutional coercion. Thus, under Professor Thomas's view of the world, the critical subject for empirical inquiry should be not simply *whether* the confession rate fell after *Miranda* but *why* it fell -- in other words, to what degree that reduction stems from eliminating unconstitutional coercion or from prophylactic overkill preventing otherwise constitutional questioning techniques.

Our study suggests that *Miranda* goes well beyond what is necessary to prevent unconstitutionally coercive questioning methods. For starters, we found that a significant number of suspects could not be questioned at all because they invoked their *Miranda* rights -- that is, they simply declined to give police permission to ask questions. It seems hard to argue that any questioning at all without a waiver is inherently coercive, unless one views custodial

interrogation itself as creating coercion. The *Miranda* court made such a finding. But this conclusion, as Professor Thomas has written elsewhere,

> has been *Miranda's* Achilles' heel. Justice White quickly found the ultimate hard case: the police ask the single question, "Do you have anything to say?" To find coercion there, White argued, is contrary to common sense and is "patently unsound. . . ." Justice White's common-sense repudiation of inherent coercion seems . . . as sound as any attempt to demonstrate inherent coercion n359

[*920] One possible answer to Justice White's hypothetical is that it is "not a 'real' case; the 'real' cases involved sustained questioning." n360 This is an empirical justification subject to empirical confirmation. Our evidence suggests otherwise. About half of incriminating statements in our sample were obtained through fifteen minutes of questioning or less and a number of incriminating statements were obtained in five minutes or less. n361 Again, it seems hard to argue that all of these statements result from inherent compulsion.

An additional suggestion that *Miranda* extends too far in its quest to prevent police misconduct comes from our finding that police now appear to follow the Court's commands scrupulously. n362 With only one possible exception, in none of the cases in our sample did police depart from the *Miranda* requirements, n363 much less engage in coercive questioning that would violate the narrower "voluntariness" rules of the Fifth Amendment. Instead, police officers seem carefully to "toe the line" set by *Miranda*. An interesting example comes from officers who referred to giving "*Beheler* warnings," citing a specific Supreme Court case as authority for their actions. n364 Other officers went beyond the *Miranda* requirements. n365 Moreover, the new doctrinal exceptions and limitations to *Miranda*, alleged by academics to leave "gaping holes" in the rules, in fact make little difference in the real world of police questioning. Police do not undercut *Miranda* by interviewing first without the required warnings. n366 Nor do they push the bounds of *Miranda* by frequently invoking the "public safety" and "booking questions" exceptions. n367 In light of this police compliance, the kind of prophylactic "buffer zone" *Miranda* envisioned in the 1960s might be unnecessary in the 1990s and beyond.

[*921] In our view, then, the benefits of *Miranda* seem slim while the costs seem substantial. We readily concede -- again -- that our conclusions must be tentative. At each point in our analysis, additional research would be quite helpful. We therefore happily join Professor Thomas's plea for more empirical research. We would add to his list of research projects exploration of reasonable alternatives to the *Miranda* rules, which might prevent unconstitutional police coercion while at the same time increasing the confession rate. On that score, it is noteworthy that we found no evidence that recording police questioning, the most prominently-offered alternative to *Miranda*, n368 had harmful effects on police success.

But this continuing need for research underscores a more general point. Professor Thomas wonders "why a constitutional interpretation that will soon be thirty years old must justify itself with empirical evidence." n369 The answer is that this is how the Court has justified (or at least has purported to have justified) the decision. The Court now tells us that *Miranda* is "a carefully crafted balance designed to fully protect *both* the defendant's and society's interests." n370 This is not a rhetorical device from a conservative Court designed to undercut the decision: As Professor Yale Kamisar reminds us, striking a balance "is the way *Miranda's* defenders -- not its critics -- have talked about the case for the past twenty years." n371 Yet without an empirical foundation, the Court's balancing of interests is illusory. n372 If there is no empirical answer to the question of how many criminals the doctrine sets free, how can the Court blithely assert -- as it has in various cases -- that the benefits of the doctrine outweigh a cost of unknown magnitude? n373 From the start, the Court developed [*922] the *Miranda* rules without empirical support, as this Article's review of the scanty available empirical research makes clear. n374 Justice Harlan exposed this deficiency in his *Miranda* dissent, explaining that the Court's precipitous imposition of the *Miranda* rules precluded other legislative action that "would have the vast advantage of empirical data and comprehensive study." n375 In applying the *Miranda* rules since then, the Court has had precious little information on what *Miranda* did *for* suspects, much less *to* law enforcement. Despite the Court's promise that it has "carefully" considered society's interests, in truth neither the Court nor *Miranda's* academic defenders has ever undertaken a substantial, empirically based cost-benefit assessment of the

Miranda rules and possible alternatives to them. n376 Indeed, in seems fair to number among *Miranda's* costs its preemptive effect, which has prevented research in different states on various ways of regulating police questioning. n377

As *Miranda's* thirtieth anniversary approaches, these deficiencies in the empirical underpinnings of *Miranda* must be regarded as extraordinary. The *Miranda* rules stem not from constitutional command, but rather from cost-benefit prophylaxis. Yet despite nearly three decades to make their case, *Miranda's* defenders have yet to provide research supporting the assertion that the decision's social costs are outweighed by its benefits. This failure leaves the entire *Miranda* doctrine apparently resting on nothing other than the personal intuitions or unarticulated assumptions of Supreme Court Justices about how the rules have operated in the real world. Perhaps *Miranda's* defenders are simply exercising their right to remain silent. But in the face of that silence, the rest of us will draw the reasonable inference -- an empirical case for *Miranda* does not exist.

APPENDIX A -- SURVEY FORMS

DATE: ___/___/___

CASE SURVEY FORM

Date Sheet No.

[Separate form for *each* suspect]

SUSPECT'S NAME[Exact Spelling]: ___ (Last) ___ (First) ___ (Initial)

AGE: ___ SEX: [] M [] F RACE: [] White [] Black [] Hispanic [] Pacific [] Other

TYPE OF CRIME *(most serious)*:
[010] [] Murder [070] [] Sex Offense [110] [] Theft
[020] [] Attempted Murder [071] [] Adult Victim [120] [] Burglary
[030] [] Robbery [072] [] Child Victim [130] [] Auto Theft
[040] [] Kidnapping [080] [] Drug Trafficking [140] [] Fraud
[050] [] Felony Assault [090] [] Fugitive [150] [] Larceny/Forgery
[060] [] Weapons [100] [] Arson [160] [] Other: ___

CHARGE UNDER CONSIDERATION: ___

Describe Briefly (if property offense, provide dollar amount involved) ___
SUSPECT PREVIOUSLY KNOWN TO VICTIM? [] Yes [] No [] N/A

PROSECUTOR'S NAME: ___
INVESTIGATOR'S NAME: ___ PHONE NO. ___
INVESTIGATOR'S AGENCY: ___ SQUAD: ___

HOW WAS THE SUSPECT CAUGHT? ___

PRIOR CRIMINAL RECORD? [] Yes [] No

Number of prior felony arrests: [] 1 [] 2-4 [] 5-9 [] 10+

Number of prior felony convictions: [] 1 [] 2-4 [] 5 or more

Did the county attorney FILE CHARGES in this case? [] Yes [] No

If No, WHY NOT? ___ [] Further Investigation

Did the POLICE TRY TO QUESTION the suspect? [] Yes [] No

If POLICE DIDN'T TRY TO QUESTION the suspect, reason was:

[010] [] No need - case against suspect overwhelming

[020] [] Belief suspect would invoke *Miranda* rights

[030] [] Reason to believe questioning would be unproductive

[040] [] Suspect intoxicated when arrested

[050] [] Suspect mentally unstable/physically injured

[060] [] No opportunity given press of other business

[070] [] Suspect already had attorney

[080] [] Other: ___

Before any questioning, EVIDENCE AGAINST suspect was:

[] Overwhelming [] Strong [] Moderate [] Weak [] Virtually nonexistent

[] Check this box if MULTIPLE INTERVIEWS attempted; complete form for each: [] 1st [] 2nd [] 3rd

If INVESTIGATOR TRIED TO QUESTION suspect:

Was the INVESTIGATOR a: [] street cop [] detective [] other: ___

Suspect questioned: [] IN CUSTODY [] not in custody -- at station [] not in custody, other

Not in custody = [] scene of crime [] field investigation [] arranged interview

In custody = [] when arrested [] on way [] at station

WHERE was the suspect questioned: ___

Were *Miranda RIGHTS READ* to the suspect: [] Yes [] No

Was the questioning done: [] in person [] over the telephone

Was the questioning: [] recorded [] not recorded

Was the suspect asked to WAIVE *Miranda* rights? [] Yes [] No

If yes, did suspect AGREE TO WAIVE rights? [] Yes [] No

If yes, was waiver [] verbal [] in writing

If suspect did not agree to waive his rights, did questioning STOP? [] Yes [] No [] Parnal

If no, reason: ___

Was a statement VOLUNTEERED without questioning? [] Yes

If yes, describe: ___

Was a statement made during "BOOKING"? *Describe:* ___ [] Yes

PUBLIC SAFETY questioning? *Describe:* ___ [] Yes

Did the suspect ask for an ATTORNEY at some point? [] Yes [] No

If yes, was the attorney requested [] at the start [] during interview

If yes, did questioning STOP at that time? [] Yes [] No

If no, reason: ___

[] Suspect brought attorney to interview

Did the suspect assert a RIGHT TO REMAIN SILENT at some point? [] Yes [] No

If yes, did he assert [] at the start [] during interview

If yes, did questioning stop at that time? [] Yes [] No

If no, reason: ___

Did the suspect ANSWER QUESTIONS about the crime? [] Yes [] No

If yes, *describe:* ___

[] Written confession [] Locked into false alibi

[] Verbal confession [] Flat denial

[] Incriminating statements: ___ [] Denial/with explanation

___ [] Other: ___

[] Other useful information: *(codefendants, location of stolen property, etc.)* ___

HOW LONG did questioning take [*in minutes*] ___

WHAT TIME did questioning begin [*military time*] ___

If the suspect confessed/made statements, what ROLE (if any) do you think the confession/statements will play in obtaining a conviction:

[] Essential [] Important [] Relatively Unimportant [] Unnecessary

FOLLOWUP CASE SURVEY FORM

Date Sheet No.

DATE: ___/___/___

[Separate form for *each* suspect]

SUSPECT'S NAME[Exact Spelling]: ___ (Last) ___ (First) ___ (Initial)

District Court Docket Number ___

Circuit Court Docket Number (if known) ___

County Attorney Number (if known) ___

1. What charges were filled: Number Filed ___

Level: [] 1st degree [] 2nd degree [] 3rd degree [] A mis [] B mis [] Lower

2. Did the defendant file a motion to suppress statements/confession? [] Yes [] No

Describe briefly: ___

3. If so, did the motion allege: [] *Miranda* violation only

[] Coerced confession only

[] Both

[] Other: ___

4. Was suppression motion granted? [] Yes, in whole [] Yes, in part [] No [] Resolved before

If granted in whole or in part describe: ___

5. Was the case ultimately dismissed? [] Yes [] No [] Diversion [] Other

6. Did the defendant pled guilty or no contest? [] Yes [] No

If yes, did he pled to: [] Charge at most serious level

[] Charge at -1 level

[] Charge at -2 level

[] Charge at -3 level

[] Other: ___

7. If the defendant went to trial,

Check this box if multiple trials: [] 1st [] 2nd [] 3rd

Was he: [] Acquitted [] Convicted [] Mistrial [] Hung Jury

If convicted, convicted of: [] Charge at most serious level

[] Charge at -1 level

[] Charge at -2 level

[] Charge at -3 level

[] Other: ___

8. If plea/convicted, convicted of (indicate number of counts): ___

[*923] [*924] [*925] [*926] APPENDIX B -- COMPARISON OF LEO STUDY TO CASSELL/HAYMAN STUDY

In his reply to our Article, Professor Thomas prominently cites Professor Richard Leo's recent study of confessions. Leo observed, either in person or on videotape, 182 interrogations in the Bay Area of California in 1993. n378 He found that 64.3% of the suspects gave incriminating information of some type. n379 Leo himself is cautious in claiming that this statement rate can be directly compared to rates from older studies. n380 However, Thomas and others n381 have made such an unabashed inference. Thomas also argues that Leo's figure should be reconciled with ours. Accordingly, it may be useful to compare Leo's figure specifically with the pre-*Miranda* studies and our study.

For comparison purposes, both the pre-*Miranda* studies and our study included suspects who were not questioned, n382 while Leo's sample is artificially limited to cases in which police actually interrogated a suspect. n383 Accordingly, Leo's figure needs to be adjusted to reflect the presumably significant fraction of cases where police never obtain a confession because they never interrogate. We found that 21% of suspects were never interrogated, n384 a figure that is quite close to the only other recent data. n385 Applying our figure for suspects not interrogated to Leo's reduces his incriminating statement rate to 50.8%. n386

The next adjustment that needs to be made is to recognize that Leo's study is limited to custodial interrogations. Yet both the earlier studies and our study generally included custodial *and* noncustodial interrogations. n387 Looking at noncustodial interrogations today is particularly [*927] important because (as Leo himself has noted) police may be shifting to noncustodial interrogations to avoid *Miranda's* onerous requirements. n388

Noncustodial interrogation appears to be less effective in obtaining confessions. Our data, the only specific data on this subject, were that 56.9% of custodial interrogations succeeded, a statistically significant difference from the 30.0% success rate of noncustodial interrogations. n389 We also found that 30.1% of all interrogations were noncustodial. Applying our figure of 30.1% interrogations not in custody to Leo's figures n390 and assuming that noncustodial interrogation was less effective to the same extent that we found n391 reduces Leo's incriminating statement rate to 44.8%. n392

A final quantitative adjustment stems from the fact that Leo's study covered only interrogations by experienced detectives, and not interrogations by patrol or other police officers. Most of the pre-*Miranda* data involved interrogations by police officers of all types. n393 Our study also [*928] involved the broader sweep of all police work. n394 We found a statistically significant difference between the success of detectives and patrol officers in obtaining statements, n395 a result that is consistent with the only other recent data on this subject. n396 The clear trend in our data remained in this direction even when controlling for the fact that detectives were more likely to question suspects in custody than were patrol officers, although the result was not quite statistically significant. n397 We also found that slightly more than half of all custodial questioning was done by detectives, n398 a [*929] result slightly higher than reported in the only other recent data. n399 Applying our ratio of detective-to-patrol-officer custodial interviews to Leo's study and applying our lower effectiveness for the patrol officer interviews n400 lowers Leo's incriminating statement rate to 38.7%. n401

The adjusted 38.7% confession rate derived from Professor Leo's data is almost indistinguishable from our 33.3% rate. A couple of other adjustments to Leo's data, however, might lower his figure even more to close the gap. First, Leo found that police in the Bay Area continued interrogations in a few cases after suspects invoked their *Miranda* rights. n402 In three interrogations, they obtained incriminating statements in violation of *Miranda*. n403 The pre-*Miranda* studies, of course, do not exclude confessions for violation of *Miranda*. Our study contained no *Miranda*-suppressible incriminating statements. n404 Thus, for comparison purposes, his figure must be reduced slightly to account for *Miranda* violations. Second, Leo used a very broad definition of what was incriminating. The 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 . . . .*" n405 Many things said by a suspect could be viewed by the detectives as potential "impeaching" information about credibility even when they were not really incriminatory. n406 Supporting the interpretation that some of these statements [*930] were not really incriminating are the facts that many of the suspects in Leo's sample (31%) were not even charged n407 and that prosecutors are particularly likely to charge suspects where they have strong incriminating statements. n408 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. n409 Finally, the study's sampling methodology also may have overstated the number of incriminating statements. n410

Taking all of these factors into account, Professor Leo's study suggests an overall incriminating statement rate somewhere below 38.7%, quite close to our 33.3% rate and much lower than the rates generally reported in pre-*Miranda* studies.

[*931] APPENDIX C -- VOLUNTEERED STATEMENTS

This table reports the features of the nine cases in which suspects volunteered incriminating information and the volunteered statement was the only incriminating statement obtained.

Suspect Number	Questioning Result	Volunteered	Role of Statement	Type of Crime
H29a	not quest.	incrim.	rel. unimp.	violent
H33	not quest.	incrim.	rel. unimp.	violent
H36	not quest.	confess	rel. unimp.	violent
H115	not quest.	confess	unnec.	prop.
H160	not quest.	confess	rel. unimp.	prop.
M2	not quest.	incrim.	ess.	violent
M11	not quest.	incrim.	unnec.	violent
H137	invoke	confess	n/a	prop.
H152	invoke	incrim.	rel. unimp.	violent

Suspect Number	Prior Record	Strength of Evidence	Charged	Outcome
H29a	no	n/a	yes	plea-1
H33	yes	overwhelm.	yes	plea-1
H36	yes	overwhelm.	yes	plea-1
H115	yes	overwhelm.	yes	n/a
H160	no	strong	yes	plea-1

M2	yes	n/a	yes	dismis'd
M11	yes	strong	yes	n/a
H137	yes	strong	yes	plea-1
H152	yes	n/a	yes	n/a

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureInterrogationMiranda RightsCustodial InterrogationCriminal Law & ProcedureInterrogationMiranda RightsSelf-Incrimination PrivilegeCriminal Law & ProcedureInterrogationNoncustodial Confessions & Statements

FOOTNOTES:

n1 384 U.S. 436 (1966).

n2 A 1974 survey of lawyers by the American Bar Association found that *Miranda* was the third most notable decision of all time, trailing only *Marbury v. Madison* and *United States v. Nixon*, and leading *Brown v. Board of Education*. JETHRO K. LIEBERMAN, MILESTONES! 200 YEARS OF AMERICAN LAW: MILESTONES IN OUR LEGAL HISTORY vii (1976).

n3 The studies are collected in Paul G. Cassell, Miranda's *Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (forthcoming 1996).

n4 H. RICHARD UVILLER, TEMPERED ZEAL: A COLUMBIA LAW PROFESSOR'S YEAR ON THE STREETS WITH THE NEW YORK CITY POLICE 198 (1988).

n5 George C. Thomas III, *Is* Miranda *a Real-World Failure? A Plea for More (and Better) Empirical Evidence*, 43 UCLA L. REV. 821 (1996).

n6 *Id.* at 822; *see also* LAWRENCE S. WRIGHTSMAN & SAUL M. KASSIN, CONFESSIONS IN THE COURTROOM ix (1993) ("For reasons that are unclear to us . . . the topic of confession evidence has been almost completely ignored by psychologists and other social scientists."); Richard A. Leo, *Police Interrogation and Social Control*, 3 SOC. & LEGAL STUD. 93, 98 (1994) ("We know very little about what actually happens during custodial interrogation.").

n7 1 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 6.5(c), at 484 (1984 & Supp. 1991).

n8 *See, e.g.*, JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 58 (1993) (noting that suspects "usually waive their right to remain silent"); CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION 347 (1993) ("In many jurisdictions, *Miranda* has had little effect on the confession rate . . . . The suspect often

pays the warnings no heed . . . .").

n9 *See, e.g.*, Davis v. United States, 114 S. Ct. 2350, 2355 (1994) (*Miranda* rule "is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose."). *See generally* JOSEPH GRANO, CONFESSIONS, TRUTH, AND THE LAW 173-98 (1993) (explaining subconstitutional status of *Miranda* rules).

n10 *See, e.g.*, New York v. Quarles, 467 U.S. 649, 657 (1984) (not applying *Miranda* rules to "public safety questioning" because such situations "pos[e] a threat to the public safety [that] outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination").

n11 For convenience, when not discussing specific statistics, this Article will generally use the term "confession" as broadly encompassing all forms of incriminating statements.

n12 In reaching this conclusion, we also respond to Professor Thomas's "steady state" theory of confessions, which he explicates in a thoughtful rejoinder to our Article. *See* George C. Thomas III, *Plain Talk About the* Miranda *Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. REV. 933 (1996).

n13 *See* 1-7 AMERICAN BAR FOUNDATION, THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE UNITED STATES: PILOT PROJECT REPORT (1957). I am indebted to Professor Richard A. Leo for calling this research to my attention.

n14 Edward L. Barrett, Jr., *Police Practices and the Law -- from Arrest to Release or Charge*, 50 CAL. L. REV. 11 (1962).

n15 *Id.* at 41-44.

n16 378 U.S. 478 (1964).

n17 *See* Briefs for Petitioner, Respondent, and the ACLU, Escobedo v. Illinois, 378 U.S. 478 (1964) (No. 615). The brief for respondent Illinois did contain a reference to an empirical study on indigent defendants' receipt of counsel after arraignment. *See* Brief for Respondent, *supra*, at 24 (citing Yale Kamisar & Jesse H. Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1 (1963)). The ACLU's brief contained references to police interrogation manuals. *See* Brief for the ACLU, *supra*, at 4-8.

n18 *Escobedo*, 378 U.S. at 488 n.10.

n19 *See* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 379 (3d ed. 1993) ("*Escobedo* did not provide much guidance to the court or the police.").

n20 The only specific published studies seem to be: Criminal Investigation Div., Detroit Police Dept.,

Confessions in Felony Prosecutions for the Year of 1961 as Compared to January 20, 1965 Through October 31, 1965 (Dec. 13, 1965) (reporting percentage of confessions for various kinds of crimes), *reprinted in* Theodore Souris, *Stop and Frisk or Arrest and Search -- The Use and Misuse of Euphemisms*, 57 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 251, 263-64 (1966); Nathan R. Sobel, *The Exclusionary Rules in the Law of Confessions, A Legal Perspective -- A Practical Perspective*, N.Y. L.J., Nov. 22, 1965, at 1; *see also* WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965) (reporting observational information about arrests).

n21 *See* Richard H. Kuh, *The "Rest of Us" in the "Policing the Police" Controversy*, 57 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 244, 247 (1966).

n22 Brief of National District Attorneys Association, Amicus Curiae, Miranda v. Arizona, 384 U.S. 436 (1966) (No. 759). Unfortunately, the methodology for collecting this data is unclear, and compilers of the data acknowledged that "many difficulties were encountered due to insufficient information in the records." *Id.* at 4a.

n23 Brief of the ACLU, Amicus Curiae, Miranda v. Arizona, 384 U.S. 436 (1966) (No. 759).

n24 *Miranda*, 384 U.S. at 445 (citing IV NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931)).

n25 *Id.* at 446 & n.7 (citing Commission on Civil Rights, Justice pts. 5, 17 (1961) and various court opinions).

n26 *Id.* at 448.

n27 The only other arguably empirically-based discussion was of FBI questioning practices, *id.* at 483-86, and questioning practices of other countries, *id.* at 486-90.

n28 *Id.* at 524 (Harlan, J., dissenting).

n29 Project, *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519 (1967) [hereinafter *Yale Project*].

n30 John Griffiths & Richard E. Ayres, *A Postscript to the* Miranda *Project: Interrogation of Draft Protestors*, 77 YALE L.J. 300 (1967).

n31 Richard H. Seeburger & R. Stanton Wettick, Jr., Miranda *in Pittsburgh -- A Statistical Study*, 29 U. PITT. L. REV. 1 (1967).

n32 Richard J. Medalie et al., *Custodial Police Interrogation in our Nation's Capital: The Attempt to Implement* Miranda, 66 MICH. L. REV. 1347 (1968).

n33 James W. Witt, *Non-Coercive Interrogation and the Administration of Criminal Justice: The Impact of* Miranda *on Police Effectuality*, 64 J. CRIM. L. & CRIMINOLOGY 320, 322 (1973).

n34 *Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 1, 1120 (1967) (statement of New York County District Attorney Frank S. Hogan) [hereinafter *Controlling Crime Hearings*].

n35 *Id.* at 200 (statement of Philadelphia District Attorney Arlen Specter).

n36 *Id.* at 341 (statement of Los Angeles District Attorney Evelle J. Younger).

n37 *Id.* at 219 (statement of Kings County District Attorney Aaron E. Koota).

n38 AMERICAN LAW INST., A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE: STUDY DRAFT NO. 1, at 140 (1968).

n39 Wayne E. Green, *Police vs.* "Miranda": *Has the Supreme Court Really Hampered Law Enforcement?*, WALL ST. J., Dec. 15, 1966, at 16.

n40 *See* Donald Janson, *Homicides Increase in Chicago, but Confessions Drop by* 50%, N.Y. TIMES (Chicago), July 24, 1967, at 24.

n41 VERA INST. OF JUSTICE, MONITORED INTERROGATIONS PROJECT FINAL REPORT: STATISTICAL ANALYSIS (1967) [hereinafter VERA INST., MONITORED INTERROGATIONS]; VERA INST. OF JUSTICE, TAPING POLICE INTERROGATIONS IN THE 20TH PRECINCT, N.Y.P.D. (1967) [hereinafter VERA INST., TAPING POLICE]. Curiously, the research was never formally published, but is available only in type-written manuscripts.

n42 NEAL A. MILNER, THE COURT AND LOCAL LAW ENFORCEMENT: THE IMPACT OF MIRANDA (1971).

n43 DAVID W. NEUBAUER, CRIMINAL JUSTICE IN MIDDLE AMERICA viii (1974).

n44 Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of* Miranda, 47 DEN. L.J. 1 (1970).

n45 *See* Cassell, *supra* note 3, at 395-417 (concluding that the reliable studies suggest confessions fell 16.1% after *Miranda); see also* WHITEBREAD & SLOBOGIN, *supra* note 19, at 381 (concluding studies conducted in jurisdictions complying with *Miranda* "found a significant (10 to 20%) drop in confessions after *Miranda* went into effect"). *But compare* Stephen J. Schulhofer, Miranda's *Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 544-47 (forthcoming 1996) (criticizing Cassell's figures and suggesting that the studies support the conclusion that confessions fell after *Miranda* somewhere between 4.1% and 6.4%) *with* Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda's

Defenders, 90 NW. U. L. REV. (forthcoming 1996) (responding to Schulhofer).

n46 Thomas, *supra* note 5, at 833.

n47 *See id.* at 827-31.

n48 The authors of the New Haven study reported that 3 of 81 suspects were apparently prevented from talking and perhaps confessing by the *Miranda* warnings and that an additional 10 suspects gave incriminating statements only after police violated *Miranda*'s questioning cutoff rules. *See* Cassell, *supra* note 3, at 408-49 (discussing *Yale Project*, *supra* note 29, at 1571, 1578). This means that the study is properly read to support a 16.0% (13/81) drop in admissible confessions after *Miranda*. *Id.; see also* Schulhofer, *supra* note 45, at 530 (agreeing that New Haven study should be read to support at least a 12.3% (10/81) drop in admissible confessions).

In a reply to our Article, Professor Thomas suggests that our reasoning ignores the "counterfactual" because it holds constant the behavior of the suspects who received warnings while counting the costs of confessions obtained in violation of the *Miranda* questioning cutoff rules. Thomas, *supra* note 12, at 940. Thus, Thomas argues we have overlooked the possibility that the warnings might "encourage some suspects to incriminate themselves." *Id.* But we are simply reporting what the Yale editors who observed the interrogations reported. They saw no indication that warnings were facilitating confessions. *See Yale Project*, *supra* note 29, at 1571 (discussing behavior of suspects affected by warnings; none apparently induced to talk more by *Miranda* warnings).

n49 Professor Thomas acknowledges that the D.C. police were not generally following *Miranda*'s requirements, but believes that the study can be salvaged by examining confession rates of those suspects who actually received *Miranda* warnings with those who did not. *See* Thomas, *supra* note 5, at 829-30. But at best this methodology would reveal the effect of the warnings; it could not reveal the effect of *Miranda*'s other requirements, such as the questioning cutoff rules. *See* Cassell, *supra* note 3, at 410 (noting D.C. police did not follow *Miranda* waiver requirements and questioning cutoff rules); *see also* Schulhofer, *supra* note 45, at 531 (agreeing with Cassell that "the study's post-*Miranda* data comes from a period before the D.C. police were fully implementing *Miranda* safeguards"). This point assumes some importance when coupled with the fact that most of *Miranda*'s harms appear to stem not from the warnings, but rather from its other requirements. *See infra* note 113 (explaining why questioning cutoff rules, not warnings, have the most substantial effect on questioning). The D.C. study is also suspect because its findings appear to have been presented in a misleading way. *See* Richard A. Leo, Police Interrogation in America: A Study of Violence, Civility and Social Change 321 & n.17, 337 & n.25 (1994) (unpublished Ph.D. dissertation, University of California at Berkeley).

n50 *See* Cassell, *supra* note 3, at 411 (finding that 41% of suspects who received some of the *Miranda* warnings confessed as compared to 55% who received no such warning).

n51 Professor Thomas recognizes that the Denver study suggests that the warning inhibited the making of admissions, but correctly points out that the key findings are statistically insignificant in large part because of the tiny sample size (50 suspects total). Thomas, *supra* note 5, at 828. But, in any event, the study appears to focus on warnings, not the more important waiver and questioning cutoff rules.

n52 *See* Cassell, *supra* note 3, at 405 (discussing problems with Seaside City data); *see also* Cassell, *supra*

note 45 (discussing why Seaside City must be regarded as anomalous by defenders of *Miranda). But see* Schulhofer, *supra* note 45, at 528-30 (defending the study).

n53 *See* Cassell, *supra* note 3, at 399-405, 412-14 (discussing data from these studies); Cassell, *supra* note 45 (same). *But cf.* Schulhofer, *supra* note 45, at 517-38 (criticizing reliance on data from New York County, New Orleans, Brooklyn, agreeing that Philadelphia and Kansas City data showed drops in the confession rate, and arguing that Los Angeles data showed a *rise* in confession rates). To be sure, some of these studies were conducted by prosecutors, not law professors; others rest on estimates, not hard data. But rejecting these studies out of hand, particularly in view of the paucity of data, seems the wrong approach. *Cf.* Thomas, *supra* note 12, at 948 (noting risk of idiosyncracy in individual studies and concluding that "we need several studies, from which an average can be obtained").

n54 *See infra* note 182-192 and accompanying text.

n55 *See* Cassell, *supra* note 45 (graphing clearance rates for violent crimes after *Miranda*); Paul G. Cassell, *The Costs of the* Miranda *Mandate: A Lesson in the Dangers from Inflexible, "Prophylactic" Supreme Court Creations*, 28 ARIZ. ST. L.J. (forthcoming 1996) (discussing clearance rate data).

n56 *See* Cassell, *supra* note 45 (collecting opinion research on police attitudes about *Miranda). But see* Schulhofer, *supra* note 45, at 507-11 (arguing that police reported accommodation to *Miranda*).

n57 Thomas's interesting speculation is based on data from "Seaside City," which showed that suspects were less likely to make an outright admission after *Miranda* but more likely to make incriminating statements. Thomas, *supra* note 5, at 831 (citing Witt, *supra* note 33, at 325 tbl. 3). Thomas suggests that the *Miranda* warnings would encourage statements because, among other reasons, suspects "might think that their willingness to talk in the face of the warnings demonstrates their innocence"; on the other hand, the warnings would discourage admissions because "even the most superficial understanding of the warnings communicates that the suspect's words will be used in court." Thomas, *supra* note 5, at 831. However, Thomas's interpretation does not fit the Seaside City data. Police there apparently began giving warnings to suspects in January 1965, when People v. Dorado, 398 P.2d 361 (Cal.), *cert. denied*, 381 U.S. 937 (1965), required them to do so. *See* Witt, *supra* note 33, at 325 n.41. In 1965, oral incriminating statements fell sharply. *See id.* at 325 tbl. 3. Thomas's conjecture also conflicts with data from other jurisdictions. *See Controlling Crime Hearings*, *supra* note 34, at 161 (reporting decline in statements in New York County in homicide cases after *Miranda); id.* at 200-01 (reporting that statements in Philadelphia fell both after *Miranda* and also after other earlier decisions requiring police warnings); *id.* at 161 (reporting that statements in Brooklyn fell after *Miranda*); Cassell, *supra* note 3, at 411-12 (reanalyzing data from the District of Columbia suggesting that statements dropped after *Miranda*); Green, *supra* note 39, at 16 (reporting that statements in Kansas City fell about 12% after *Miranda*).

n58 *See* Thomas, *supra* note 5, at 822.

n59 *See, e.g.*, FLOYD FEENEY ET AL., ARRESTS WITHOUT CONVICTION: HOW OFTEN THEY OCCUR AND WHY (1983); FLOYD FEENEY & ADRIANNE WEIR, THE PREVENTION AND CONTROL OF ROBBERY (1974); Gary D. LaFree, *Adversarial and Nonadversarial Justice: A Comparison of Guilty Pleas and Trials*, 23 CRIMINOLOGY 289, 302 (1985).

n60 Leo, *supra* note 49. Leo's informative dissertation will be published as Richard A. Leo, *Inside the Interrogation Room: A Qualitative and Quantitative Analysis of Contemporary American Police Interrogation Practices*, 86 J. CRIM. L. & CRIMINOLOGY (forthcoming 1996), and Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY (forthcoming 1996).

n61 *See infra* notes 378-410 (Appendix B) (discussing the Leo study in more detail).

n62 *See generally* ROYAL COMM'N ON CRIMINAL JUSTICE, REPORT (1993) (describing criminal justice questions in Britain).

n63 *See, e.g.*, DAVID BROWN, DETENTION AT THE POLICE STATION UNDER THE POLICE AND CRIMINAL EVIDENCE ACT 1984 (1989); BARRIE L. IRVING, POLICE INTERROGATION: A CASE STUDY OF CURRENT PRACTICE (1980); BARRIE L. IRVING & IAN K. McKENZIE, POLICE INTERROGATION: THE EFFECTS OF THE POLICE AND CRIMINAL EVIDENCE ACT 1984 (1989); MICHAEL McCONVILLE, CORROBORATION AND CONFESSIONS: THE IMPACT OF A RULE REQUIRING THAT NO CONVICTION CAN BE SUSTAINED ON THE BASIS OF CONFESSION EVIDENCE ALONE (1993); PAUL SOFTLEY, POLICE INTERROGATION: AN OBSERVATIONAL STUDY IN FOUR POLICE STATIONS (Royal Comm'n on Criminal Procedure Research Study No. 4, 1980); Barry Mitchell, *Confessions and Police Interrogation of Suspects*, 1983 CRIM. L. REV. 596; 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 (1993).

n64 Thomas, *supra* note 5, at 837.

n65 Unattributed descriptions of the practices of law enforcement and prosecuting agencies in this Article are based on personal interviews with members of the affected agencies during and following the collection of the data.

n66 *See, e.g.*, KATHLEEN B. BROSI, INSTITUTE FOR LAW AND SOCIAL RESEARCH, A CROSS-CITY COMPARISON OF FELONY CASE PROCESSING 7, 9, 10, 12, 15, 24 (1979) (finding that Salt Lake City was in the middle of five jurisdictions in its rejections at screening and that dispositions after arrest looked similar to other jurisdictions); *see also* John D. O'Connell & C. Dean Larsen, Note, *Detention, Arrest, and Salt Lake City Police Practices*, 1965 UTAH L. REV. 593 (reporting results of field research on Salt Lake City police practices).

n67 BUREAU OF ECONOMICS AND BUSINESS RESEARCH, UNIVERSITY OF UTAH, STATISTICAL ABSTRACT OF UTAH 1993, at 25 (1994) (citing Bureau of the Census information).

n68 *Id.* at 24 tbl. 18.

n69 *See generally* Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1376-79 (collecting statewide statistics on this point).

n70 DEPARTMENT OF PUBLIC SAFETY, BUREAU OF CRIMINAL IDENTIFICATION, CRIME IN

UTAH 1994, at 17 (1994) [hereinafter cited as CRIME IN UTAH].

n71 *See* U.S. DEPT. OF JUSTICE, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 1993, at 5 (1994) [hereinafter cited as 1993 UNIFORM CRIME REPORTS].

n72 *Survey Shows S.L. with High Crime Rate for City Its Size*, SALT LAKE TRIB., Apr. 27, 1993, at B10.

n73 *S.L. Crime Up, Bucks U.S. Trend*, SALT LAKE TRIB., May 22, 1995, at A1.

n74 *See Anti-Gang Bills Pass in Special Session*, SALT LAKE TRIB., Oct. 17, 1993, at B4.

n75 *Compare* CRIME IN UTAH, *supra* note 70, at 17 (Salt Lake County violent crime rate of 3.7 per 1000) *with* 1993 UNIFORM CRIME REPORTS, *supra* note 71, at 10 (national violent crime rate of 7.5 per 1000).

n76 Prosecutors told us that their summer caseload was not significantly different than during other parts of the year.

n77 In a few cases, the screening resulted in the decision to file misdemeanor rather than felony charges. We continued to follow the disposition of these cases, which were a tiny fraction of our sample.

n78 Most of the data were collected by one of the authors (Hayman) and a second-year law student. The other of the authors (Cassell) collected data for the last day of the study.

n79 The survey forms used to collect the data are set forth in Appendix A, *infra*.

n80 The four cases included a sensitive rape case and a homicide case involving a suspect with complicated psychiatric problems. These cases did not appear, on the surface, to pose major *Miranda* issues.

n81 This estimate does not include cases involving drug sweeps in a downtown park. *See infra* note 84.

n82 Confessions may be less important in drug cases. *See* SKOLNICK & FYFE, *supra* note 8, at 194; UVILLER, *supra* note 4, at 199.

n83 Some screenings for child abuse cases were held in the Salt Lake Children's Justice Center. *See* UTAH CODE ANN. §§ 67-5b-101 to-107 (Supp. 1995) (describing Children's Justice Centers).

n84 Small drug cases are underrepresented in part because we excluded "Pioneer Park" cases from our sample. Pioneer Park is an area in Salt Lake City of concentrated drug trafficking. *See* Brian Maffly, *Crime and Commerce: They Coexist Painfully Near Pioneer Park*, SALT LAKE TRIB., Oct. 23, 1994, at B1. Salt Lake City police conduct concerted "buy-bust" operations in the park, in which an undercover officer purchases drugs while under surveillance from the other officers, who then join the undercover officer in an arrest. In these cases,

the officers do not typically question suspects for a combination of reasons: the cases are "slam-dunks," the street dealers rarely provide useful cooperation against higher-ups, and language problems (many of the suspects are immigrants from Mexico) make interrogation difficult. The researchers attended six Pioneer Park screenings. In none of the six was the suspect interrogated. At that time, concerned that the sheer numbers of such cases would hamper reasonable statistical analysis, we decided to exclude these cases from the sample and not to attend any further Pioneer Park screenings. The effect of our decision was to increase the percentage of confessions we found in our sample.

n85 190 males of 219 suspects.

n86 146 with prior records of 208 suspects, with information unavailable on an additional 11 suspects.

n87 Offenders under the age of 18 are handled by Salt Lake County's juvenile court system. While juvenile offenders can be "certified" and tried as adults, *see* UTAH CODE ANN. § 78-3a-25 (1953 & Supp. 1995), such cases are rare and were not present in our sample.

n88 137 white, 49 Hispanic, 12 African-American, 4 other suspects, with information unavailable on an additional 17 suspects.

n89 Naturally enough, categorizing offenses into only two categories requires some generalizations. For example, we have included drug offenses under the heading of "violent" offenses. For a similar categorization, see NEUBAUER, *supra* note 43, at 104.

n90 *See* UVILLER, *supra* note 4, at 199.

n91 173 questioned of 219 suspects.

n92 *See* Gordon Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HASTINGS L.J. 1, 116-17 (1986) (advancing this hypothesis and collecting studies). *But see* Schulhofer, *supra* note 45, at 34 ("There is no apparent reason why *Miranda* would prevent police from making an initial attempt to question a suspect . . . .").

n93 FEENEY ET AL., *supra* note 59, at 13 tbl. 15-2 (Jacksonville 37/200; San Diego 44/219).

n94 *See* Seeburger & Wettick, *supra* note 31, at 7, 23; *see also id.* at 13 tbl. 3 (all suspects divided into one of two categories: refused to talk or willing to talk). It is possible that the interrogation rate statistics were skewed since the study involved "the more difficult cases for which investigation was deemed necessary by the police." *Id.* at 7. Unfortunately there is no way to determine the interrogation rate for cases not referred to the Detective Branch.

n95 Witt, *supra* note 33, at 323.

n96 *Id.* at 325 tbl. 3.

n97 Barrett, *supra* note 14, at 43-44.

n98 *Controlling Crime Hearings*, *supra* note 34, at 200.

n99 *Id.* at 223.

n100 *Yale Project*, *supra* note 29, at 1589 tbl. F-7 (reporting that 2 of 90 suspects were "not questioned"); *see also* Cassell, *supra* note 3, at 407-08 (arguing that the New Haven study is really a pre-*Miranda* study because the police were following pre-*Miranda* procedures).

The Yale editors cautioned that they observed only felony cases brought to the station house for questioning, *Yale Project*, *supra* note 29, at 1587, and reported (without specifying a basis for the finding) that "no statement was requested in over 25 per cent of the cases," *id.* at 1574. The editors observed that police rarely interrogated in misdemeanor cases. For example, the Special Services Division (vice squad) questioned only 8 suspects out of 200 arrests. *Id.* at 1587. The Division handled predominantly misdemeanor cases. *Id.* at 1587 n.179.

n101 Medalie et al., *supra* note 32, at 1364. This data was based on interviews with defendants. *Id.* It is hard to tell whether the study's "no interrogation" category included suspects who were in fact questioned but requested counsel.

n102 In his reply to our Article, Professor Thomas appropriately highlights this point. *See* Thomas, *supra* note 12, at 944-46.

n103 Witt, *supra* note 33, at 325; Medalie et al., *supra* note 32, at 1365 tbl. 5. Professor Thomas contends that the change in the interrogation rate in the District of Columbia should be disregarded because it is not statistically significant. Thomas, *supra* note 12, at 944 n.50. However, to reach this conclusion he shrinks the sample size of the study by throwing out post-*Miranda* defendants with counsel on the grounds that they were not included in the pre-*Miranda* sample. *Id.* Nothing in the report of the D.C. study supports this conjecture. Instead, the study strongly suggests consistent pre-and post-*Miranda* sampling. *See* Medalie et al., *supra* note 32, at 1351, 1354 (noting that a series of interviews with District of Columbia defendants was divided into pre-*Miranda* and post-*Miranda* categories based on date of arrest).

n104 Arizona v. Fulminante, 111 S. Ct. 1246, 1257 (1991).

n105 For example, one case involving police belief that a suspect would invoke *Miranda* arose when the mother of a suspect told police her son would not talk without an attorney. The detectives left their card with the mother in case the son wanted to talk. He never called.

n106 The two cases involved suspects who had not yet been charged or detained, suggesting that the prophylactic *Miranda* right to counsel had not yet technically attached. Stansbury v. California, 114 S. Ct. 1526, 1529 (1994) (per curiam) (discussing custody as triggering event for *Miranda* right to counsel). However, courts have suggested that questioning in such circumstances is troublesome, particularly under rules of ethics applicable to prosecutors and their agents. *See, e.g.*, United States v. Foley, 735 F.2d 45, 47-48 (2d Cir. 1984). It seems fair to conclude that some of the questions about questioning in such circumstances has arisen from the

backdrop of the *Miranda* rules. *See, e.g., id.* at 48 (citing *Miranda*-related cases as grounds for concern).

n107 In his reply to our study, Professor Thomas essentially agrees that at least some suspects will not be questioned due to *Miranda*, but argues that the extent of that effect is small. *See* Thomas, *supra* note 12, at 945. Agreeing that some suspects are not questioned, however, is an important concession: It means that *Miranda* has reduced the interrogation rate (and, inevitably, the confession rate) and the only subject remaining for discussion is the size of that effect. Moreover, Thomas's quantification of the size of the *Miranda* effect we found is too small. He includes only cases in which *Miranda* was directly identified as the reason for not questioning, failing to consider cases in which *Miranda*'s indirect effects may have prevented questioning. *See supra* note 105, 106; *infra* note 109. It is also important to remember that our study is not the only one to estimate the interrogation rate drop after *Miranda*. Other data suggest a larger drop in the interrogation rate. *See supra* note 103 and accompanying text.

n108 The effect of logistical difficulties of arranging for interviews has been noted in other studies. *See, e.g.*, FEENEY ET AL., *supra* note 59, at 143 (finding that hours worked by detectives and physical layout of jail make interrogations more difficult in San Diego than in Jacksonville).

n109 *See* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: THE LAW OF PRE-TRIAL INTERROGATION 126 (1986) [hereinafter OLP PRE-TRIAL INTERROGATION REPORT] (recounting case of murderer who went free due to *Miranda* because confession was obtained after routine assignment of counsel) *reprinted in* 22 U. MICH. J.L. REF. 437 (1989).

n110 *Cf.* Witt, *supra* note 33, at 325 n.44 (noting that *Miranda* allows "unenterprising detectives . . . [to] rationalize their indolence"); *see also supra* note 84 (giving example of cases where questioning was rare).

n111 Thomas, *supra* note 5, at 823-24, 826, 832-33.

n112 *See generally* LAFAVE & ISRAEL, *supra* note 7, at 479-83. *Cf.* Davis v. United States, 114 S. Ct. 2350 (1994) (assertion of right to counsel after waiver must be unambiguous).

n113 *See* Cassell, *supra* note 3, at 492-96 (collecting evidence showing that warnings had small impact but waiver requirements had large impact).

This point may be underemphasized in Professor Thomas's article. For instance, the article calls for research on the behavior of suspects after they have received judicial warnings at the initial appearance. Thomas, *supra* note 5, at 834 (calling for research "to determine what part, if any, judicial warnings played in the interrogation process"). While this might be a useful project to undertake in its own right, it will shed little light on the costs of *Miranda*, which stem in significant part from suspects invoking their rights before initial appearance.

n114 *See* Cassell, *supra* note 3, at 495 n.623.

n115 108 of 129 suspects asked to waive rights.

n116 Both had prior criminal records.

n117 *Cf.* ROGER LEND, THE RIGHT TO SILENCE IN POLICE INTERROGATION 16-17 (Royal Comm'n on Criminal Justice Research Study No. 10, 1993) (employing similar methodology). There was one such case in our sample involving a suspect who was suspected of a series of check forgeries. He agreed to talk to police about some of the forgeries but not others. Police obtained incriminating statements from him.

n118 *See infra* Table 4.

n119 In two of the three cases, the suspects were questioned at the scene and gave denials. At the station house, they invoked their rights. In the third case, a suspect was questioned and invoked her rights. She later called a probation officer and a short discussion of a non-incriminating nature followed.

n120 In the first (a domestic violence case), police questioned a suspect at the scene non-custodially, where he admitted that he stabbed his wife. They then took him to the police station and gave him *Miranda*. He refused to waive his rights for follow-up questioning. In the second (an attempted murder case), a patrol officer at the scene asked a suspect a few desultory questions without *Miranda*. By the time the case reached a detective for interrogation, the suspect had been assigned an attorney.

n121 Harris v. New York, 401 U.S. 222 (1971).

n122 *See, e.g.*, Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1442-43 (1987) (suggesting police will ignore invocations of *Miranda* rights); Geoffrey R. Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 113 (commenting that *Harris* "seems to carry at least the potential seriously to undercut the incentive of the police to comply with the dictates of *Miranda*") (footnote omitted); Alan M. Dershowitz & John H. Ely, Comment, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1220 (1971) ("Under the *Harris* rule, what possible incentive would the police have to comply with *Miranda* . . . ."); *see also* Harris v. New York, 401 U.S. 222, 232 (1971) (Brennan, J., dissenting) ("I fear that today's holding will seriously undermine the achievement of [the] objective [of deterring improper police questioning].").

n123 It might be argued that because our study relies on police recounting of events, it would fail to capture questioning in violation of *Miranda*. After all, police might be unwilling to admit deviations from *Miranda*. However, the relative infrequency of *Miranda* suppression motions, *see infra* note 243 and accompanying text, corroborates the law enforcement version.

n124 This figure is derived by multiplying 12.1% by the 2,800,000 arrests for FBI index crimes for 1993. *See* 1993 UNIFORM CRIME REPORTS, *supra* note 71, at 217 tbl. 29. FBI index crimes are: murder, rape, robbery, assault, burglary, larceny, and vehicle theft. Our sample includes all felonies, not just index crimes.

n125 *See, e.g.*, Yale Kamisar, *Edward L. Barrett, Jr.: The Critic with "That Quality of Judiciousness Demanded of the Court Itself*," 20 U.C. DAVIS L. REV. 191, 210 (1987) ("It cannot be denied that for the past twenty years suspects have continued to make incriminating statements with great frequency.").

n126 *See* Thomas, *supra* note 5 (noting importance of distinguishing between confessions and incriminating statements); *see also* THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND

PSYCHOLOGICAL COMPETENCE 35 n.23 (1981) (noting difficulty of classifying "admissions," "confessions," etc.); McCONVILLE, *supra* note 63, at 30 (discussing problems in defining "confession").

n127 Similar terminology is employed in *Yale Project*, *supra* note 29, at 1643-47.

n128 Survey protocol at 4 (copy on file with Cassell).

n129 *Id.*

n130 *Id.* The intent of this category was to capture cases where the prosecutor had direct evidence that a particular alibi scenario was untrue. Of course, prosecutors who convict defendants with alibis always have substantial indirect evidence that the alibi is untrue -- otherwise the prosecution would fail.

n131 For example, in the case just discussed, we classified a suspect's stammering and hesitating answers as "incriminating," even though they did not substantively implicate him in the auto theft, because their tone made the officer believe something was amiss. Acting on his suspicions, the officer checked and the suspect was arrested and charged with auto theft. A second example comes from a first degree murder case. During police questioning the suspect admitted being at the scene -- a fact never really in doubt -- but stated that he could not remember anything else. Eventually the suspect pled to a reduced manslaughter charge. Thus, his "incriminating" statements did not end up being notably useful in prosecuting the crime charged. A final example of an "on the fence" incriminating statement occurred in a domestic violence case where the victim claimed her boyfriend hit her. The suspect responded to police questioning by stating that the two were fighting but he never struck her. We classified the statement as incriminating because the defendant admitted that he and the victim were fighting. The district attorney's office did not prosecute the alleged assault due to evidence problems.

n132 Survey protocol at 4 (copy on file with Cassell).

n133 *Id.* Professor Thomas calls this classification scheme "more problematic than most." Thomas, *supra* note 12, at 949. Yet we used this classification because it appeared in ANDREW SANDERS ET AL., ADVICE AND ASSISTANCE AT POLICE STATIONS AND THE 24 HOUR DUTY SOLICITOR SCHEME 135 (1989), a widely-cited British study on confessions that appeared to be more sophisticated than other American studies on point.

n134 *See* UTAH CODE ANN. § 76-6-404 (1995) ("A person commits theft if he obtains or exercises *unauthorized* control over the property of another with a purpose to deprive him thereof.") (emphasis added).

n135 Professor Thomas questions whether more than a very few suspects would testify falsely, asking, "How many defendants would falsely testify at trial that the car was recently purchased?" Thomas, *supra* note 12, at 950. But, in fact, testimony by defendants claiming to have purchased stolen cars is routine. *See, e.g.*, State v. Larocco, 742 P.2d 89, 90 (Utah Ct. App. 1990) (noting that the defendant "consistently claimed he had purchased the [allegedly stolen] Mustang"). According to the supervisor of the section of the Salt Lake County District Attorney's Office responsible for prosecuting stolen car cases, a claim of legitimate purchase is "the most common defense we get." Telephone Interview with Deputy District Attorney Ernest Jones (Jan. 10, 1996).

Defeating such explanations is a "50/50 proposition" because sometimes the jury will credit the story, or at least be unable to reject it beyond a reasonable doubt. *Id.* Viewed in this real world context, statements of the form "I bought the car" cannot realistically be viewed as "incriminating."

n136 *See* UTAH CODE ANN. § 76-6-202 (1995) ("A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person.").

n137 *See id.* § 76-5-402 (1995) ("A person commits rape when the actor has sexual intercourse with another person without the victim's consent.").

n138 Two of the nine involved unlawful sexual fondling, where the suspects claimed that the touching was accidental.

n139 Professor Thomas claims that as many as two-thirds of our denials with explanations might have been categorized as incriminating statements by earlier researchers. Thomas, *supra* note 12, at 951. This assertion is untenable. The earlier studies defined incriminating statements as those that were helpful to police in prosecuting cases. *See, e.g.*, Seeburger & Wettick, *supra* note 31, at 10 ("We did not include as confessions any statement which contained certain self-incriminating statements but were primarily self-serving in nature and *of little value to the police* . . . .") (emphasis added); Witt, *supra* note 33, at 325 n.43 (including "oral incriminating evidence or other *useful material for conviction* through interrogation") (emphasis added). Likewise, our study made helpfulness to the police the touchstone of incriminating statements. With this in mind, Thomas's suggestion that statements like "I fought back in self-defense" or "I bought the [allegedly stolen] car" would be regarded as helpful to the prosecution, Thomas, *supra* note 12, at 949-50, seems dubious.

It also should be noted that Professor Thomas parses our study for incriminating statements we might have miscategorized as denials, but not the reverse, offsetting possibility: denials that we miscategorized as incriminating. *Cf. supra* note 131 (explaining that statements were classified as "incriminating" even though they were not substantive admissions of a crime). Of course, Professor Thomas is free to conduct such flyspecking of our denial category only because we have provided more information about our classifications than any other previous confessions study. We hope that our extensive explication will provide a new standard of disclosure to which future researchers on confessions will adhere.

n140 Confirming that our "denials with explanation" were not really "incriminating" statements is the ultimate outcome of such cases: Those who gave denials with explanations were significantly less likely to be convicted than those who gave incriminating statements. Of suspects who gave denials with explanations, 18 were convicted of some charge (47%) while 20 were not. Of suspects who gave incriminating statements, 17 were convicted of some charge (72%) while 8 were not. (The chi-square statistic for the difference was significant at the .05 level.) Even among those convicted of some charge, those who gave only denials (rather than incriminating statements) fared better. Of convicted suspects who gave denials with explanations, three (17%) were convicted of an offense as serious as the one with which they were charged and nine (50%) were convicted of an offense only one level lower. *See infra* notes 322-328 and accompanying text (describing methodology for determining case outcomes). Of convicted suspects who gave incriminating statements, four (24%) were convicted of an offense as serous as the one with which they were charged and 12 (71%) were convicted of an offense only one level lower. Professor Thomas despairs of the "near impossibility" of making a distinction between incriminating and exculpatory statements. But these findings -- that suspects who gave a denial with explanation were less likely to be convicted of some charge and, even when convicted, more likely

to be able to escape with a conviction to a lower charge than those who gave incriminating statements -- are precisely the results one would expect if we have properly distinguished between incriminating and exculpatory statements. Thus, we must strongly disagree with Professor Thomas's suggestion that "for future research, a better system is one that includes all explanations as potentially incriminating." Thomas, *supra* note 12, at 951. Rather, we believe -- and our statistics confirm -- that lumping such statements together will obscure the important real world difference between incriminating and exculpatory statements.

n141 *See infra* notes 297-305 and accompanying text (discussing multiple interviews of suspects).

n142 Police also were fortunate enough to receive thirteen "volunteered" incriminating statements, including nine statements from suspects who had not otherwise provided incriminating information. *See infra* notes 230-237 and accompanying text (discussing volunteered statements). Adding these nine suspects into the total would produce the result that 37.4% of our cases contained incriminating statements.

n143 We address this issue *infra* notes 174-177 and accompanying text. In view of this concern, for subsequent tables dealing with variables affecting interrogation success, we exclude suspects who were never questioned.

n144 Our success rate would also have been lower if we included more routine drug cases, where police officers often did not interrogate. *See supra* note 84 (discussing exclusion of park drug sweep cases from sample).

n145 *See* VERA INST., TAPING POLICE, *supra* note 41, at 62; *Controlling Crime Hearings*, *supra* note 34, at 199, 205 (statement of Arlen Specter, District Attorney for the City and County of Philadelphia, Pennsylvania).

n146 *See generally* Cassell, *supra* note 3, at 463-64.

n147 The chi-square statistic is not significant at .05 level, but is significant at .10 level. For the chi-square statistics here and elsewhere in this Article, we have focused on factors that might produce statistically significant differences in successful and unsuccessful questioning and have therefore excluded the invocation category (unless specifically noted otherwise). We report chisquare results with some trepidation, because our small sample size may make such tests misleading. In particular, a small sample size means that all but the most substantial differences will be found to be not statistically significant. *Cf.* Medalie et al., *supra* note 32, at 1414 (declining to report statistical significant tests at all on these grounds); Thomas, *supra* note 5, at 823 n.7 (using .10 significance level in view of paucity of data). For the crimes included in the categories of "violent" and "property" crimes, see *supra* Table 1.

n148 *See* Cassell, *supra* note 3, at 458-59 & tbl. 3.

n149 Barrett, *supra* note 14, at 43-44.

n150 Souris, *supra* note 20, at 264.

n151 *See* Cassell, *supra* note 3, at 406 (discussing *Yale Project*, *supra* note 29, at 1573, 1644).

n152 The only other early figures come from the NDAA Brief in *Miranda*, the methodology of which is unclear. *See supra* note 22.

n153 *See, e.g.*, Cassell, *supra* note 3, at 403 (noting that estimated confession rate fell in Philadelphia after *Escobedo* and again after a pre-*Miranda* decision by the Third Circuit). *See generally* Cassell, *supra* note 45 (discussing influence of *Escobedo* in confession rate figures).

n154 *See* SLOBOGIN, *supra* note 8, at 6 (Supp. 1995) (concluding that a 64% confession rate is "comparable to pre-*Miranda* confession rates").

Curiously, Professor Thomas ignores these pre-*Escobedo* studies in calculating a pre-*Miranda* confession rate. Rejecting our estimate, he proposes instead an estimated range of 45%-53% based solely on Cassell's table of data from seven jurisdictions in which data from both before and after *Miranda* is available. *See* Thomas, *supra* note 12, at 935-36 & n.12 (citing Cassell, *supra* note 3, at 418 & tbl. 1). But in determining the confession rate *before Miranda*, there is no sound reason for arbitrarily confining the database to jurisdictions in which we can determine what the confession rate was *after*. Indeed, the inevitable consequence of such a limitation is to use *only* the most problematic data, that is, only the data obtained closest to *Miranda* and thus most likely to be infected by anticipatory implementation problems. In any event, simply including the five confession rates mentioned in the text above with the seven studies Professor Thomas uses produces an estimated pre-*Miranda* confession rate of 56%, which lies within our estimate but outside of his.

n155 Thomas, *supra* note 12, at 936, 952.

n156 *Id.* at 947.

n157 *See infra* notes 216-221 and accompanying text.

n158 Thomas, *supra* note 12, at 952.

n159 Medalie et al., *supra* note 32, at 1351.

n160 Witt, *supra* note 33, at 323 ("This eliminated all cases in which suspects were detained for questioning but never incarcerated.").

n161 Seeburger & Wettick, *supra* note 31, at 7.

n162 *See id.* ("It is standard practice for the [Detective] Branch to question every suspect in all cases in which it makes an arrest. The questioning occurs at the time the suspect is taken into custody.").

n163 Our Table 15, *infra*, divides suspects into those against whom charges were filed and those against whom they were not. Looking only at the category for charges filed, the "questioning successful" rate is 63/173

or 36.4%, still well below pre-*Miranda* levels.

n164 *See* Cassell, *supra* note 3, at 459 tbl. 3.

n165 *Controlling Crime Hearings*, *supra* note 34, at 1120.

n166 *Id.* at 223 (referring to "suspects" in these categories of crimes); *see also id.* at 224 (giving example of an interview of a suspect in his home where "custody" was disputed).

n167 *See infra* notes 169-172 and accompanying text (collecting evidence that *Miranda* has led to more noncustodial interrogations).

n168 Thomas, *supra* note 12 (noting that our data "confirm that non-custodial settings produce fewer successful interrogations") (footnote omitted).

n169 FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 234 (3d ed. 1986) (The Supreme Court's decision in *Mathiason* "is an excellent illustration of the advisability of arranging, whenever feasible, for an interrogation opportunity based upon a consensual situation. A suspect who has willingly consented to come to or be taken to the place of interrogation . . . is not in custody."); *cf.* FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSION (1962) (pre-*Miranda* edition of same manual that apparently does not discuss need to avoid interrogating in custody).

n170 *See, e.g.*, H. RICHARD UVILLER, TEMPERED ZEAL: A COLUMBIA LAW PROFESSOR'S YEAR ON THE STREETS WITH THE NEW YORK CITY POLICE 52 (1988) (reporting a case where the police "didn't really want to arrest him at that point; they figured if he wasn't under arrest, they could 'interview' him without giving him *Miranda* warnings"); Jerome H. Skolnick & Richard A. Leo, *The Ethics of Deceptive Interrogation*, CRIM. JUSTICE ETHICS, Winter/Spring 1992, at 5 ("Police will question suspects in a 'non-custodial' setting . . . so as to circumvent the necessity of rendering warnings. This is the most fundamental, and perhaps the most overlooked, deceptive stratagem police employ.").

n171 *See, e.g.*, United States v. J.H.H., 22 F.3d 821, 831 (8th Cir. 1994) (suspect told that questioning was voluntary, that he was not under arrest, and that he was free to leave at any time, apparently taking advantage of Supreme Court decision finding similar questioning noncustodial in *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam)); *see also infra* notes 209-210 and accompanying text (reporting use of *Beheler* warnings in Salt Lake County); *cf.* Oregon v. Mathiason, 429 U.S. 492, 499 n.5 (1977) (Marshall, J., dissenting) (suggesting that in the context of traffic stops "police officers can circumvent *Miranda* by deliberately postponing the official 'arrest' and the giving of *Miranda* warnings until the necessary incriminating statements have been obtained").

n172 *See, e.g.*, JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 58-59 (1993) ("Police who are seeking admissions have learned how to *interview* rather than *interrogate*. . . . 'Interviews' do not require *Miranda* warnings . . . ."); Mark Berger, *Compromise and Continuity:* Miranda *Waivers, Confession, Admissibility, and the Retention of Interrogation Protections*, 49 U. ILL. L. REV. 1007, 1020 (1988) (police will be able to undertake interrogation "in a

non-custodial environment in order to avoid having to administer warnings and secure waivers"); Irene M. Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69, 112 (1989) (suggesting that police will circumvent *Miranda* by conducting coercive noncustodial interviews in suspect's home); *see also* 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.") (quoting Kamisar's remarks at a 1966 CLE conference on *Miranda*).

n173 Professor Thomas derides the evidence as consisting of "nothing but anecdotes and police interrogation manuals." Thomas, *supra* note 12, at 947 n.60. But the fact remains that this is the only available evidence on this issue because of the dearth of pre-*Miranda* empirical studies distinguishing between custodial and noncustodial interrogations. *Cf. id.* at 943 (promising to "accept the Cassell-Hayman challenge to render a judgment on the available evidence").

n174 *See supra* notes 91-104 and accompanying text.

n175 *See* Thomas, *supra* note 12, at 952 tbl.

n176 *See* Medalie et al., *supra* note 32, at 1365 tbl. 5, 1373 tbl. 9 (reporting statement rates in which a substantial proportion of suspects were never questioned); Seeburger & Wettick, *supra* note 31, at 7 ("For *almost* every file which we examined, the Detective Branch attempted to obtain a confession from all the suspects involved.") (emphasis added); Witt, *supra* note 33, at 325 tbl. 3 (reporting confession rate data with category for "suspect not questioned"); *supra* notes 164-167 and accompanying text (collecting many studies which determined number of confessions present in criminal cases that were filed, without regard to whether suspects were questioned or not); *see also Yale Project*, *supra* note 30, at 1589 tbl. F-7 (reporting that two percent of the suspects sampled were "not questioned" after *Miranda*).

n177 Professor Thomas responds that this means that the Salt Lake City confession rate is lower than pre-*Miranda* rates, in part, because the interrogation rate is lower. *See* Thomas, *supra* note 12, at 946. But the critical point is that, contrary to Thomas's "steady-state" hypothesis, post-*Miranda* confession rates are in fact lower. We can then, of course, debate causes for that fact. *Cf. supra* notes 92-103 and accompanying text (arguing that lower interrogation rates are attributable, at least in part, to *Miranda*). It is important to remember that the total number of confessions -- our subject of inquiry -- is determined not just by suspect's responses to *Miranda* but by police responses as well. To borrow an economic analogy, one must assess not only the "supply" of confessions but also the "demand" for them. *Cf.* Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 155 (1988) (noting importance of measuring supply and demand for crime in deterrence studies).

n178 FEENEY ET AL., *supra* note 59, at 142. Professor Thomas adjusts these figures upwards by excluding suspects who were never questioned. Thomas, *supra* note 12, at 954. This adjustment is inappropriate. *See supra* notes 174-177 and accompanying text.

n179 LaFree, *supra* note 59, at 298. Professor Thomas notes that the study used a narrow definition of "confession" that, in his view, lowered the confession rate. Thomas, *supra* note 12, at 955. A compensating effect, however, was that the study's sample was drawn from court cases, not police interrogations. *Id.* at 298 tbl.

2. Because cases are more likely to result in charges and verdicts if a defendant confesses, *see infra* notes 315-341 (finding that incriminating statements affect the processing of criminal cases), the overall confession rate in police interrogations was certainly below the 40.3% reported. Sorting out these two offsetting effects precisely is impossible; but their countervailing nature suggests that simply relying on the reported 40.3% figure is reasonable.

n180 *See infra* notes 378-410 and accompanying text.

n181 Of course, this is not a criticism of the study itself. Leo's study is probably the single best source of information about what goes on during custodial interrogation by experienced detectives, which was the subject the study was designed to explore. The study is applied beyond its intended purposes, however, if used as a measure of overall police success in obtaining confessions.

n182 *See* Cassell, *supra* note 3, at 418-22 (collecting available data); *see also* Van Kessel, *supra* note 92, at 127-28 (exhaustively reviewing available studies and concluding that most American studies find suspect admissions to be below 50% and that "a substantially greater percentage of English than American suspects subjected to questioning make damaging statements").

n183 Thomas, *supra* note 12, at 942.

n184 *See, e.g.*, Yale Kamisar, *How to Use, Abuse -- and Fight Back with -- Crime Statistics*, 25 OKLA. L. REV. 239, 242, 248-49 (1972) (contending that rising crime rates in England and Wales during late 1960s disprove connection to the American "revolution in criminal procedure"); Yale Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORNELL L.Q. 436, 460-62 (1964) (chiding Chicago police chief's criticism of Warren Court's restriction as contributing to increasing crime rates for failing to recognize that crime rates were increasing in England and Wales).

n185 *See* CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION 96-108 (England and Wales), 112-17 (Canada) (1993). Bradley makes the valuable point that "while the Supreme Court's cooption of [the criminal procedure] field has essentially eliminated the states as 'laboratories,' where new ideas can be tested, foreign countries can play the same role." *Id.* at 95. Indeed, foreign countries may be the only possibility for real comparisons in the *Miranda* area. It appears that all jurisdictions in the United States follow the critical questioning cutoff rules prescribed by *Miranda*. Accordingly, despite Thomas's plea for "cross-jurisdictional" comparison of *Miranda*'s effects, Thomas, *supra* note 5, at 834-35, there is no possibility of a domestic assessment of the effect of this critical feature of the doctrine. *See supra* note 109 and accompanying text (noting centrality of questioning cutoff rules to *Miranda*'s costs). *See generally* Cassell, *supra* note 3, at 498-99 (noting that *Miranda*'s "greatest cost" is that it has blocked experimentation on alternative ways of regulating interrogation).

n186 Van Kessel, *supra* note 92, at 8.

n187 *See* Miranda v. Arizona, 384 U.S. 436, 486-89 (1966) (discussing regulations of interrogation practices in England, Scotland, India, and Ceylon).

n188 New York v. Quarles, 467 U.S. 649, 673 (1984) (O'Connor, J., concurring and dissenting) (footnote omitted).

n189 Thomas, *supra* note 12, at 942.

n190 *Id.* One response is to note that British confession rates fell from over 60% before 1986 to between 40% and 50% when the *Miranda*-style Police and Criminal Evidence Act was imposed on British police in that year. *See* Cassell, *supra* note 3, at 420-21. British respect for authority cannot explain the *drop* in confession rates; only the view that restrictions on police questioning lead to lower confession rates seems plausible. *See id.*

n191 *See supra* notes 146-147 and accompanying text.

n192 On that score, in any event, Salt Lake County might be a comparable jurisdiction for comparison. *See supra* note 75 and accompanying text (noting that Salt Lake County has lower violent crime rates than the American average).

n193 *See supra* Table 5. The overall success rate (including suspects not questioned) would be even lower.

n194 Thomas, *supra* note 12, at 956.

n195 *Id.*

n196 *Id.*

n197 *Id.*

n198 *See supra* note 57 (collecting data suggesting that incriminating statements fell after delivery of warnings).

n199 *Cf., e.g.*, Leiken, *supra* note 44, at 16-26 (reporting factors bearing on the "decision to talk" based on interviews with interrogated prisoners; incentive to tell the truth not mentioned); Leo, *supra* note 49, at 282-84 (discussing why interrogations succeed; incentive to tell the truth not mentioned); *Yale Project, supra* note 29, at 1570-73 (reporting observational assessments of interrogations; incentive to tell the truth not mentioned).

n200 *See, e.g., infra* note 343 (questioning of one person produces information about real perpetrator of crime).

n201 Of 173 suspects overall, 24 suspects gave other information.

n202 Because we gathered our data from screening sessions where the agenda was whether to initiate criminal charges against a particular suspect, officers likely reported only information that was relevant for this

purpose. Thus, results gleaned from interrogation that were useful for other purposes (*e.g.*, prosecutions of other persons or other crimes) would not have been regularly reported. Moreover, because our data came from such sessions, they would not capture cases where interrogation provided information leading to other enhanced charges. For example, if the police were prepared to charge a suspect with a burglary before interrogation and a murder afterwards, from the perspective of a screening session the case would appear to involve only a murder charge.

n203 Yale Kamisar, *On the "Fruits" of* Miranda *Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 1000 (1995); *see also id.* at 933 n.17, 1000 n.329 (collecting commentary supporting this view); *cf.* Akhil R. Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857 (1995) (discussing fruits doctrine in general).

n204 Two other studies have also measured collateral purposes of interrogation. Neither reported that uncovering "fruits" was a significant purpose. *See* Witt, *supra* note 33, at 326-28; *Yale Project*, *supra* note 29, at 1593-97. An attitudinal study found that police, and prosecutors as well, viewed obtaining a confession (or its corollary -- determining that a suspect was innocent) as far and away the primary purpose for interrogation, while obtaining other leads was a more remote concern. *See* 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, 437-438 tbl. 1C, 440 tbl. 1D, 445-46 tbls. 1G & 1H.

n205 *Accord* Witt, *supra* note 33, at 327 (finding that identification of accomplices is an important collateral purpose); *Yale Project*, *supra* note 29, at 1593-94 (same).

n206 In one case, a murder weapon was recovered. However, the interrogation that produced the gun was of a person who was viewed more as a witness than a suspect. Charges against this person were later dismissed pursuant to a diversion agreement. In the other case, the police wanted to recover a knife in a domestic violence case, apparently to avoid further incidents. Charges were never filed in the case.

n207 *See* Stansbury v. California, 114 S. Ct. 1526 (1994) (*per curiam*).

n208 *See supra* notes 169-172 and accompanying text.

n209 463 U.S. 1121, 1125 (1983) (per curiam).

n210 *Id.* at 1122.

n211 Other agencies follow a different approach. For example, one large department trained its field officers not to give *Miranda* prematurely because of the possibility of the suspect invoking his rights. As a result, typically in this department the only officers to give *Miranda* were detectives, who conducted most post-arrest custodial interrogations.

n212 In Salt Lake City v. Carner, 664 P.2d 1168, 1171 (Utah 1983), the Utah Supreme Court set out a four-part test for determining "custody" under *Miranda*. Then, the United States Supreme Court handed down California v. Beheler, 463 U.S. 1121, 1125 (1983), and Berkemer v. McCarty, 468 U.S. 420, 441-42 (1984),

which established a more-relaxed custody standard, focusing on whether the suspect was in essence under arrest. Faced with conflicting opinions, in 1993, the Utah Supreme Court held that its earlier decision in *Carner* prevailed because it rested in part on the Utah Constitution, art. I, § 12 (state protection against self-incrimination), and therefore was not controlled by federal interpretations. State v. Wood, 868 P.2d 70, 82 (Utah 1993); *see also* State v. Mirquet, No. 930098, slip op. at 3-4 (Utah June 30, 1995) (applying *Carner*). But the Utah Supreme Court apparently did not recognize that after *Carner*, it had specifically held that the Utah self-incrimination provision was no broader than the federal provision. American Fork City v. Crosgrove, 701 P.2d 1069 (Utah 1985). Indeed, the Utah Supreme Court has never even squarely held that *Miranda* is part of the state self-incrimination provision and has historically construed the provision as turning on considerations of voluntariness, rather than compliance with *Miranda* nuances. *See, e.g.*, State v. Mares, 192 P.2d 861, 870-71 (Utah 1948) (explaining state voluntariness doctrine). *See generally* Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example*, 1993 UTAH L. REV. 751 *passim* (explaining difficulties with interpreting Utah constitutional provisions beyond federal standards); Paul G. Cassell, *Search and Seizure and the Utah Constitution: The Irrelevance of the Antipolygamy Raids*, 1995 B.Y.U. L. REV. 1 *passim* (1995) (same).

n213 The available qualitative evidence suggests that noncustodial interrogations have increased since *Miranda. See supra* notes 169-172 and accompanying text.

n214 121 of 173 custodial; 52 of 173 noncustodial. The researchers coded a case as "custodial" where they thought, under prevailing *Miranda* doctrine, a court would conclude that the suspect was in custody.

n215 21 at the scene; 14 field investigations; 17 arranged interviews.

n216 For clarity of presentation, we have omitted invocations from this table because virtually all of them would fall into the custodial category. It is interesting, however, that we found two suspects who invoked their rights in non-custodial interviews.

n217 The chi-square is significant at the .01 level.

n218 *See* Thomas, *supra* note 5, at 832-33 (advancing similar hypothesis).

n219 74 of 102 property offenders questioned in custody; 47 of 71 violent offenders questioned in custody.

n220 This interview is described *infra* note 343.

n221 *See, e.g.*, Tamar Jacoby, *Fighting Crime by the Rules: Why Cops Like* Miranda, NEWSWEEK, July 18, 1988, at 53; Schulhofer, *supra* note 45, at 12 n.32 (suggesting that "*Miranda*, now that police have assimilated it and learned to use it, may actually generate some net increase in the rate of successful interrogations").

n222 *See, e.g.*, Mathew Lippman, *A Commentary on Inbau and Manak's "Miranda v. Arizona -- Is It Worth the Costs?*," THE PROSECUTOR, Spring 1989, at 35, 37 ("The Court has eviscerated the decision to the point of evaporation.").

n223 New York v. Quarles, 467 U.S. 649 (1984).

n224 *See, e.g.*, Mary M. Keating, Note, New York v. Quarles: *The Dissolution of* Miranda, 30 VILL. L. REV. 441 (1985).

n225 Irene M. Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69, 82 (1989).

n226 The case involved an officer who approached a woman suspected of being an accomplice to an armed robber. The officer asked for consent to search her purse for a weapon. After obtaining consent, the officer searched the purse and found stolen checks. This prompted volunteered incriminating statements from the woman. The case probably would not be viewed as a public safety questioning by the courts, as there was no "interrogation" to trigger the *Miranda* requirements. *See* Rhode Island v. Innis, 446 U.S. 291 (1980) (*Miranda* warnings required only for "interrogation").

n227 Pennsylvania v. Muniz, 496 U.S. 582, 600-02 (1990).

n228 Of course, even though the exceptions have a small quantitative impact, they might still be justified on their own merits. *See, e.g.*, William T. Pizzi, *The Privilege Against Self-Incrimination in a Rescue Situation*, 76 J. CRIM. L. & CRIMINOLOGY 567 (1985) (vigorously defending public safety exception).

n229 *See* Cassell, *supra* note 3, at 460-62.

n230 Miranda v. Arizona, 384 U.S. 436, 478 (1966).

n231 *See, e.g.*, U.S. v. Gonzalez, 875 F.2d 875, 881 (D.C. Cir. 1989) (holding spontaneous statements made at the moment of arrest admissible even without *Miranda* warnings).

n232 For discussion of how we assessed the strength of the evidence, see *infra* note 256 and accompanying text.

n233 91 of 219. *See generally supra* Table 1.

n234 114 of 165. *See generally infra* Table 9.

n235 Of these statements, one would have been classified as a verbal confession, one as an incriminating statement, and one as an "other statement" unrelated to the crime.

n236 *See infra* notes 312-313 and accompanying text (describing methodology for assessing statement importance).

n237 *See, e.g., supra* note 142 and accompanying text (noting the difference this categorization makes for the total number of "successful" outcomes in the sample).

n238 *Compare, e.g.*, Seeburger & Wettick, *supra* note 31, at 8 (suggesting that Pittsburgh police complied with *Miranda) with* Medalie et al., *supra* note 32, at 1362-70 (suggesting that D.C. police failed to implement *Miranda*).

n239 *See, e.g.*, LAFAVE & ISRAEL, *supra* note 7, § 6.5, at 484 (suggesting that officers "regularly" advise suspects of their rights); Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 456 & n.56 (1987) (suggesting that the degree of compliance with *Miranda* "has been high").

n240 *Cf.* Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 722 (1970) ("The predominant incentive for interrogation is to obtain evidence for use in court. Consequently, police conduct in this area is likely to be responsive to judicial rules governing the admissibility of that evidence.").

n241 Based on the descriptions of the *Miranda* warnings, the researchers found no cases of "participating" *Miranda. See* Peter W. Lewis & Harry E. Allen, "*Participating Miranda": An Attempt to Subvert Certain Constitutional Safeguards*, 23 CRIME & DELINQUENCY 75 (1977) (describing delivery of *Miranda* warnings interwoven into discussion with defendants). Nor were any such cases alleged in motions to suppress by defendants.

n242 This is the so-called "fifth warning." It is not strictly required by *Miranda*, *see* INBAU, *supra* note 169, at 221-22, and its use is discouraged by the leading police interrogation manual, *see id.* at 222.

n243 *See* COMPTROLLER GEN. OF THE U.S., IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS 8 (1979) (finding that 4.4% of federal defendants filed motion to suppress confessions); FEENEY ET AL., *supra* note 59, at 144 (finding in two-city study that motions to suppress confessions were filed in 1.0% of all arrests and that 50.0% of these were granted, for a total of 0.5% successful motions); Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 595, 597, 598 (finding in nine-county survey that motions to suppress confessions were filed in 6.6% of all cases, and that 2.3% of these were granted, for a total of 0.16% successful motions); Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, 1987 U. ILL. L. REV. 223, 228, 231, 232 (finding in Chicago survey that motions to suppress confessions were filed in 1.1% of all cases and that 6.1% of these were granted, for a total of 0.04% successful motions); *see also* MICHAEL ZANDER & PAUL HENDERSON, ROYAL COMM'N ON CRIMINAL JUSTICE, CROWN COURT STUDY (1993) (finding that confessions were challenged in about 5% of cases in British sample).

n244 Three motions in 63 filed cases with successful outcomes to questioning. Expressed as a percentage of total cases filed, suppression motions were filed in 1.7% (3 motions in 173 filed cases). One theoretical possibility was that defendants pled guilty before they had an opportunity to file a motion to suppress. Although we were unable to interview defense attorneys about whether this took place in any of our cases, discussions with prosecutors indicated that such a sequence of events would be extraordinary.

n245 *See supra* note 9 and accompanying text (discussing difference between *Miranda* requirements and

Fifth Amendment voluntariness requirements).

n246 All three of the motions sought to suppress statements that were obtained at the scene of the crime, rather than through station house interrogation.

n247 Interestingly, none of the interrogations was recorded. *Cf.* Cassell, *supra* note 3, at 488 (suggesting that recording of interrogations might eliminate "swearing contests" about what happened).

n248 This finding should not be confused with support for the proposition that *Miranda* has had no ill effects on law enforcement. *See id.* at 391-94 (explaining why analysis of the suppression motions is the wrong way to measure *Miranda*'s overall effects).

n249 *See, e.g.*, George C. Thomas III, *An Assault on the Temple of* Miranda, 85 J. CRIM. L. & CRIMINOLOGY 807, 821 (1995) (noting position of Yale Kamisar that real world interrogations involve "sustained questioning").

n250 Barrett, *supra* note 14, at 42-43.

n251 VERA INST., TAPING POLICE, *supra* note 41, at 49.

n252 Leo, *supra* note 49, at 267.

n253 We also had a very large number of cases in which data was unavailable.

n254 The chi-square statistic is not significant at the .05 level but is significant at the .10 level. Our findings on this point may shed some light on Professor Thomas's suggestion that police interest in obtaining a confession is an important factor in whether a confession is obtained. *See* Thomas, *supra* note 5, at text accompanying notes 43-44. The length of interrogation might serve as a surrogate for police interest.

n255 We had great difficulty collecting data on this subject, as many officers were uncertain as to exactly what time interrogations took place.

n256 *See Yale Project*, *supra* note 29, at 1646-47. More extensive data from Britain suggests the same conclusion. *See* IRVING & MCKENZIE, *supra* note 63, at 95; McCONVILLE, *supra* note 63, at 29; *cf.* MICHAEL McCONVILLE & JACQUELINE HODGSON, CUSTODIAL LEGAL ADVICE AND THE RIGHT TO SILENCE 182 (Royal Comm'n Criminal Justice Research Study No. 16, 1993) (suggesting problems with collecting data on this subject); Stephen Moston et al., *The Effects of Case Characteristics on Suspect Behaviour During Police Questioning*, 32 BRIT. J. CRIMINOLOGY 23, 34-36 (1992).

n257 *See* UVILLER, *supra* note 4, at 200-01 (advancing a similar hypothesis); Gisli H. Gudjonsson & Hannes Petursson, *Custodial Interrogation: Why Do Suspects Confess and How Does It Relate to Their Crime, Attitude and Personality?*, 12 PERSONALITY & INDIVIDUAL DIFFERENCES 295, 303 (1991) (studying Icelandic prisoners and finding that "the most common reasons for the confession related to perceptions of proof

and the offender consequently did not see much point in denying the offence").

n258 The chi-square statistic is significant at the .01 level.

n259 Leo, *supra* note 49, at 265 tbl. 5.

n260 VERA INST., TAPING POLICE, *supra* note 41, at 53.

n261 An alternative explanation for our finding is that the pool of suspects in the category of "weak" evidence might include more innocent suspects than other categories. Since innocent suspects are obviously less likely to confess, this effect would produce a spurious correlation between the strength of the evidence and confessions. Because of the methodology used in this study, however, the number of innocents in the sample is probably quite small. *See infra* note 343 and accompanying text (sample drawn from cases pre-screened and presented for prosecution).

n262 Thomas, *supra* note 5, at 823-24.

n263 *See* Philip B. Heymann, *The Defendant's Rights vs. Police Efficiency: An Important Symbol of Fairness*, N.Y. TIMES, Jan. 25, 1987, at E5 ("Every hardened criminal . . . knows his rights and isn't about to confess.").

n264 *See* NEUBAUER, *supra* note 43, at 105 tbl. 2 (finding that only 36% of those with a prior felony conviction confessed, compared to 59% without); Leiken, *supra* note 44, at 21 tbl. 4 (finding suspects with nine or more previous arrests slightly less likely to give a confession); Leo, *supra* note 49, at 277 (finding suspects with a felony record four times as likely to invoke *Miranda* rights); *Yale Project*, *supra* note 29, at 1644 tbl. A (finding interrogation successful for 29% of the suspects with a previous arrest, compared to 60% without).

British data also suggests that suspects with criminal records are less likely to talk. *See* ROYAL COMM'N ON CRIMINAL JUSTICE, REPORT 51 (1993) (reporting police found experienced criminals less likely to answer questions); SOFTLEY, *supra* note 63, at 69, 75 (observing that suspects with a criminal record were significantly more likely to exercise right to silence and to request counsel); Moston et al., *supra* note 256, at 38 tbl. 4 (finding that 21% of suspects with criminal history stayed silent as compared with only 11% without). *But cf. id.* at 39 tbl. 7 (finding that for those with legal advice criminal history had a marked effect on the rate of admission).

n265 At the initial screening, police officers typically had available a National Criminal Information Center ("NCIC") "rap sheet" for each suspect. Not infrequently the rap sheet would list arrests with no indication of disposition.

n266 The chi-square statistic (pr = .387) is not significant.

n267 *See* Leo, *supra* note 49, at 276-77 (finding a small difference between suspects with no record and those with a misdemeanor record in willingness to invoke *Miranda* rights but finding a big difference between those with no record and those with a felony record).

n268 *See* OLP PRE-TRIAL INTERROGATION REPORT, *supra* note 109, at 105; Cassell, *supra* note 3, at 486-92; Phillip E. Johnson, *A Statutory Replacement for the Miranda Doctrine*, 24 AM. CRIM. L. REV. 303, 306, 313 (1987).

n269 *See, e.g.*, BRADLEY, *supra* note 138, at 85; Yale Kamisar, *Foreword:* Brewer v. Williams -- *A Hard Look at a Discomfiting Record*, 66 GEO. L.J. 209, 236-43 (1977); Schulhofer, *supra* note 45, at 66-67; George Dix, *Putting Suspects' Confessions on Videotape*, MANHATTAN LAW., Apr. 25, 1989, at 12.

n270 *See* Paul G. Cassell & Stephen J. Markman, *Miranda's Hidden Costs*, NAT'L REV., Dec. 25, 1995, at 30, 33 (noting law enforcement reluctance to adopt videotaping).

n271 WILLIAM A. GELLER, POLICE VIDEOTAPING OF SUSPECT INTERROGATIONS AND CONFESSIONS: A PRELIMINARY EXAMINATION OF ISSUES AND PRACTICES -- A REPORT TO THE NATIONAL INSTITUTE OF JUSTICE (1993).

n272 *Id.* at 107.

n273 VERA INST., MONITORED INTERROGATIONS, *supra* note 41, at 53.

n274 *See* CAROLE F. WILLIS ET AL., THE TAPE-RECORDING OF POLICE INTERVIEWS WITH SUSPECTS: A SECOND INTERIM REPORT 34-35, 73 (1988) (British study finding that police obtained more confessions when interviews were taped); Alan Grant, The Audio-Visual Taping of Police Interviews with Suspects and Accused Persons by Halton Regional Police Force, Ontario, Canada -- An Evaluation Final Report 80 (1987) (unpublished study done for the Law Reform Commission of Canada) (on file with author) (concluding from empirical study that the "videotaping process does not appear to inhibit suspects from making confessions"); *cf.* Cassell, *supra* note 3, at 491 n.602 (noting problems with statistics in Grant's study).

n275 LUPO PRINS, SPECIAL STUDY GRANT'S SCHEME FOR MEMBERS OF AUSTRALASIAN POLICE FORCES: SCIENTIFIC AND TECHNICAL AIDS TO POLICE INTERROGATION 145 (1983).

n276 INBAU, *supra* note 169, at 176-78.

n277 The Utah Supreme Court had previously encouraged recording of custodial interrogations. State v. Carter, 776 P.2d 886, 891 (Utah 1989). During the period of our study, a case was pending before the Utah Supreme Court in which the defendant argued that the court should formalize that encouragement and mandate recording of custodial interrogations. After our data collection was finished, the Utah Supreme Court rejected that contention. State v. Villarreal, 889 P.2d 419, 427 (Utah 1995).

n278 The hypothesis that recording actually helps interrogation was not proven, as the chisquare statistic (pr = .211) was not statistically significant.

n279 In our sample, the recorded interrogations involved a higher percentage of violent crimes (particularly sex crimes) than the overall sample.

n280 Police agencies apparently tape statements more frequently in cases involving child victims. This might be because videotaped statements of children are admissible in certain cases, *see* UTAH R. CRIM. P. 15.5 (1995) (authorizing admission of visual recording of statement of child victim or witness of sexual or physical abuse if certain conditions are met), and, as a result, investigators in these kinds of cases have greater access to videorecording equipment.

n281 *See* Thomas, *supra* note 5, at 832-33.

n282 One possible problem with our data should be noted: We did not have a specific box on our survey form for suspects who objected to recording. *See infra* Appendix A (survey form). However, the researchers do not recall any such case in police descriptions of questioning.

n283 There were no allegations in our sample of tape tampering or other recording problems.

n284 *See, e.g.*, Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1843 (1987); Rosenberg & Rosenberg, *supra* note 225, at 98; *cf.* JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 49, 62-64 (1993) (discussing police perjury more generally); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 95-114 (1992) (discussing police perjury in search and seizure context).

n285 There is one British study, which reported that women were less likely to "exercise silence" when questioned by police (28.5% for males vs. 9.1% for females), although the small sample size meant the difference was not statistically significant. McCONVILLE & HODGSON, *supra* note 256, at 177-78.

n286 *See* William Hart, *The Subtle Art of Persuasion*, POLICE MAG., Jan. 1981, at 17.

n287 The chi-square statistic is not significant at the .05 level, but is significant at the .10 level. A possible explanation for this difference is that women are less likely to commit violent crimes than are men, *see* 1993 UNIFORM CRIME REPORTS, *supra* note 71, at 222 (reporting violent crime arrests of males outnumber arrests of females by a 6 to 1 ratio), and confessions are less likely for crimes of violence, *see supra* note 143 and accompanying text. To see whether this explained the difference, we compared success rates by gender, limited to property crimes only. Even controlling for this possibility, the trend remained that women were more likely to confess. For males suspected of property crimes, 38 were questioned successfully, and 37 were questioned unsuccessfully. For females suspected of property crimes, 10 were questioned successfully, and five were questioned unsuccessfully. The chi-square statistic is not significant at .05 level, but is significant at the .10 level.

n288 *Yale Project*, *supra* note 29, at 1644-45 (finding no statistically significant relation between race and interrogation success).

n289 Leiken, *supra* note 44, at 13; *see also* GRISSO, *supra* note 100, at 34, 37 (finding black juvenile offenders interrogated less often than whites).

n290 *See* McCONVILLE & HODGSON, *supra* note 256, at 177-78 (no substantial difference in "exercise of silence" between whites and Afro-Caribbeans); *cf.* SANDERS ET AL., *supra* note 132, at 37 tbl. 3.22 (reporting that "take-up" rates on solicitor assistance during questioning was 32.8% for Afro-Caribbeans, 26.7% for whites, and 18.1% for Asians).

n291 The chi-square statistic (pr. = .921) is not significant.

n292 FEENEY ET AL., *supra* note 59, at 144 tbl. 15-3.

n293 The chi-square statistic is significant at the .05 level (not including "other" category).

n294 *See supra* notes 214-217 and accompanying text.

n295 Even with this limitation, there might still be differences in questioning circumstances between patrol officers and detectives. A patrol officer might more frequently interview a suspect "in custody" on the street than a detective, for whom custodial interviews are almost always at the station house.

n296 For patrol officers, 11 suspects invoked, 19 were questioned successfully, and 23 were questioned unsuccessfully. For detectives, 8 suspects invoked, 37 were questioned successfully, and 20 were questioned unsuccessfully. The chi-square statistic (pr. = .125) is not statistically significant.

n297 One British study found that more than 40% of arrested suspects were questioned more than once. IRVING, *supra* note 63, at 103. Another British study reported that about 5% of suspects were interviewed in custody twice. McCONVILLE & HODGSON, *supra* note 256, at 174.

n298 16 of 173 suspects. Ten suspects were originally questioned by patrol officers and later questioned by detectives; five suspects were questioned by detectives in all interviews. Six suspects were in custody for both interviews; ten suspects were not in custody during the first interview but were in custody during the second; one suspect was not in custody for both interviews (but even he was given his *Miranda* warnings during this second interview).

Only one suspect was interrogated more than twice. The suspect was questioned three times about his involvement in an auto theft, all by a detective. The first two were separate custodial interviews at the scene of the crime, while the third was a custodial interrogation at the station. The suspect originally gave incriminating statements to the police during the first interview, which called his truthfulness into question. But in the subsequent interviews, the suspect simply gave denials with explanations concerning his involvement. It appears that the longest interrogation lasted only fifteen minutes.

n299 The one exception was in a domestic violence case in which the victim declined to cooperate with police.

n300 Two suspects offered flat denials in their first interviews and then gave verbal confessions in their second interviews. One suspect refused to answer questions in his first, noncustodial interview, but then gave incriminating statements in his second interview. One suspect who gave incriminating statements in his first

interview gave a verbal confession in his second interrogation.

n301 Three of four suspects. *See supra* notes 293-296 and accompanying text (finding detectives more often successful in questioning than patrol officers).

n302 In three cases the suspect gave a verbal confession at each interview: One suspect gave incriminating statements at both interviews; two suspects gave denials with explanations at both interviews; and a final suspect gave a flat denial at both interviews.

n303 In one case, the suspect obtained an attorney between the first and second interviews. In the other cases, the suspects simply invoked their *Miranda* rights. In two of these cases, the suspect had not been in custody during the first interrogation, and hence had not received *Miranda* warnings.

n304 470 U.S. 298 (1985).

n305 Ogletree, *supra* note 284, at 1840; *see* Rosenberg & Rosenberg, *supra* note 225, at 95 (arguing that *Elstad* gives "officers a blueprint for obtaining inculpatory statements that will withstand judicial scrutiny despite circumvention of the spirit if not the letter of *Miranda*").

n306 Miranda v. Arizona, 384 U.S. 436, 481 (1966).

n307 *Compare* INBAU, *supra* note 169, at xiv ("Many criminal cases . . . are capable of solution only by means of an admission or confession from the guilty individual or . . . [from] the questioning of other criminal suspects.") *with* James Fyfe, *The Rule Is Rarely an Issue in Criminal Cases*, NEWS PRESS (Fort Myers, Fla.), Feb. 8, 1987, at A23 ("Confessions rarely have anything to do with convictions because all the evidence needed to convict is usually in long before anybody confesses.").

n308 *See* Cassell, *supra* note 3, at 422-37 (collecting available research).

n309 *See* Schulhofer, *supra* note 45, at 541-44 (arguing that the necessity rate is at most around 19%). *But see* Cassell, *supra* note 45 (responding to Schulhofer).

n310 *See* 2 FEENEY & WEIR, *supra* note 59, at 42 (finding that police sergeants thought confessions were essential more often than did academic researchers); *Yale Project*, *supra* note 29, at 1591-92 (finding that detectives thought confessions necessary more often than did Yale editors).

n311 *See* Cassell, *supra* note 3, at 468-70.

n312 *See infra* Appendix A (survey forms).

n313 *See Yale Project*, *supra* note 29, at 1582-83. We used the Yale terminology rather than our own to avoid suggestions that we biased our outcome by asking slanted questions. The Yale terminology was also

adopted in Witt, *supra* note 33, at 324.

n314 We have less data on this subject than on others because the researchers had to ask prosecutors a question in the course of screening sessions rather than passively record information that was already being provided. Sometimes a convenient opportunity for this question was unavailable.

n315 *See, e.g.*, BROSI, *supra* note 66, at 12 (reporting findings on prosecutorial screenings).

n316 The Bay Area study found that successfully interrogated suspects were more likely to be charged than those who were unsuccessfully interrogated. Leo, *supra* note 49, at 294 tbl. 16. The study also found that suspects who waived or invoked their *Miranda* rights were equally likely to be charged. *Id.* at 278 tbl. 10. An older study by L.A. District Attorney Evelle Younger found that complaints were issued in 65.3% of cases where the defendant had given a statement but in only 49.9% of cases in which no such statement was available. *See Controlling Crime Hearings*, *supra* note 34, at 347 (figures derived from worksheets in the complaint-stage table); *cf.* Cassell, *supra* note 3, at 426 (noting the definitional problems in Younger's study). A British study found that "suspects who confess are far more likely to be charged than suspects who deny the offence or remain silent." SANDERS ET AL., *supra* note 133, at 148.

n317 Comparing those successfully questioned to all others produced a definite trend that just missed significance at the .05 level, but was significant at the .10 level (pr = .054). Comparing those successfully questioned to those unsuccessfully questioned was chi-square significant at the .05 level.

n318 *See, e.g.*, Schulhofer, *supra* note 239, at 456.

n319 *See, e.g.*, Stephen J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering* Miranda," 54 U. CHI. L. REV. 938, 946-47 n.20 (1987).

n320 *See* PETER F. NARDULLI ET AL., THE TENOR OF JUSTICE: CRIMINAL COURTS AND THE GUILTY PLEA PROCESS 236, 254 tbl. 8.13 (1988) (finding that some effect of confessions on plea bargaining); NEUBAUER, *supra* note 43, at 109-10 (finding that defendants who confessed received fewer concessions in plea bargaining); *Yale Project*, *supra* note 29, at 1608 (finding defendants who confessed were less successful in bargaining for lower charges); *see also* Leo, *supra* note 49, at 293 (finding confessing defendants less likely to have their cases dismissed and more likely to have their cases resolved by plea bargaining).

n321 This is not the same, of course, as definitively proving that confessions caused this effect. It is possible that other factors that correlated with confessions were responsible.

n322 *See generally* UTAH CODE ANN. §§ 77-2a-1 to -4 (1995) (setting forth the standards for pleas in abeyance). It is also possible for a defendant to be "diverted" after charging through a formal diversion agreement. *See generally id.* §§ 77-2-2(2), 77-2-5 (1995). There were no such cases in our sample.

n323 *Id.* § 76-3-103(1) (1995). Utah also has a fourth category for capital felonies. *Id.* There were no capital cases in our sample. Misdemeanors are likewise divided into three classes: Class A, Class B, and Class C. *Id.* §

76-3-104 (1994).

n324 *Id.* § 76-3-203 (1995) (generally speaking, first degree felonies are punishable by five years to life; second degree by one to fifteen years; and third degree felonies by probation to five years). Utah also has a few mandatory minimum sentences, primarily associated with sex and firearms offenses.

n325 For this reason, we did not collect data on whether confessions affected sentences ultimately served by defendants. To do so would have unduly prolonged our study, as complete data would not be available until parole dates were set for all defendants. Nor did we collect data on sentencing recommendations, an area that is sometimes the subject of plea bargaining.

n326 The office had a policy prohibiting plea bargaining unless there was some reason justifying it. In practice, the exception appeared to be at least as important as the rule.

n327 *See* UTAH CODE ANN. § 76-6-202 (1995) (defining burglary offenses).

n328 *See, e.g.*, Hans Zeisel, *The Disposition of Felony Arrests*, 1981 AM. B. FOUND. RES. J. 407, 437-40.

n329 Comparing those who were successfully questioned to all others combined produced a chi-square result significant at the .01 level; comparing to those unsuccessfully questioned produced a chi-square result that just missed significance at the .05 level (pr = .055). Because a case can be made for doing the statistical significance test either way, we have reported both numbers here and report both such tests for all other analyses of Tables 16 and 17, *infra*.

n330 Comparing those who were successfully questioned to all others combined produced a chi-square result significant at the .05 level; comparing to those unsuccessfully questioned produced a chi-square result significant at the .01 level.

n331 One more suspect who was questioned unsuccessfully went to trial. During the trial, he pled to reduced charges (at the -1 level).

n332 *Compare* Leo, *supra* note 49, at 394-95 & n.4 (arguing that the proper measure of *Miranda's* effects is to compare ultimate outcomes for those who invoked their *Miranda* rights with those who waived their rights) *with* Cassell, *supra* note 3, at 432 n.267 (arguing that such an approach is unlikely to capture all of *Miranda's* effects).

n333 Our "invoked" category was also unusual in that it appeared to take much longer to resolve these cases. The only theory we could think of was that those who invoked might be "hard cases" who would fight criminal charges more aggressively all the way through the system.

n334 The chi-square result is not significant (pr = .189).

n335 Difficulties in collecting prior record data are discussed *supra* note 265 (noting difficulty of

determining convictions). Of twenty-one suspects who invoked, sixteen had criminal records. We had no further information on four of these suspects. Of the remaining twelve, one had five or more convictions, two had at least two convictions, three had ten or more arrests, three had at least two arrests, and three had one arrest (at least two of whom were ultimately convicted). These kinds of records seemed to be more serious than the average criminal record in our sample.

n336 *See, e.g.*, NEUBAUER, *supra* note 43, at 218.

n337 *See supra* note 264 and accompanying text (noting that studies find suspects with prior records more likely to invoke).

n338 For example, the Bay Area study found no difference in punishment between those who invoked their rights and those who waived them. Leo, *supra* note 49, at 281. But the same study found that those who invoked were four times more likely to have felony records. *Id.* at 277. Without controlling for this effect, it is difficult to reach conclusions about the unique contribution of invocations to sentencing outcomes.

n339 The chi-square is significant at the .01 level.

n340 The conviction difference is important because it might plausibly serve as a measure of the need for confessions to convict. *See* Cassell, *supra* note 3, at 430.

n341 The chi-square is significant at .01 level.

n342 The only exception is the New Haven study, which suggested that two of ninety suspects were believed to be innocent by the study's authors. *Yale Project, supra* note 29, at 1586.

n343 The fact that even this one case ended up in our sample was a quirk. Originally a boyfriend was a suspect in an arson. When police questioned him over the phone, he gave them information about his old girlfriend (and even secretly recorded a conversation in which she admitted the crime -- confirming that "heaven has no rage like love to hatred turned"). When the case was screened, the researcher recorded the results of questioning for both the boyfriend and the girlfriend.

n344 *See supra* note 144 and accompanying text (discussing police pre-screening).

n345 *See generally* ALAN M. DERSHOWITZ, THE BEST DEFENSE xxi (1982) (proposing "Rule I" of the "justice game" as "almost all criminal defendants are, in fact, guilty"); Cassell, *supra* note 3, at 480-81 (discussing small percentage of convictions of innocent persons). Lest this position be misconstrued, we should make clear our belief that suspects are entitled to a presumption of innocence in a court of law and that cases of innocents ensnared in the criminal justice system are great tragedies. We also acknowledge that a few innocent persons are in fact convicted, a few more are charged, and even more suspected by police. Our claim here is only that factually innocent defendants constitute a tiny percentage of cases that pass through the courts in Salt Lake County.

n346 *See, e.g., supra* notes 263-267 and accompanying text (finding prior criminal record had no bearing on questioning success).

n347 Such generalizations have a venerable tradition in the confessions literature. *See, e.g., Yale Project, supra* note 29, at 1533 (generalizing from 100 cases in New Haven to the entire country).

n348 *See, e.g.*, Moran v. Burbine, 475 U.S. 412, 427 (1986) (rejecting rule requiring police to inform suspect when lawyer attempts contact because the "minimal benefit . . . would come at a substantial cost to society's legitimate and substantial interest in securing admissions of guilt"); Oregon v. Elstad, 470 U.S. 298, 312 (1985) (rejecting rule against continued questioning after confession obtained in violation of *Miranda* because "this immunity comes at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being compelled to testify against himself.").

n349 *Cf.* GRANO, *supra* note 9, at 202 (arguing that *Miranda* is vulnerable apart from pragmatic considerations).

n350 *See supra* notes 142-181 and accompanying text (reporting frequency of successful outcomes to interrogations and offering comparison to pre-*Miranda* statistics). Of course, the proposition that confession rates are *lower* than before *Miranda* is different than the proposition that confession rates are *low*. One could believe that a 33.3% success rate is "high" and accept the proposition that it is lower than pre-*Miranda* rates.

n351 *See supra* notes 115-119 and accompanying text (reporting findings on invocations).

n352 *See supra* notes 214-217 and accompanying text (reporting findings on noncustodial questioning).

n353 *See supra* notes 306-345 and accompanying text (reporting findings on confessions and ultimate outcomes).

n354 *See supra* notes 45-56 and accompanying text (noting that before-and-after studies, declining crime clearance rates, and police perceptions all suggest that *Miranda* reduced confessions).

n355 *See* Thomas, *supra* note 5, at 821-23.

n356 The "equality" rationale for *Miranda* has been, in our view, effectively refuted by Professor Joseph Grano. *See* GRANO, *supra* note 9, at 32-38. Reviewing Grano's book, Professor Thomas concedes that if empirical evidence demonstrates a substantial loss of confessions from *Miranda*, the costs to society "could outweigh the equality objective." Thomas, *supra* note 249, at 826.

n357 Oregon v. Elstad, 470 U.S. 298, 306 (1985).

n358 New York v. Quarles, 467 U.S. 649, 684 n.7 (1984) (Marshall, J., dissenting).

n359 Thomas, *supra* note 249, at 819, 821; *see also id.* at 826-27.

n360 *Id.* at 821 & n.21 (noting view of Professor Yale Kamisar).

n361 *See supra* Table 7. This data involves both custodial and noncustodial questioning. Other limitations to the data are discussed at *supra* notes 253-255 and accompanying text.

n362 Attributing the absence of unconstitutional questioning to *Miranda* requires proof that such questioning often took place before *Miranda* and that *Miranda* helped eliminate it. The empirical evidence on both points, however, is quite weak. *See* Cassell, *supra* note 3, at 473-78 (discussing whether *Miranda* resulted in the disappearance of coercion).

n363 *See supra* note 243 and accompanying text (finding only one case of 173 in which *Miranda* was not followed).

n364 *See supra* notes 209-210 and accompanying text (describing use of *Beheler* warnings).

n365 *See supra* notes 211-212 and accompanying text (describing the giving of *Miranda* warnings by officers not required to do so).

n366 *See supra* notes 304-305 and accompanying text (discussing compliance with *Miranda* in multiple interview situation).

n367 *See supra* notes 222-237 and accompanying text (discussing infrequent use of these exceptions to *Miranda*).

n368 *See supra* note 268 and accompanying text.

n369 Thomas, *supra* note 12, at 935.

n370 Moran v. Burbine, 475 U.S. 412, 433 n.4 (1986).

n371 Yale Kamisar, *The "Police Practice" Phases of the Criminal Process and the Three Phases of the Burger Court, in* THE BURGER YEARS 143, 150 (Herman Schwartz ed., 1987).

n372 *Cf.* Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 626 (noting that "there is no empirical content to this 'balancing' approach to considering the costs and benefits" of the search and seizure exclusionary rule); James B. White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273, 1282 (1983) (suggesting that in the absence of real empirical evidence, an assessment of the costs and benefits of the exclusionary rule "must rest not upon those grounds, but upon prior dispositions or unarticulated intuitions that are never justified") (footnote omitted).

n373 *See, e.g.*, Minnick v. Mississippi, 498 U.S. 146, 151 (1990) (asserting that the benefit of "specificity" of the *Edwards* prophylactic rule "has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis") (quoting Fare v. Michael C., 442 U.S. 707, 718 (1979)).

n374 *See supra* notes 13-28 (discussing dearth of empirical information on police interrogation at the time of *Miranda*).

n375 Miranda v. Arizona, 384 U.S. 436, 524 (1966) (Harlan, J., dissenting). Justice Harlan noted that "studies are also being conducted by . . . the Georgetown Law Center, and by others equipped to do practical research." *Id.* at 523 (footnote omitted).

n376 Professor Schulhofer's article, written after this Article was drafted, is the most notable effort in this regard. Schulhofer, *supra* note 45. Yet his analysis is quite problematic. *See generally* Cassell, *supra* note 45.

n377 *See supra* note 185. Professor Thomas's limited research agenda illustrates the point. *See* Thomas, *supra* note 5, at 833-37 (outlining research agenda). He is unable to recommend real comparative projects (comparing, for instance, what happens when police do and do not request waivers of rights), but instead must suggest projects that would at best provide inferential information on *Miranda* (such as, whether judicial warnings at initial appearances make a difference in confessions).

n378 Leo, *supra* note 49.

n379 *Id.* at 268 tbl. 7.

n380 *Id.* at 269 n.5 (comparing to post-*Miranda* confession rates but noting this must be done "with some caution").

n381 *See, e.g.*, Schulhofer, *supra* note 45 (arguing that Leo's 64% confession rate is "much *higher* than most of the estimates available in the pre-*Miranda* period").

n382 *See supra* note 176.

n383 Leo, *supra* note 49, at 255 (study consists of 182 interrogations); *see also id.* at 455-69 (describing process of waiting at the station house for detectives to begin interrogations).

n384 *See supra* notes 91-104 and accompanying text.

n385 FEENEY ET AL., *supra* note 59, at 143 tbl. 15-2 (finding 18.5% of arrested burglary suspects in Jacksonville, Florida, and 20.1% in San Diego, California not interrogated).

n386 Leo reports 117 incriminating statements from 182 suspects interrogated. Leo, *supra* note 49, at 268 tbl. 7. Assuming an additional 48 suspects never questioned would approximate a 21% noninterrogation rate and produce a 50.9% (117/(182 + 48)) incriminating statement rate.

n387 *See supra* notes 159-167.

n388 *See supra* note 170 (citing article co-authored by Leo on this point); *see also supra* notes 169-172 and accompanying text (collecting evidence that police are shifting to noncustodial interrogations).

n389 *See supra* notes 216-217 and accompanying text.

n390 Leo reported 182 interrogations. *See supra* note 386. Applying a 30.1% noncustodial interrogation rate would mean that, for comparison purposes, 55 interrogations should be regarded as not in custody.

n391 One measure of the extent of effectiveness is to divide our success rate for noncustodial interrogations by the success rate for custodial interrogation. For this purpose, an invocation is an "unsuccessful" outcome. To determine an effectiveness rate, one can add to our data *supra* Table 6 (custodial vs. noncustodial questioning success rate), data on invocations by custodial status, *see supra* Table 3; *supra* note 216. This produces the result that custodial interrogations were successful 58 times and unsuccessful 63 times (44 denials + 19 invocations), a success rate of 47.9%. Noncustodial interrogations were successful 15 times and unsuccessful 37 times (35 denials + 2 invocations), a success rate of 28.8%. This means that noncustodial interrogation is about 60.1% (28.8%/47.9%) as effective as noncustodial interrogation.

n392 Reducing Leo's 64.2% success rate to adjust for the lower effectiveness for custodial interrogations, *see supra* note 391, results in a 38.6% success rate (64.2% x 60.1%) for noncustodial interrogations. In the 55 assumed noncustodial interrogations, *see supra* note 390, 21 incriminating statements would be obtained (55 x 38.6%), while in the remaining 127 custodial interrogations (182 total interrogations -- 55 noncustodial interrogations), a total of 82 incriminating statements would be obtained (127 x 64.2%). Dividing the 103 total incriminating statements (82 + 21) by the 230 suspects assumed to have been questioned and not questioned, *see supra* note 9, results in a 44.8% (103/230) incriminating statement rate.

n393 *See Controlling Crime Hearings, supra* note 34, at 1120 (New York County study assessed "almost all felony cases"); *id.* at 223, 224 (Kings County study involves all suspects in various categories of crimes; providing illustration of questioning by "police officer" after vehicle stop); Brief of National District Attorneys Association, *supra* note 22, at 6a-7a (collecting data from eight cities based on confessions present in "prosecutions" without regard for detective/police officer distinctions); Barrett, *supra* note 14, at 41 (reporting information for interrogation in City B, California by "all interrogation, including . . . arresting officer"); Medalie et al., *supra* note 32, at 1362 (study assessed response of the D.C. "police department"); *cf. Controlling Crime Hearings, supra*, at 200 (discussing statistics for Philadelphia "police" and "Police Department" but noting that statistics compiled by "Detective Division of the Philadelphia Police Department"); Witt, *supra* note 33, at 324, 325 (study based on files from "Seaside City Police Department" but referring to procedures followed by Seaside City "detectives"). *But see* Barrett, *supra* note 14, at 41 (reporting interrogation in City A, California by "members of the detective division"); Seeburger & Wettick, *supra* note 31, at 7 (study includes only case "investigated by the Detective Branch"); Souris, *supra* note 20, at 264 (Detroit data based on "prosecutions handled by the Specialized Bureaus of the Criminal Investigation Division"); *Yale Project, supra* note 29, at 1527 (observations made by students "in the detective division"). Our count of these citations is that data from

eleven of the cities involved interrogations by all officers, four interrogations by detectives only, and data from two could not be classified.

n394 *See supra* note 293 and accompanying text.

n395 *See id.*

n396 *See* FEENEY ET AL., *supra* note 59, at 144 tbl. 15-3 (detectives obtained a higher percentage of confessions than patrol officers in Jacksonville and San Diego).

n397 Patrol officer success in custodial interviews was 35.8%. *See supra* note 296 (19/53 successful). Detective success in custodial interviews was 56.9%. *See id.* (37/65 successful). This difference just missed statistical significance at the 90% confidence level. *See id.* Because we have already adjusted Leo's figures to reflect lower effectiveness of noncustodial interviews, some may argue that any further adjustment for lower effectiveness of patrol officer interviews is "double counting." We nonetheless believe that the adjustment is appropriate for several reasons: (1) The lack of statistical significance may well stem from the small sample size available when restricted to custodial interviews by patrol officers. *See supra* note 147 (noting difficulty with small sample size). Indeed, when a 20% difference in success rates (35.8% vs. 56.9%) comes back as statistically insignificant, it is clear that the sample size permits only the most substantial variations to be found to be significant. (2) Common sense suggests that experienced detectives would be more successful in obtaining confessions. Most of the detectives in Leo's sample had been police officers for ten to twenty years. Leo, *supra* note 49, at 259. It seems reasonable to assume that these officers would be better interrogators, either from experience or training, than the general run of patrol officers. Indeed, Leo discusses interrogation training seminars that "certify police detectives as professionals who command exclusive control over a specialized body of knowledge." *Id.* at 108. (3) In our study, patrol officers frequently conducted "custodial" interviews "on the street" after arrest, probably a less productive setting for questioning than the station house, where custodial interviews by detectives were frequently conducted. (4) Professor Thomas has challenged us to reconcile our study with Leo's. The adjustment for detective effectiveness is one way of doing so. However, as a partial response to double counting concerns, we have performed this adjustment only for custodial interrogations, leaving in place the assumption that detectives and patrol officers are equally effective in noncustodial settings.

n398 *See supra* note 296 (custodial questioning done by detectives 65 times; patrol officers 53 times; a ratio of 55.1% of questioning done by detectives).

n399 *See* FEENEY ET AL., *supra* note 59, at 144 tbl. 15-3 (more than half of interrogations conducted by patrol officers in Jacksonville and San Diego).

n400 One measure of reduced effectiveness is to divide the success rate of patrol officer questioning by the success rate of detective questioning. Using figures only for custodial questioning, *see supra* note 397, the ratio of patrol officer success to detective success is 62.9% (35.8%/56.9%).

n401 Taking the 82 incriminating statements in custodial interrogations out of the 230 suspects overall, as calculated earlier, *see supra* note 391, and multiplying by the 55.1% ratio of detective interviews to patrol interviews, *see supra* note 398, produces the result that 45 would have been obtained by detectives and 37 by patrol officers. Adjusting for the fact that the patrol officers would have obtained only 62.9% as many

incriminating statements in the 37 successful interrogations, *see supra* note 400, means that the 37 incriminating statements obtained by patrol officers should be reduced to 23 incriminating statements (37 x 62.9%). The total success rate is, therefore, 38.7% ((45 + 23 custodial successes + 21 noncustodial successes)/230 suspects overall).

n402 Leo, *supra* note 49, at 263.

n403 Internet message from Richard A. Leo to Paul G. Cassell, Nov. 8, 1995 (on file with Cassell).

n404 *See supra* notes 244-247 and accompanying text.

n405 Leo, *supra* note 49, at 268 n.4 (emphasis added).

n406 Compounding this problem is Leo's failure to have a "denial with explanation" category, like the category we used in our study. *See supra* notes 139-140 (explaining importance of this category). As a result, he probably classified some such denials as incriminating statements.

n407 Leo, *supra* note 49, at 273.

n408 *See supra* note 317 and accompanying text (only 12.5% of suspects successfully interrogated not charged).

n409 *Compare supra* notes 144-145 and accompanying text (reporting a 27.2% "confession" rate) *and* FEENEY ET AL., *supra* note 59, at 142 tbl. 15-1 (reporting a 32.9% confession rate in Jacksonville and 20.3% in San Diego) *with* Leo, *supra* note 49, at 268 tbl. 7 (24.2% of suspects gave confessions, 17.6% gave partial admissions, and 22.5% gave "incriminating statements").

n410 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 49, 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 incriminating statements Leo found in his sample.