

Northwestern University Law Review
Winter, 1996
*387 MIRANDA'S SOCIAL COSTS: AN EMPIRICAL REASSESSMENT
Paul G. Cassell [\[FNa\]](#)

Copyright © 1996 Northwestern University School of Law, Northwestern
University Law Review; Paul G. Cassell

- I. The Methodology of Calculating Miranda 's Costs 391
 - A. The Wrong Analysis -- Suppression Rates 391
 - B. The Right Analysis -- Lost Confessions 394
- II. The Empirical Evidence on Miranda and Confessions 394
 - A. Studies on the Drop in the Confession Rate 395
 - 1. Before-and-After Studies 395
 - (a) The Pittsburgh Study 396
 - (b) The New York County Study 399
 - (c) The Philadelphia Study 402
 - (d) The 'Seaside City' Study 405
 - (e) The New Haven Study 406
 - (f) The Washington, D.C. Study 409
 - (g) The New Orleans Study 412
 - (h) The Kansas City Study 413
 - (i) The Kings County Study 413
 - (j) The Chicago Homicide Study 414
 - (k) The Los Angeles Study 414
 - (l) Summary of the Before-and-After Studies 416
 - 2. International Comparisons 418

(a) Britian	419
(b) Canada	421
B. Studies on the Necessity for Confessions	422
1. The Pittsburgh Study	424
2. The New York County Study	425
3. The Los Angeles Study	425
4. The New Haven Study	426
5. The 'Seaside City' Study	427
6. The Detroit Study	428
7. The Kings County Study	428
8. The Sobel Study	429
9. The Jacksonville and San Diego Study	430
10. The Oakland Robbery Study	430
11. The Middle America and Chicago Studies	431
12. Bay Area Study	432
13. Salt Lake County Study	432
14. Summary of Confession Necessity Studies	433
III. Calculating Miranda 's Costs	437
A. Direct Costs in Terms of Lost Cases	437
B. Indirect Costs in Terms of More Lenient Plea Bargains	440
IV. Problems with Generalizing	446
A. Generalizations on Confession Rates	447
1. Generalizing Across Jurisdictions	447
2. Generalizing Across Time	450
(a) Empirical data from the before-and-after studies	454

(b) Evidence from later time periods	455
(c) The effect of doctrinal changes since Miranda	460
3. Generalizing Across Offenses	462
B. Generalizations on the Necessity for Confessions	466
1. Generalizing Across Jurisdictions	466
2. Generalizing Across Time	466
3. Generalizing Across Offenses	470
V. The Legitimacy of the Concept of a 'Cost' to Miranda	471
A. Miranda's Cost as Dictated by the Fifth Amendment	471
B. Miranda's Cost as the Benefit from the Disappearance of Coercion	473
C. Miranda's Cost as the Benefit of Protecting the Innocent	479
VI. Assessing Miranda in Light of Its Costs	483
A. Miranda 's Costs in Perspective	483
B. Moving Beyond Miranda	486
1. Recording as an Alternative to Miranda	486
2. Minimizing Miranda 's Costs	492
(a) Warnings	493
(b) Waiver and questioning cut-off requirements	494
3. The Replacement for Miranda	496
C. Miranda's Greatest Cost	498

*389 Introduction

Justice White argued in his dissenting opinion in *Miranda* that "[i]n some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him." [\[FN1\]](#) Common sense suggests the same conclusion: Surely fewer persons will confess if police must warn them of their right to silence, obtain affirmative waivers from them, and end the interrogation if they ask for a lawyer or for questioning to stop. Yet today, with more than a quarter of a century of experience with the *Miranda* rules, legal academics generally take the opposite view -- that *Miranda* has had only a "negligible" effect on law enforcement. [\[FN2\]](#) For example, the nation's leading criminal procedure hornbook concludes that "little has changed since *Miranda* was decided."

(Cite as: 90 Nw. U. L. Rev. 387)

[FN3] The great majority of law review articles on Miranda likewise assert that the decision has had no significant effect on police effectiveness in obtaining confessions and, indeed, often refer to this proposition as though it were an empirically demonstrated fact. [FN4] Many of the most widely used criminal procedure textbooks contain the same definitive pronouncement. [FN5]

*390 Given this wide agreement that Miranda's effects are negligible, it is perhaps a little surprising that no one has quantified Miranda's effects on the American criminal justice system. Legal scholars have assayed this type of "cost" (in terms of "lost arrests") for the Fourth Amendment search and seizure exclusionary rule. [FN6] But for Miranda, no one has bothered to explain what a "negligible" effect is and how many dangerous criminals such an effect involves.

This Article contends that the conventional academic wisdom about Miranda's effects is simply wrong. As common sense suggests, Miranda has significantly harmed law enforcement efforts in this country. In defense of this thesis, this Article makes the first (and admittedly preliminary) attempt to advance the Miranda debate beyond the prevailing qualitative level. [FN7] Justice White was, of course, correct in concluding that we will never know exactly how many criminals have avoided conviction because of Miranda's requirements. [FN8] However, "[f]rom a policy perspective, what is needed is not precise numbers so much as a sound estimate of the general level of [Miranda's] effects." [FN9]

This sort of meticulous cost analysis is also important in light of the Supreme Court's recent portrayal of the Miranda rules. The Court has described Miranda as "a carefully crafted balance designed to fully protect both the defendants' and society's interests." [FN10] Even Miranda's most ardent defenders choose to view the decision in terms of costs and benefits. [FN11] But any supposed "balancing" of interests requires some attempt to measure the weight on the cost side of the *391 scales. [FN12] This Article provides a metric for doing so and also for assessing the costs of alternatives to Miranda, such as videotaping police interrogations.

This Article proceeds in six parts. Part I briefly describes the proper methodology for assessing Miranda's costs. Miranda's effects should be measured not by looking at suppression motions filed after police have obtained a confession, but rather by examining how many confessions police never obtain because of Miranda. Part II reviews the available empirical evidence concerning Miranda's effect on confession rates and on the role of confessions in obtaining convictions. Read together, these studies suggest that Miranda has resulted in a lost confession in roughly one out of every six criminal cases and that confessions are needed to convict in one out of every four cases. Part III then specifically quantifies Miranda's costs, both in terms of lost cases and more favorable plea bargains for defendants. It suggests that each year Miranda results in "lost cases" against roughly 28,000 serious violent offenders and 79,000 property offenders and produces plea bargains to reduced charges in almost the same number of cases. Part IV responds to some anticipated objections that might be raised to the extrapolations that my calculus involves. Part V examines whether this concept of a cost to Miranda is a "legitimate" one. Finally, Part VI assesses Miranda in light of these costs and concludes that they are unacceptably high, particularly because alternatives such as videotaping police interrogations can more effectively prevent coercion while reducing Miranda's harms to society.

I. The Methodology of Calculating Miranda's Costs

A. The Wrong Analysis -- Suppression Rates

One possible way of assessing Miranda's costs is to look at how many confessions are suppressed because of Miranda violations. In some cases Miranda suppression motions have led to the release of dangerous criminals. For example, in Texas a member of the Bandidos motorcycle gang killed a young woman who had testified against the gang. He confessed to the killing, but his confession was suppressed because he had received routine assignment of counsel before confessing. [FN13] He walked out of the courtroom "with a big *392 smirky grin on his face," leaving the parents of the victim to say they had

(Cite as: 90 Nw. U. L. Rev. 387)

lost faith in the system. [\[FN14\]](#)

While these cases are dramatic, defenders of Miranda respond -- quite correctly, according to the existing empirical data -- that the suppression of confessions leading to the release of criminals, much less dangerous criminals, is quite rare. Peter Nardulli's detailed study of nine medium-sized counties in Illinois, Michigan, and Pennsylvania in the late 1970s found that, out of 7035 cases studied, only one conviction (.071%) was lost as the result of a successful Miranda suppression motion. [\[FN15\]](#) Nardulli's similar study in the city of Chicago in 1983 found that, out of 3626 cases studied, only about one conviction (.028%) was lost as the result of motions to exclude confessions. [\[FN16\]](#) Similar conclusions came from a study conducted by Floyd Feeney, Forrest Dill, and Adrienne Weir, who gathered data in Jacksonville, Florida and San Diego, California and found that -- at most -- two of 619 cases (0.3%) could be said to have been dropped because of Miranda problems with the confession. [\[FN17\]](#) Other studies suggest a similarly minimal impact of suppression motions on convictions. [\[FN18\]](#) To complete the picture, *393 studies find that convictions are rarely reversed on appeal because of a motion to suppress under Miranda. [\[FN19\]](#)

Based on these small percentages, it has been argued that Miranda has had only a minimal effect on law enforcement. For example, Professor Mathew Lippman, citing the Nardulli figure of 0.071% of cases lost due to Miranda, has asserted that "[t]he Miranda exclusionary rule has had a negligible impact on the ability of the police to obtain confessions." [\[FN20\]](#) Similarly, Professor Paul Marcus has argued that evidence that suppression motions are rarely granted "mutes th[e] concern" about Miranda's harm. [\[FN21\]](#) Nardulli himself has read his data as supporting the proposition that the "exclusionary rule[] -- as applied to . . . confessions -- ha[s] a truly marginal effect on the criminal court system." [\[FN22\]](#)

These arguments fail to appreciate the true extent of the problems Miranda creates for law enforcement. Analysis of numbers of suppressed confessions tells us only about what happens to cases when police obtain confessions. It tells us nothing about cases in which police fail to obtain confessions because of the Miranda rules. As Professor Joseph Grano has written, this calculus does not consider "the loss of statements that are never obtained because of Miranda, voluntary statements that would help a trier of fact to determine truth." [\[FN23\]](#) Suppression motion analysis simply ignores these "lost cases." Indeed, whatever impact shows up in suppression motion analysis is not a substitute for the costs of lost confessions; it is a cost that must be added on top. [\[FN24\]](#) In any event, proof that law enforcement *394 is rarely harmed by suppressed confessions does not negate the contention that law enforcement is often harmed by confessions never being obtained. To focus on the admittedly tiny fraction of cases that go forward but are later lost because of a Miranda suppression motion is to confuse the exceptional cost with the typical one. [\[FN25\]](#)

B. The Right Analysis -- Lost Confessions

To quantify Miranda's costs from lost cases, we must examine whether Miranda has produced any lost confessions through its combination of warnings, waivers, and questioning cut-off rules. It now appears to be common ground that the Miranda litany dissuades at least some suspects from talking. That is why Miranda's defenders carefully claim that Miranda's costs are negligible rather than nonexistent.

A lost confession from Miranda does not necessarily translate into a social cost. Even when Miranda has resulted in a lost confession, prosecutors may have enough other evidence to obtain a conviction. In assessing Miranda's costs, therefore, we need quantification not only of changes in the confession rate due to Miranda but also of the proportion of cases in which a confession is needed to convict. These two variables can then be multiplied together to determine Miranda's costs. For example, if Miranda reduced confessions by 20% and confessions were needed in 20% of those cases to convict, then Miranda's costs would be 4% of all cases (20% x 20%). Some sophisticated defenders of Miranda acknowledge that this is the proper methodology. [\[FN26\]](#) This approach is similar to that used in studies assessing the cost of the Fourth Amendment

exclusionary rule. [\[FN27\]](#)

II. The Empirical Evidence on Miranda and Confessions

In developing evidence on the magnitude of lost cases from Miranda, one can take either a qualitative or a quantitative approach. *395 While some of the academic commentators have made qualitative assessments, [\[FN28\]](#) it seems likely that a hardheaded look at the quantitative information will give a better picture of Miranda's effects. This Article adopts a quantitative approach and surveys the available statistical evidence on the need to assess Miranda's effects. This Part first examines the quantitative information available on the change in the confession rate caused by Miranda. It then turns to the quantitative information available on the need for confessions for successful prosecutions.

A. Studies on the Drop in the Confession Rate

Quantifying Miranda's effect on the confession rate is quite difficult because one cannot simply tote up the number of "lost confessions" by looking at a law enforcement bulletin or court docket. Instead, what is required is some comparison of the number of confessions [\[FN29\]](#) obtained outside of the Miranda regime with the number obtained under it. Two possible data sources suggest themselves. First, we can examine the "before-and-after" studies of custodial interrogation under Miranda. Second, we can compare the confession rate in the United States under Miranda with the confession rate in other countries that follow different approaches to regulating police interrogation.

1. Before-and-After Studies. -- With regard to a change in the confession rate due to Miranda, the best evidence, if available, would probably be "before-and-after" assessments of changes in the confession rate in various American cities conducted after Miranda. [\[FN30\]](#) Studies in a single jurisdiction automatically hold constant a variety of factors that might otherwise confound comparative analysis. [\[FN31\]](#) Several such studies have been done, although they vary in quality. These studies allow preliminary estimates of the change in the confession rate due to Miranda.

*396 (a) The Pittsburgh Study. -- Perhaps the best study on Miranda's effect on confession rates was published by Professors Richard H. Seeburger and R. Stanton Wettick, Jr. They surveyed Pittsburgh detective branch files from 1964 through the summer of 1967 for cases of homicide, rape, robbery, burglary, and auto larceny. [\[FN32\]](#) Even before Miranda, the Pittsburgh Police Department had met many of the decision's requirements, including the requirements of advising a suspect of the right to remain silent and of the right to counsel (although not counsel free of charge). This advice, however, was not given at the beginning of questioning, but rather was "woven into" the conversation between the suspect and the officer. [\[FN33\]](#)

The Pittsburgh study concluded that Miranda did reduce the confession rate. [\[FN34\]](#) Before Miranda the detectives obtained confessions from 48.5% of suspects; after Miranda the rate was 32.3% -- a 16.2% drop [\[FN35\]](#) in the confession rate. [\[FN36\]](#) The same findings continued in a second sample drawn in the summer of 1967. The confession rate was an even lower 27.1% [\[FN37\]](#) -- a drop of 21.4% from the pre- Miranda rate. [\[FN38\]](#) Combining the two samples produces a post- Miranda confession rate of 29.9% -- an 18.6% drop from the pre- Miranda rate.

Academic defenders of Miranda who discuss the Pittsburgh data usually note that, while the study found a decline in the confession rate, it also found that the conviction rate and clearance rate did not. [\[FN39\]](#) These are indirect measures of Miranda's effects on confessions, and there is no reason to rely on them in preference to the direct data on confession rates.

(Cite as: 90 Nw. U. L. Rev. 387)

Turning first to the conviction rate data, relying on such a measure to gauge Miranda's impact is problematic. Conviction rates can *397 vary widely for reasons that have nothing to do with confessions. [FN40] More important, conviction rates do not capture all of the "lost cases" from Miranda. [FN41] If a police or prosecutorial agency drops a case before a suspect is ever formally charged, the case never shows up in the conviction rate statistics. [FN42] Because Miranda weakens cases in the investigative process before charges are ever formally filed (by preventing police from obtaining confessions), much of Miranda's impact is not captured in conviction rate data.

If my argument is correct, we should find that, after June 1966, charges were brought in fewer cases. [FN43] Unfortunately, the Pittsburgh study did not collect sufficiently comprehensive evidence on grand jury and other pre-indictment dismissals that would allow verification of this hypothesis. However, according to the study's authors, the incomplete figures available "[o]ffer some support to this explanation." [FN44] In particular, before Miranda the grand jury refused to indict for 13.6% of the cases; after Miranda it refused for 15.9% of the cases in 1966 and 16.3% of the cases in the first three quarters of 1967. [FN45] The difference between the pre- Miranda figure of 13.6% and the 1967 figure of 16.3% is 2.7% -- close to what one might expect under the model developed in this Article. [FN46] In addition to grand jury presentment, there are other points at which cases weakened by Miranda *398 were screened out. [FN47] The criminal justice literature recognizes that prosecutorial screening plays an important role in the process [FN48] and thus that studies that fail to account for prosecutorial screening are less useful. [FN49] If we could determine the post- Miranda change in cases excluded by prosecutors in Pittsburgh, we would probably discover the balance of the lost cases that comprise the cost figure identified here.

Turning next to the possibly stable crime clearance rates found in Pittsburgh, [FN50] this is also an understated measure of Miranda's effects. Like suppression rates and conviction rates, clearance rates do not capture all of the "lost cases" that might result from Miranda. To see this, note that, for statistical purposes, police can record a crime as "cleared" when they have identified the perpetrator and placed him under arrest. [FN51] A later conviction, or even an indictment, is not a requirement for a crime to be cleared. The police, of course, can arrest and "clear" a crime on a probable cause standard [FN52] -- a standard well below the beyond a reasonable doubt standard required for conviction at trial. If Miranda reduces the number of confessions obtained from arrested suspects, and if some of these lost confessions are needed for prosecutors to convict, that fact will not necessarily be reflected in the clearance rate data. [FN53] The finding of a 2.7% decline in the grand *399 jury's willingness to indict is one example of a screening mechanism in action not captured in the clearance rate data. [FN54]

Professor Welsh White has offered one last reason for disbelieving the Pittsburgh study's finding that confession rates fell after Miranda. He concludes that a problem of "sampling bias" infects the study's conclusions because the study "focused on a detective branch composed of highly professional officers who may have been particularly conscientious in complying with Miranda." [FN55] Why a sample drawn from a jurisdiction that followed Miranda is "biased" when considering the effects of Miranda is unclear. [FN56] In any event, the prevailing view now is that law enforcement generally complies with Miranda. [FN57] In sum, the Pittsburgh study shows a substantial 18.6% change in the confession rate due to Miranda; stable conviction and clearance rates do not cut against this conclusion. [FN58]

- (b) The New York County Study. -- District Attorney Frank Hogan of New York County, New York gathered statistics concerning Miranda's effects in his cases. For six months before the Miranda decision, his office kept records of the number of admissions used in presenting cases to the grand jury in almost all felony cases (excluding homicides). [FN59] Cases that went to the grand jury in New York County were the more solid and serious criminal cases. [FN60] From December 1965 through May 1966, 49.0% of the felony defendants

(Cite as: 90 Nw. U. L. Rev. 387)

made incriminating statements. [FN61] After Miranda (from July 1966 to December 1966), the number of incriminating statements dropped to 14.5% of *400 the cases. [FN62] Thus, the change in the confession rate due to Miranda in New York County was 34.5%.

Professor Stephen Schulhofer discounts these figures on the grounds that they involved presentations of confessions by prosecutors to the grand jury, not the number of confessions actually obtained by police officers. [FN63] The decline, claims Schulhofer, should be attributed to "Miranda's partial retroactivity, which prevented use of nearly all pre-Miranda confessions in the immediate post-Miranda period." [FN64] Yet the study tabulated post-Miranda data for the period of July through December 1966, which would allow for some dissipation of the effect of pre-Miranda confessions going to the grand jury. [FN65] More importantly, Hogan reported that "[o]nly 15% confessed in the six months after the Miranda ruling and 49% confessed before." [FN66] Thus, as then-Assistant Attorney General Stephen Markman has concluded, "[b]arring misrepresentation by the report, this implies that pre-Miranda confessions were presented to grand juries regardless of their inadmissibility at trial, or that the number of cases affected by retroactivity was not statistically significant." [FN67] This interpretation is fully confirmed by Hogan's qualitative assessment that "the Miranda caution significantly inhibits the making of a statement by a suspect to a *401 police officer." [FN68] It is also supported by Hogan's separately tabulated data on homicides, which plainly involved post-Miranda questioning of suspects. [FN69] The data show that after Miranda 30% of homicide suspects interrogated refused to make a statement -- a number significantly higher than the pre-Miranda experience. [FN70]

Regardless of how one interprets Hogan's report, another study undercuts Schulhofer's speculation that the low confession rate in New York County is attributable to Miranda's "partial retroactivity" rather than to a decrease in police success in obtaining confessions. In 1967, the Vera Institute conducted a comprehensive study of confessions in New York City, which has been virtually ignored by Miranda's academic defenders. The study involved two parallel efforts to collect data on confessions in New York. In August and September 1967, the Institute collected 1460 reports of interrogations of suspects in felony and "finger-printable misdemeanors" from 22 different Manhattan precincts. [FN71] From April to October 1967, the Institute collected 806 tape recordings of interrogations in the 20th Precinct in New York City. [FN72] Both of these surveys reported extremely low confession rates that are close to Hogan's reported post-Miranda figure of 14.5% and far below Hogan's pre-Miranda figure of 49.0%. [FN73] The Manhattan survey found that only 3.1% of suspects gave confessions and 13.7% made admissions, for a total incriminating statement rate of 16.8%. [FN74] The 20th Precinct survey found an incriminating statement rate of 23.7%. [FN75] Unfortunately, because the Vera Institute did not collect pre-Miranda data on confession rates, its findings do not allow exact quantification of a change in the confession rate. [FN76] But the low confession *402 rates found by the Vera Institute parallel Hogan's post-Miranda rate, which strongly suggests that Hogan's reported drop in the confession rate to 14.5% is accurate.

(c) The Philadelphia Study. -- Then-Philadelphia District Attorney Arlen Specter surveyed the most serious offenses prosecuted in Philadelphia, such as homicide, robbery, rape, burglary, aggravated assault, battery, and larceny, from 1964 to February 1967. [FN77] Based on discussions with "police officials and experienced district attorneys," Specter estimated that 90% of suspects arrested before June 1964 gave some type of statement. [FN78] Following the Supreme Court's June 1964 decision in *Escobedo v. Illinois*, [FN79] the Philadelphia Police Department gave limited warnings, presumably advising suspects that they had the right not to say anything and that anything said would be used against them. [FN80] Specter estimated that the number

(Cite as: 90 Nw. U. L. Rev. 387)

of suspects giving statements fell to 80%. [FN81] In October 1965, the United States Court of Appeals for the Third Circuit ruled that suspects must be advised of their right to consult counsel before making any statement. [FN82] Between October 17, 1965 and the Miranda decision in June of the following year, the Detective Division of the Department began compiling statistics concerning statements. During this period, 68.3% of individuals arrested gave statements. [FN83] In June 1966, Miranda was announced. From that time until February 1967, only 40.7% of individuals arrested gave statements. [FN84]

The Philadelphia study examined "statements" to the police, not "incriminating statements." [FN85] To compare this data with the other *403 data reviewed in this Article, we need some measure of the relation between the number of statements and incriminating statements. Specter reports that when the police were obtaining statements in 90% of their cases, "[f]requently the statements did not constitute admissions or confessions, but they were very helpful in later investigation." [FN86] More concrete evidence comes from the Pittsburgh study, which reported that of suspects who talked, roughly half confessed, [FN87] and from the Vera Institute survey, which found that of suspects who talked, roughly 60% confessed or made incriminating admissions. [FN88] Other studies suggest similar results. [FN89] Using 50% as a conservative estimate of the relationship of confessions to total statements and assuming that the relation remained constant from 1964 to 1967 [FN90] produces the following numbers in Philadelphia: An estimated 45% of suspects confessed before Escobedo, [FN91] an estimated 40% of suspects confessed after Escobedo but before the Third Circuit ruling, 34.2% of suspects confessed after the Third Circuit ruling but before Miranda, and 20.4% of suspects confessed after Miranda. Thus the overall change in the confession rate in Philadelphia brought about by these court rulings was from roughly 45% to 20.4%, a net change of 24.6%.

The Philadelphia study has been attacked on several grounds. First, Professor Harold Pepinsky argues that District Attorney Specter "wanted to prove Miranda's deleterious effects" and therefore may have "taken a biased sample after Miranda." [FN92] Such ad hominem attacks *404 are unpersuasive. Taking a biased sample would have required quite an elaborate bit of statistical legerdemain because Specter's study involved not one, but two separate samples that would need to be skewed: (1) the post- Escobedo but pre- Miranda sample and (2) the post- Miranda sample. Assuming Specter intended to take a biased sample to attack court-created procedural requirements, this motive existed when the first sample was drawn. Specter therefore would have needed to come up with not only the means to cook the books on the first sample, but also to discover additional ways to further slant the second.

Professor Pepinsky also contends that because Specter measured refusals to give statements rather than the confession rate, the police "may have obtained these results after Miranda simply by giving perfunctory warnings to many suspects and pro forma asking for waivers in many cases where before Miranda they would not have even bothered to initiate an interrogation." [FN93] But this argument also overlooks the fact of two sets of data involving warnings, required in the first instance by the Escobedo decision and in the second instance by Miranda. This speculative possibility also ignores the fact that the police would likely interrogate in most of the serious criminal cases involved in the study. Finally, to achieve the desired results, hundreds of police officers would have had to secretly conspire together for criminal justice research purposes -- an unlikely event. [FN94]

Finally, based on the premise that "arrest rates for crimes have been rising steadily over the last few years" because of community pressures to crackdown on crime, Professor Pepinsky contends that the Philadelphia samples "could be expected to comprise those cases with progressively less evidence." [FN95] Because it is harder to obtain confessions in such cases, the rising arrest rates "alone" could account for the rise in the rate of refusals to make statements. [FN96] It would be surprising, to say the least, to find that changing arrest patterns would trigger a 24.6% change in the confession rate in the

year or two covered by the study. But beyond that, Professor Pepinsky cites no authority for the proposition that arrest rates were dramatically rising in Philadelphia or anywhere else. [FN97] In sum, the critics of the Philadelphia *405 study offer no good reason for disbelieving its finding of a substantial post- Miranda drop in the willingness of suspects to give statements.

(d) The "Seaside City" Study. -- James W. Witt surveyed the effect of Miranda on police in "Seaside City," an enclave in the Los Angeles area with a population of 83,000. [FN98] Witt reviewed files from 1964 to 1968 for cases dealing with murder, forcible rape, robbery, and burglary. [FN99] He found only a 2.0% percent drop in the confession rate after Miranda, from 68.9% to 66.9%. [FN100] One possible explanation for the low figure is that Witt examined "only those cases in which suspects were actually arrested and incarcerated by the Seaside City Police Department. This eliminated all cases in which suspects were detained for questioning but never incarcerated." [FN101] Cases where suspects were "never incarcerated" might include those where Miranda took its toll. This suggestion gains strength when coupled with the fact that, contrary to Witt's statistical findings, most detectives in Seaside City reported that "they were getting many fewer confessions, admissions and statements." [FN102] Witt also did not give any information on how the Seaside Police implemented Miranda. It is possible that they did not follow all of the Miranda requirements. [FN103] Finally, even before Miranda, the Seaside police were already giving warnings to suspects, as required by a 1965 California Supreme Court decision. [FN104] Thus, Witt's "before-and-after" Miranda figures do not capture any effect on suspects' willingness to confess caused by warnings. [FN105] In *406 sum, the Seaside City study found only a modest decline in confession rates, which probably understates Miranda's effects.

(e) The New Haven Study. -- While each of the four preceding studies found a negative impact on the confession rate from Miranda, a study by the editors of the Yale Law Journal of interrogations in New Haven concluded that Miranda did not have such an effect. [FN106] The study's conclusions have assumed a central role in the prevailing academic view that Miranda has not had harmful effects. A close review of the study, however, demonstrates that this conclusion results from a misreading of the underlying data.

The editors of the Yale Law Journal studied interrogations by the New Haven police during the summer of 1966, immediately after Miranda, by placing two students in the New Haven police station at all times during that summer. [FN107] They observed all 127 interrogations at the station. [FN108] To obtain pre- Miranda data for comparison, the editors also reviewed approximately 200 cases from 1960 to 1965 to compare with their 1966 sample. [FN109] Although the "methodological difficulties" in examining the earlier files made them "very cautious about [their] findings," they discovered that "there was a decline in success from 1960 to 1965 and probably a greater decline from 1965 to 1966. The data suggest a decline of roughly 10 to 15 percent from 1960 to 1966 in the number of people who gave some form of incriminating evidence over the entire time." [FN110] Given that during the summer of 1966 New Haven police were "successful" in questioning 48.2% of the time, [FN111] this would place the pre- Miranda confession rate in the area of 58% to 63%.

*407 The editors believed that this decline could have been caused by factors other than the Miranda warnings. In particular,

(Cite as: 90 Nw. U. L. Rev. 387)

they pointed to the 1960 -1965 sample containing "more serious crimes, more cases with a large amount of evidence available at the time of arrest, and more juveniles" -- all factors correlated with interrogation success. [\[FN112\]](#) The editors also suggested that the Miranda rules may have provided the detectives with an excuse for avoiding the "laborious process of statement-taking when they felt it unnecessary for obtaining a conviction." [\[FN113\]](#) Also, the editors believed that the interrogation process had become "considerably less hostile" from 1960 to 1966, a change attributable to court decisions and new administration in the police department. [\[FN114\]](#) Finally, the editors noted that suspects might have become generally less cooperative "not because of specific warnings but because mass-media publicity and grapevine communication concerning Court decisions expanding protection of criminal suspects have made citizens generally more aware of their rights." [\[FN115\]](#)

At the same time, the editors ventured their conclusion that "[n]ot much has changed after Miranda." [\[FN116\]](#) This was certainly correct in New Haven during the summer of 1966 because the New Haven police did not comply with the requirements of the decision. The Yale editors found that the New Haven police gave full Miranda warnings to less than a quarter of the suspects they interrogated. [\[FN117\]](#) Beyond that, it appears that the police did not comply with the most harmful Miranda rules. [\[FN118\]](#) In particular, the New Haven police failed to follow Miranda's requirement of obtaining an affirmative waiver of rights from a suspect before questioning. The New Haven police did not receive waiver of rights cards until "[n]ear the end of the observation period." [\[FN119\]](#) Even this card, however, likely would not satisfy Miranda because it did not contain any language in which a suspect waived his rights. [\[FN120\]](#) Moreover, it appears that the typical format for questioning did not include obtaining a waiver. [\[FN121\]](#) Indeed, the editors of the Yale Law Journal, no less than the New Haven police, may not have focused *408 on Miranda's affirmative waiver of rights requirement, [\[FN122\]](#) perhaps because the editors designed their study before Miranda was announced. [\[FN123\]](#) Nor did the police adhere to their Miranda obligations to stop questioning when a suspect requested counsel or when a suspect tried to exercise his right to remain silent. [\[FN124\]](#) All of these failures lead to suppression of confessions under Miranda. It is therefore interesting to note that the study did not contain any information on whether the prosecutors successfully introduced the confessions in court.

The study, then, is not really a "before-and-after" study, but rather a "before-and-before" study -- it reveals only what interrogation looked like before police began complying with Miranda. [\[FN125\]](#) The study's authors admitted as much in noting that "[o]ur study took place immediately after the Miranda decision. It is quite possible that some of our findings, particularly with regard to the giving of warnings and the impact of warnings on suspects, would have changed had we begun six months later." [\[FN126\]](#)

If examined carefully, however, the study does contain data that is consistent with the studies cited here finding that Miranda reduced confession rates. The editors of the study gave their judgment that Miranda warnings affected "only eight of 81 suspects whose conduct could be analyzed," [\[FN127\]](#) and only three of those eight suspects refused to give a confession. [\[FN128\]](#) But a cross-reference reveals that an additional ten suspects indicated that they "wanted to terminate the interrogation, but the police violated Miranda by continuing the interrogation and obtained incriminating evidence." [\[FN129\]](#) Because such statements are suppressible or would never have been obtained if police *409 complied with Miranda (as police now appear generally to do [\[FN130\]](#)), these ten cases should properly be included as a "cost" of the Miranda decision. Adding the three cases in which the editors concluded that the warnings affected the interrogation outcome to the ten cases in which the Miranda questioning cut-off rules required termination of the interview reveals a 16% drop in confessions due to Miranda in New Haven. [\[FN131\]](#) The Yale Study, then, is fully consistent with the studies discussed earlier finding a confession rate decline after Miranda. [\[FN132\]](#)

- (f) The Washington, D.C. Study. -- Another favorite study of Miranda's academic defenders was conducted by Richard J. Medalie, Leonard Zeitz, and Paul

Alexander, who collected data on the effect of Miranda on interrogation in the nation's capital. [\[FN133\]](#) For present purposes, the important data in the study come from interviews with 260 persons who had "been subjected to arrest procedures in the District of Columbia during 1965 and 1966" [\[FN134\]](#) -- 175 before Miranda and 85 after Miranda. [\[FN135\]](#) The data came from the defendants' reporting about what had happened to them. [\[FN136\]](#) The study reported only a 3% drop in the statement rate, from 43% to 40%, after the *410 haphazard implementation of Miranda in the District. [\[FN137\]](#) If half of the statements were confessions, as suggested previously, [\[FN138\]](#) the confession rate in the District fell from 21.5% to 20% -- only a 1.5% drop from the Miranda requirements.

While Miranda's defenders have been quick to draw favorable conclusions from the study, [\[FN139\]](#) it shows little about Miranda's overall effects because the D.C. police, like the New Haven police, generally did not follow Miranda-prescribed procedures during the study period. Many suspects apparently did not receive proper Miranda warnings. Medalie et al. reported that only 30% of defendants received all four Miranda warnings. [\[FN140\]](#) Reviewing the study, the British Royal Commission on Criminal Procedure concluded that the study's figures "cannot be taken at their face value since there is uncertainty whether the appropriate warnings were always given to suspects." [\[FN141\]](#) It also appears that the police failed to follow the important Miranda waiver procedure. The study reported that of 85 post-Miranda defendants, only seven were asked to sign a "Consent to Speak" form, and only four actually signed it. [\[FN142\]](#) In addition, the police did not comply with Miranda's questioning cut-off rules. When suspects indicated that they did not wish to talk, the police frequently asked them to reconsider or otherwise continued the interview. [\[FN143\]](#) When suspects requested counsel, the officers did not stop questioning, but instead often continued pending the attorney's arrival. [\[FN144\]](#)

The study is also questionable because its data appear to have been presented in a tendentious, if not dishonest, fashion. Richard Leo has pointed out that "buried deep" in a "clumsily organized appendix" to the study the authors report that 52% of the post-Miranda defendants and 44% of the pre-Miranda defendants were never even *411 interrogated. [\[FN145\]](#) Medalie et al. criticized the D.C. police for failing to give warnings to many of the defendants, but as Leo notes, "it is utterly dishonest to criticize the police for failing to provide . . . Miranda warnings when . . . [there was] no legal obligation to do so." [\[FN146\]](#) The study suffers from other similar problems of slanted presentation of the data. [\[FN147\]](#)

Since these biases were all in service of the position that Miranda was a "proper safeguard" of suspects' rights and that police should do more to implement the decision, [\[FN148\]](#) it is hardly surprising that nothing in the published report of the study's results suggests that Miranda was harming the confession rate. Read carefully, however, the study does contain some information suggesting that, at least where police complied with the Miranda rules, the confession rate dropped. After Miranda, 55% of those suspects who did not receive a warning about either the right to counsel or the right to remain silent gave statements, as compared to 40% who gave statements after receiving the warning about the right to remain silent [\[FN149\]](#) -- a 15% change in the rate. Similarly, 46% gave statements after receiving the warning about the right to counsel [\[FN150\]](#) -- a 9% change from the 55% who gave statements without any such warnings. Combining these figures, 41% of suspects who received some of the Miranda warnings confessed as compared to 55% who received no such warning -- a 14% change. [\[FN151\]](#) While there may be some difficulties with using the data to establish this kind of *412 precise confession rate change, [\[FN152\]](#) one must acknowledge that the study contains data about warnings consistent with a confession rate drop after Miranda.

Pointing towards the same conclusion, the study found that Miranda resulted in more requests for counsel. While 64% of suspects requested counsel after being advised of stationhouse counsel, only 17% made such a request after being advised

(Cite as: 90 Nw. U. L. Rev. 387)

about the right to non-stationhouse counsel, 23% after being advised about the right to silence, and 12% after being advised about neither the right to counsel nor the right to silence. [\[FN153\]](#) Under Miranda's rules, these suspects could not have been questioned by police until counsel arrived. Of course, after counsel arrives, questioning is rarely fruitful. [\[FN154\]](#)

While these facts might suggest that the D.C. study could be used as support for the position that Miranda harmed the confession rate, perhaps the safest conclusion to draw is that we can say little about Miranda's effects in D.C. -- both because the D.C. police had not yet implemented the Miranda rules and because the study's authors may have presented their evidence in a tendentious way.

(g) The New Orleans Study. -- Some limited comparative data on Miranda's effects comes from New Orleans. Professors Seeburger and Wettick, the authors of the Pittsburgh study, compiled data provided by the New Orleans Police Department. The Department reported that since the adoption of the Miranda requirements, "988 out of the 3506 persons (28.2%) arrested waived their rights and made incriminating statements." [\[FN155\]](#) For the two-year period before *413 Miranda, the Department estimated that about 40% of arrested suspects made incriminating statements, [\[FN156\]](#) an estimate that appears to be reasonable. [\[FN157\]](#) This suggests an approximate 11.8% reduction in the incriminating statement rate in New Orleans after Miranda.

(h) The Kansas City Study. -- Sketchy comparative data about the effect of Miranda in Kansas City is available. A few months after the decision, Chief of Police Clarence M. Kelley reported that about 12% fewer suspects were giving "statements." [\[FN158\]](#) Assuming conservatively that Kelley was referring to all statements rather than incriminating statements, [\[FN159\]](#) and applying the 50% relation of statements to confessions discussed earlier, [\[FN160\]](#) this would still suggest a 6% drop in the confession rate.

(i) The Kings County Study. -- District Attorney Aaron Koota of Kings County, New York (otherwise known as the Borough of Brooklyn) reported that before Miranda for crimes such as homicide, robbery, rape, and felonious assault, approximately 90% of suspects gave statements. [\[FN161\]](#) Following the decision (between June and September 1966), 59% gave statements. [\[FN162\]](#) Relying on the previously *414 discussed estimate that 50% of statements are confessions, [\[FN163\]](#) this would mean that the confession rate went from 45% [\[FN164\]](#) to 29.5% after -- a 15.5% drop in the rate before Miranda.

(j) The Chicago Homicide Study. -- Another statistic comes from Chicago. Then-Professor James R. Thompson of Northwestern University School of Law reported in July 1967 that a study by the Chicago state's attorney's office found that the number of confessions by arrested homicide suspects had dropped about 50% since the Escobedo decision in 1964. [\[FN165\]](#) To make this figure comparable to other data discussed in this Part, we must convert this change in the number of confessions to a change in the confession rate. To come up with a rough conversion, we can posit that confessions were obtained in about 53% of all homicide cases before Escobedo (as indicated in one study in a city close to Chicago [\[FN166\]](#)). If so, a 50% drop in the rate would mean a post- Miranda

confession rate of 26.5% and a change in the confession rate of 26.5%. I have been unable to locate any further information about this study. [\[FN167\]](#)

(k) The Los Angeles Study. -- Los Angeles County District Attorney Evelle J. Younger undertook a three-week survey regarding the effects of the Miranda decision in Los Angeles. The Los Angeles County District Attorney's Office distributed survey forms on June 21, 1966. The survey ended three weeks later on July 15, 1966. [\[FN168\]](#) The results of the survey indicated that confessions and admissions were present in 50.2% of the requests for felony complaints received from police agencies during this survey period. [\[FN169\]](#)

It is possible to devise a before-and-after Miranda figure for Los Angeles by comparing this data with a separate survey compiled the *415 previous year by the District Attorney's Office regarding the effect of *People v. Dorado*, [\[FN170\]](#) a decision handed down by the California Supreme Court on January 29, 1965. *Dorado* required California law enforcement officers to warn a suspect in custody of her right to counsel and her right to remain silent. [\[FN171\]](#) The Los Angeles District Attorney's Office sampled cases during the week of December 13 -17, 1965, approximately eleven months after *Dorado*. [\[FN172\]](#) The post- *Dorado* survey found that confessions or admissions were present in 40.4% of the requests for felony complaints received from police agencies during the survey period. [\[FN173\]](#) Thus, comparing the post- *Dorado* survey with the post- *Miranda* survey gives the impression that the confession rate rose by about 10% after *Miranda*, from 40.4% to 50.2%.

The notion that *Miranda* would cause an immediate, substantial increase in the confession rate seems paradoxical, and one should hesitate before ascribing this to the Los Angeles data. [\[FN174\]](#) Most important, it is impossible to compare directly the post- *Dorado* data with the post- *Miranda* data, as the questionnaires were different in at least one important respect. The District Attorney's Office had questions about the accuracy of the post- *Dorado* data. [\[FN175\]](#) Accordingly, it apparently redesigned the study questionnaire. [\[FN176\]](#) As part of the redesign, the questionnaire was changed from asking about "confessions and *416 admissions" to asking about a "confession, admission or other statement." [\[FN177\]](#) Because many suspects make "other statements," [\[FN178\]](#) this amorphous category likely swelled the number of post- *Miranda* cases lumped together with "confessions and admissions."

There are also other serious problems. Because the *Miranda* survey was conducted only a few weeks after the decision, some of the post- *Miranda* data actually may have been pre- *Miranda* data. [\[FN179\]](#) In addition, since the surveys involved requests for complaints from the police, they would not detect those cases in which police agencies were unable to obtain a vital confession and therefore did not request a complaint. The District Attorney's Office acknowledged that "[w]e cannot tell from this present survey how many cases we are not even seeing from the police agencies." [\[FN180\]](#) Finally, it appears that the District Attorney's Office viewed the *Miranda* requirements and the *Dorado* requirements as essentially indistinguishable. [\[FN181\]](#) Thus, the study is not really a before-and-after study, but rather an "after-and-after" study. [\[FN182\]](#) Based on these problems, it is difficult to draw any comparative conclusions from the data.

(l) Summary of the Before-and-After Studies. -- All of the quantitative studies of changes in the custodial confession rate due to *Miranda* are summarized in Table 1, which follows. [\[FN183\]](#) As can be seen, *417 excluding the unreliable comparison made by extrapolating from two different Los Angeles surveys, all studies report a drop in the confession rate after the *Miranda* decision, most in double digits. This directly contradicts the prevailing myth in legal academe. [\[FN184\]](#) The change in rate ranges from 34.5% for New York County to 2.0% for Seaside City. The "reliable" studies [\[FN185\]](#) -- from

Pittsburgh, New York County, Philadelphia, Seaside City, New Haven, Kansas City, Kings County, and New Orleans -- show confession rate drops of 18.6%, 34.5%, 24.6%, 2.0%, 16.0%, 6%, 15.5%, and 11.8%, for an average reported drop of 16.1%. In other words, based on the comparative studies, the best estimate is that Miranda results in a lost confession in roughly one out of every six criminal cases in this country.

Table 1 -- Estimates of Changes in the Confession Rate Due to Miranda

City	Confession Rate	Confession	Change	Major
	Before	Rate After		Problems?
Pittsburgh	48.5%	29.9%	-18.6%	
N.Y. County	49.0%	14.5%	-34.5%	
Philadelphia	45% (est./der.)	20.4% (der.)	-24.6%	
'Seaside City'	68.9%	66.9%	-2.0%	?
New Haven- 1960-66	58-63% (est.)	48.2%	-10-15%	Yes
New Haven- calculated	?	?	-16.0%	
D.C.	21.5% (der.)	20.0% (der.)	-1.5%	Yes
Kansas City	?	?	-6%	?
			(der.)	
Kings County	45% (est./der.)	29.5% (der.)	-15.5%	
New Orleans	40% (est.)	28.2%	-11.8%	?
Chicago homicides	53% (der.)	26.5% (der.)	-26.5%	?
Los Angeles	40.4%	50.2%	+9.8%	Yes
Average of Studies				-16.1%*
Without Major Problems				

est. = estimated

der. = derived

* Excluding Chicago

homicide study for

reasons given in

note 185, supra.

***418** 2. International Comparisons. -- An alternative way of determining the change in the confession rate caused by Miranda is to compare confession rates in this country under Miranda with confession rates in other countries that do not follow Miranda's requirements. [\[FN186\]](#) Chief Justice Warren's decision in Miranda made something of an anticipatory comparison, arguing that "[t]he experience in some other countries also suggests that the danger to law enforcement in curbs on interrogation is overplayed." [\[FN187\]](#) He then examined the practices in England, Scotland, and other countries, described the restrictive features of the interrogation regimes there, and concluded that "[t]here appears to have been no marked detrimental effect on criminal law enforcement in these jurisdictions as a result of these rules." [\[FN188\]](#) While the accuracy of the Chief Justice's description of the practices in these countries has been powerfully challenged, [\[FN189\]](#) our concern here is ***419** whether the confession rates in these countries suggest anything about the validity of my estimate that Miranda reduced the American confession rate by about 16%. [\[FN190\]](#) I will examine data from the two obvious countries for comparison: Britain and Canada.

(a) Britain. -- Britain is a good country for comparison. The historically-prevailing English approach gave suspects the equivalent of the first two Miranda warnings, but did not employ the other features of the Miranda system -- e.g., the right to counsel during questioning and waiver requirements. [\[FN191\]](#) The available studies suggest very high confession rates under this approach. A study conducted in Worcester found that suspects gave full confessions or made other incriminating statements in 86% of all cases. [\[FN192\]](#) A study of cases at the Old Bailey found an incriminating statement rate of 76%. [\[FN193\]](#) An observational study in Brighton found that 65% of observed interrogations produced incriminating statements. [\[FN194\]](#) An observational survey of four police stations in West Yorkshire, Nottinghamshire, Avon and Somerset, and the Metropolitan Police District (London) found that police obtained incriminating statements in 61% of their interrogations. [\[FN195\]](#) A study of cases heard in the seven Crown Court centers in London found that a total 71.2% of defendants gave incriminating

information. [\[FN196\]](#) Finally, interviews with a sample of defendants drawn *420 randomly from Sheffield court records found that 94% admitted their guilt to police. [\[FN197\]](#) While recent (and highly publicized) examples of coerced confessions have been responsible for several miscarriages of justice in Britain, [\[FN198\]](#) it seems unlikely that the high overall British confession rate is attributable to such tactics. [\[FN199\]](#)

Although varying definitions and methodologies make exact comparisons difficult, these reported English confession rates are substantially higher than the post- Miranda confession rate in the United States. As Professor Gordon Van Kessel concluded after a comprehensive review of the available literature, "it can generally be said that a substantially greater percentage of English than American suspects subjected to questioning make damaging statements." [\[FN200\]](#) Comparing the reported British confession rates (ranging from 61% to 84.5%) with the American post- Miranda rates (generally in the range of 30% to 50% [\[FN201\]](#)) suggests that the estimate made here of a 16% drop in the confession rate after Miranda is quite reasonable.

The British experience not only allows us to assess confession rates without Miranda rules, but also allows us to review what happens as a country moves to a Miranda-style regime. In the 1980s, Britain adopted a more heavily regulated structure for police interrogations, one that in many respects tracks Miranda. In 1984, Parliament adopted the Police and Criminal Evidence Act ("PACE") to regulate, among other things, the process of custodial questioning of suspects. As required by PACE, the Home Office followed up with the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers in 1985 and with the Code of Practice on Tape Recording in 1988. [\[FN202\]](#) These enactments provide a series of safeguards for suspects, including imposed access to counsel during questioning and recording of interrogations.

British confession rates have recently started to decline towards American levels as this Miranda-style interrogation regime has been put into effect. Summarizing the available studies in 1992, Gisli *421 Gudjonsson noted that "[t]he frequency with which suspects confess to crimes in England has fallen in recent years from over 60% to between 40 and 50%. This appears to have followed the implementation of PACE, which came into force in January 1986. The reasons for this decrease seem to be associated with the increased use of solicitors by detainees and changes in custodial interrogation and confinement procedures." [\[FN203\]](#) Interestingly, the post-PACE drop in the British confession rate (from over 60% to between 40% and 50%) corresponds roughly with the post- Miranda confession rate drop suggested in this Article. Because of law enforcement concerns, Parliament recently modified the warnings given to suspects and made other changes to encourage more confessions. [\[FN204\]](#)

(b) Canada. -- Another good country for comparison is our neighbor, Canada. Until recently, the Canadian police gave Miranda-style warnings concerning the right to remain silent, but did not follow the rigid Miranda waiver requirements and questioning cut-off rules. [\[FN205\]](#) Since 1982, Canadian law on interrogation has moved towards the Miranda requirements because of the passage of Section 10(b) of the Canadian Charter of Rights and Freedoms.

[\[FN206\]](#)

Canada apparently had confession rates substantially higher than the rates in this country. The only data on Canadian confession rates I have located come from a study in July 1985 of the Halton Regional Police Force in Ontario, Canada. The study reported the results of a two-year pilot project involving the videotaping of all interviews at the police station for crimes more serious than traffic and drunk driving offenses in Burlington compared with standard police interrogation in Oakville. Despite the presence of video cameras to prevent police misconduct, the Burlington officers obtained confessions or incriminating *422 statements in 68% of their interviews. [\[FN207\]](#) The confession rate is even higher if one excludes the

(Cite as: 90 Nw. U. L. Rev. 387)

4.8% of suspects who refused to be videotaped; of those agreeing to be videotaped, 71.6% made inculpatory statements. [\[FN208\]](#) In the "control" city of Oakville, police obtained incriminating information in 87.0% of the interviews. [\[FN209\]](#) These Canadian confession rates are substantially higher than any recently reported rate here, which suggests that Miranda may be inhibiting American suspects. [\[FN210\]](#)

In sum, contrary to the predictions made in the Miranda decision, rough comparisons with Britain in particular and Canada to a lesser extent suggest that the Miranda rules have reduced the confession rate. While more detailed analysis is certainly warranted, this alternative means of assessing Miranda's effect on the confession rate confirms calculations based on the before-and-after studies.

B. Studies on the Necessity for Confessions

Said the cop as he viewed with contrition

The defendant's bloody condition,

"For the case that's not sure

There is really no cure

Like a solid, substantial admission." [\[FN211\]](#)

Of course if confessions were not needed for criminal convictions, the Miranda debate would be of little consequence. It appears to be common ground, however, that in at least some cases a confession is necessary for a successful prosecution. The debate focuses on how often a confession is necessary. As with allegations of changes in the confession rate, the dispute has often been conducted at the qualitative *423 level. Critics of Miranda charge that confessions are often necessary; defenders claim they are only rarely needed. [\[FN212\]](#) As with the confession rate issue, resort to the extant empirical data may be a more helpful approach.

Three brief methodological issues should be noted before diving into the various statistics. First, estimates of the number of "necessary" confessions tend to be somewhat more subjective than the statistics on the total number of confessions just reviewed. [\[FN213\]](#)

Second, for purposes of the cost calculation in this Article, we would like to see "necessity" statistics for the confessions that were lost because of Miranda. For example, given the Pittsburgh study's 18% drop in the confession rate, we would like to know what portion of the 18% involved losses of confessions necessary for conviction. For apparent reasons, such statistics are not available: Even where aggregate statistics suggest a change in the confession rate stemming from Miranda, it is usually not possible to point to any particular criminal case without a confession and know whether a confession would have been given in the absence of the Miranda regime. Thus, we must use some sort of aggregate necessity statistic and assume that it applies to the confessions lost because of Miranda.

Using aggregate statistics probably understates Miranda's costs. The available empirical evidence suggests that a suspect is more likely to confess when the evidence against him is strong and he knows "the jig is up." Conversely, a suspect probably has greater incentives not to confess when he believes -- correctly -- that the authorities will be unable to make a case against him without a confession. [\[FN214\]](#) As a consequence, *424 the lost confession cases are likely to be those where the evidence is weaker than the overall run of cases and thus where a confession may often be necessary to convict.

Third, most of the "confession necessity" studies may be flawed because they do not consider that a suspect's confession might lead police to incriminating evidence. [\[FN215\]](#) If so, the evidence might be so incriminating that it would be viewed as rendering the confession "unnecessary" -- even though the evidence would never have been available without the confession. The studies generally fail to consider this possibility, and they may all therefore understate the real importance of confessions to convictions. [\[FN216\]](#) With these caveats in mind, we turn to the existing quantitative data on the importance of confessions.

1. The Pittsburgh Study. -- The previously discussed Pittsburgh study by Professors Seeburger and Wettick contains statistics not only on the frequency of confessions but also on their necessity to obtaining convictions. Seeburger and Wettick deemed a confession necessary where, in their judgment, "a conviction would not have been likely without the use of a confession and any additional evidence obtained as a result of the confession." [\[FN217\]](#) In making this determination, they "assumed the competent gathering of available evidence, average presentation of the case by counsel for both sides, decisions based on the merits of the case at the arraignment and trial levels and cooperation by witnesses (other than the defendant and his family) who supplied evidence to the police during their investigation." [\[FN218\]](#)

Seeburger and Wettick found that a confession was needed to convict in roughly 20% of all cases. [\[FN219\]](#) They also found that a confession*425 was necessary in roughly 25% of cases involving confessions (both pre- and post- Miranda). [\[FN220\]](#)

2. The New York County Study. -- New York County District Attorney Frank Hogan testified before Congress concerning the importance of confessions in cases prosecuted by his office. A survey of 91 homicide cases in his office awaiting trial or disposition in 1965 disclosed that 25 of the cases (27.5%) "would have lacked legally sufficient evidence for trial without the defendant's statement." [\[FN221\]](#) While Hogan does not give any estimate with respect to whether alternative means of investigation would have been successful in the absence of a confession, [\[FN222\]](#) one might reasonably assume a certain degree of thoroughness in investigating homicide cases. [\[FN223\]](#)

3. The Los Angeles Study. -- The Los Angeles District Attorney's Office reported figures on the importance of confessions in cases prosecuted in 1965 and 1966. The 1965 survey found that for 26.2% of criminal complaints involving confessions or admissions, the issuing deputy district attorney concluded that the confession or admission was needed to sustain a conviction. [\[FN224\]](#)

The 1966 (post- Miranda) survey did not report a figure for the importance of confessions at the complaint stage. Instead, it reported figures for 649 defendants who had trials or pleaded guilty during a three-week period in the summer of 1966. [\[FN225\]](#) Of these cases, in 67 (roughly 10%) the prosecutor believed that an incriminating statement *426 or admission was needed for conviction. [\[FN226\]](#) Surveying cases only where there was a trial or guilty plea is subject to the criticism that it fails to reflect cases that were dropped at earlier points in the process because of weakness in the state's evidence. [\[FN227\]](#) Moreover, the 10% figure fails to reflect the fact that a large number of defendants (103) in the survey were acquitted at trial. In most of these cases, it might fairly be said that a confession was "necessary" for conviction. [\[FN228\]](#) If the acquittals are added to the cases in which a statement was needed for conviction, the importance of the confession figure rises to 26.2%

(170/649), almost the same result reported in the 1965 survey. On the other hand, both the 1965 and 1966 surveys may slightly overstate the importance of confessions in that they do not consider whether other investigative means could have produced evidence to secure a conviction. [\[FN229\]](#)

4. The New Haven Study. -- The Yale Project developed an elaborate coding system to record their observations about whether a confession was necessary for obtaining a conviction. The Project editors called their system the "Evidence-Investigation Scale" because it focused on two critical issues: the amount of evidence against a suspect without a confession and the investigative alternatives open to police. [\[FN230\]](#) Based on these two factors, the editors developed a matrix to categorize the need for interrogation as either "essential," "important," "not important," or "unnecessary." [\[FN231\]](#)

*427 Using these categories, the editors estimated that, of the 90 cases they observed, interrogation was "essential" in 3.3% and "important" in 10.0%. [\[FN232\]](#) The editors combined the "essential" and "important" categories into an "interrogation necessary" category, which was therefore estimated to be 13.3% of total cases. [\[FN233\]](#) The Yale Project data can be used to derive a necessity figure for confession cases only. The editors observed 49 cases involving a "successful" conclusion to interrogation; of these, in only four (8.2%) was interrogation deemed necessary to solve the case. [\[FN234\]](#)

The Yale Project figures for necessary confessions are lower than the figures reported by most of the other studies previously discussed. The reason may be a rather curious labelling used by the Project editors that appears to significantly understate the importance of confessions. The editors called interrogation "not important" even where no plausible investigative alternatives existed and the evidence (besides the confession) was sufficient only to take the case to trial but not to obtain a conviction! [\[FN235\]](#) The editors did not report their data in order to allow any assessment of the importance of this unusual labelling for the results. The Yale Project figures are thus likely to understate confession necessity.

5. The "Seaside City" Study. -- The "Seaside City" study by Professor James W. Witt used the Yale "Evidence-Investigation Scale" to review the files involved in the study. Professor Witt concluded that interrogation was essential in 16% of cases and important in 8%, for a total interrogation "necessary" figure of 23.6%. [\[FN236\]](#) The Seaside figure might be conservative because it follows the curious labelling used by the Yale editors. Possibly offsetting this problem, Professor Witt conceded a possible tendency "to overestimate the amount of evidence needed for conviction in some cases" because of court decisions expanding the rights of suspects. [\[FN237\]](#)

*428 6. The Detroit Study. -- Detroit Chief of Detectives Vincent W. Piersante compiled statistics on the importance of confessions in prosecutions for serious crimes for 1961 and for a nine-month period in 1965. Unfortunately, interpreting his study is difficult because I have been unable to locate a copy of his original data. Instead, I have been able to locate three different recountings, which report different figures. First, Theodore Souris, a Justice on the Supreme Court of Michigan, published an article and appended what appears to be the Piersante study. [\[FN238\]](#) This reprinting shows that confessions were deemed "essential" in 13.1% of 1445 prosecutions surveyed in 1961 and in 11.3% of 1358 prosecutions in 1965. [\[FN239\]](#) Second, the Yale Law Journal cites the same study with a later date of publication for

the proposition that confessions were essential in 23.6% of a 1961 sample of 2620 completed prosecutions and 18.8% of a 1965 sample of 2234 completed prosecutions. [FN240] Finally, Chief Piersante participated in a panel discussion of Miranda, in which he reportedly said that confessions were essential in 23.6% of his 1961 sample of 2630 prosecutions (in agreement with the Yale Law Journal figure) and in 15.2% of his 1965 sample of 2769 prosecutions. [FN241]

Regardless of which recounting of the data is used, Piersante's figures probably understate the importance of confessions because they pertain to "felony prosecutions," which apparently means something later than a preliminary juncture in the process. As a result, Piersante's data do not appear to include cases that were screened from prosecution because of insufficient evidence -- including cases that were not prosecutable because they lacked a confession. [FN242] In view of the significance of prosecutorial screening, this renders his ultimate figures suspect. It is also unclear what definition of "essential" Piersante used. [FN243]

7. The Kings County Study. -- District Attorney Aaron E. Koota of Kings County, New York reported that from June 1966 to the end of September 1966, 316 suspects were interrogated for crimes such as *429 homicide, robbery, rape, and felonious assault. [FN244] Of these, 130 refused to make any kind of statement. Koota estimated that sufficient evidence to prosecute existed without a confession in 30 of these cases. [FN245] A straightforward calculation from this data would suggest that confessions are needed in 76.9% of cases without confessions (100/130).

Such a calculation presents several problems. To begin, Koota's figure of only 30 cases with sufficient evidence to prosecute appears to be a rough estimate. [FN246] His testimony reveals nothing about the methodology for his calculations. Moreover, it is unclear whether Koota considered the possibility of other avenues of investigation to obtain evidence other than interrogation. [FN247]

8. The Sobel Study. -- Judge Nathan R. Sobel, a Supreme Court Justice in Kings County, New York, surveyed completed criminal cases raising confession issues in his jurisdiction from 1962 to 1964. Of 47 cases in which a confession issue was involved, Sobel believed that the confession was "essential" or "helpful" in 10 (21.3%). [FN248] Apart from the small sample size, about which Sobel himself cautioned, [FN249] there is a substantial question about the representativeness of a sample drawn from completed and appealed court cases. For example, Sobel did not survey cases involving acquittals. [FN250] Thus, the study is not particularly useful.

- *430 9. The Jacksonville and San Diego Study. -- Floyd Feeny, Forrest Dill, and Adrienne Weir conducted a detailed survey of robbery, burglary, and stranger felony assault cases handled in Jacksonville, Florida and San Diego, California in 1978 and 1979. [FN251] While they did not directly report a necessity rate, they found that in all categories in both cities (except for felony assault in Jacksonville) the percentage conviction rate for confession cases was much higher than in nonconfession cases. From this data, one might be able to infer a confession necessity rate by calculating the difference

between the conviction rates. For example, in burglary cases in San Diego, there was a 73% conviction rate in confession cases, but only a 47% conviction rate in nonconfession cases, which might imply a necessity rate of 26% (the difference between the two). [\[FN252\]](#) This methodology produces an average necessity rate of 18.7% in Jacksonville and 28.3% in San Diego, the mean difference within the three offense categories. However, one must be cautious about such an inference. As the study documented in great detail, cases can result in nonconviction for a variety of reasons, such as police release of suspects, district attorney rejections, and pretrial diversion. [\[FN253\]](#) Without knowing that these processes operate uniformly in both confession and nonconfession cases, we cannot be certain that we have derived a reliable necessity rate. [\[FN254\]](#)

10. The Oakland Robbery Study. -- Floyd Feeney and Adrienne Weir performed an earlier study of robbery investigations in Oakland. They concluded that, at least for the crime of robbery, "[c]onfessions are relatively unimportant, being judged as essential for only five-to-ten percent of the charged suspects." [\[FN255\]](#) This statistic is misleading. It is derived by taking essential confessions in confession cases and then dividing by all cases -- even though the authors never assessed whether confessions were essential in nonconfession cases. [\[FN256\]](#)

***431** Looking just at confession cases, one arrives at a much higher percentage of confessions deemed as essential. Of 35 confession and admission cases, six of the incriminating statements were deemed "essential to the case" [\[FN257\]](#) -- a rate of 17.1%. Even this rate may be too low since it was obtained by the authors overriding the assessments of the investigating sergeants, who indicated that 10 of 35 incriminating statements (28.5%) were essential. [\[FN258\]](#) The authors explained that they were substituting a "single, uniform standard," but they did not explain what that standard was. [\[FN259\]](#) Their uniform standard probably related to the ability of the police to arrest or detain, not to the ability of the prosecution to convict. [\[FN260\]](#) In particular, the authors apparently failed to list incriminating statements as "essential" even where suspects were released before charging because of lack of evidence and even where suspects were acquitted at trial. [\[FN261\]](#) In light of these problems, the study should be read as suggesting that incriminating statements are essential to the charging process in at least 17.1% of all robbery cases. Beyond that, the authors' data do not allow further assessments on confession necessity. [\[FN262\]](#)

11. The Middle America and Chicago Studies. -- Peter Nardulli has performed two exclusionary rule studies that contain confession data allowing estimation of a confession necessity rate. His study of nine counties in three mid-American states (Illinois, Michigan, and Pennsylvania) found that the defendant was convicted in 87.6% of cases in which a motion to suppress a confession was denied, while the rate was 58.3% when the motion was granted. [\[FN263\]](#) His later study in Chicago found that the conviction rate was 94.1% when the motion to suppress a confession was denied, but 66.7% when the motion was granted. [\[FN264\]](#) The difference between these figures might be regarded as a necessity rate, suggesting necessity figures of 29.3% in middle America and 27.4% in Chicago. As noted above, however, one must be cautious about such an interpretation.

*432 12. Bay Area Study. -- Richard Leo conducted a detailed analysis of interrogations in three cities in the California Bay area in 1993. [\[FN265\]](#) While he did not directly report a necessity figure, he found that suspects who gave incriminating statements to police were much more likely to be convicted. In all, 69% of suspects who provided incriminating information were convicted, compared to 43% of those who did not. [\[FN266\]](#) From this data, one might infer a necessity rate by taking the difference between the conviction rates -- in this case, 26%. [\[FN267\]](#) However, one must be cautious about such a conclusion for the reasons explained above. [\[FN268\]](#)

13. Salt Lake County Study. -- The most recent data on the importance of confessions to convictions come from my 1994 study in Salt Lake County, Utah.

[\[FN269\]](#) In 59 cases in which police questioning was "successful" (in obtaining a confession, incriminating statement, or other useful information), prosecutors were asked to characterize the importance of that success.

Following the classifications of the Yale Project, my study found that prosecutors considered 22.0% of the incriminating statements "essential" and 39.0% "important," which suggests (again using the Yale Project methodology) that incriminating statements were "necessary" in 61.0% of the cases in

*433 which they were obtained. [\[FN270\]](#) Along the same lines, the study found that 78.3% of those suspects whom police successfully questioned were convicted of some charge, as compared to 49.3% for those unsuccessfully questioned -- a difference of 29.0%. [\[FN271\]](#)

14. Summary of Confession Necessity Studies. -- The studies on the importance of confessions in obtaining convictions are summarized in Table 2. As can be seen, the studies report that confessions are needed in somewhere between 10.3% to 29.3% of all cases (excluding the unusual Kings County and Oakland calculations [\[FN272\]](#)) and between 8.2% to 61.0% of cases involving confessions. Excluding my own recently completed study [\[FN273\]](#) and examining the "reliable" estimates [\[FN274\]](#) from Pittsburgh, New York County, Los Angeles (post- Dorado), and Seaside City produces an average estimate of confessions needed to convict in 23.8% of all cases and in 26.1% of confession cases.

Table 2 -- Estimates of the Importance of Confessions for Conviction

City	Confessions Needed -- All Cases	Confessions Needed -- Confession Cases	Major Problems?
Pittsburgh	20.2%	25.9%	

N.Y. County	27.5%		
Los Angeles-post- Dorado		26.2%	
Los Angeles-post- Miranda	10.3%		Yes
New Haven	13.3%	8.2%	Yes
Seaside City	23.6%		?
Detroit-1961 (Souris)	13.1%		Yes
Detroit-1965 (Souris)	11.3%		Yes
Detroit-1961 (Yale L.J.)	23.6%		Yes
Detroit-1965 (Yale L.J.)	18.8%		Yes
Detroit-1965 (Piersante)	15.2%		Yes
Kings County	76.9% (der.)		Yes
Sobel		21.3%	Yes
Jacksonville	18.7% (der.)		Yes
San Diego	28.3% (der.)		Yes
Oakland	17.1+%		Yes
Middle America	29.3%		Yes
Chicago	27.4%		Yes
New Orleans	75% (est.)		Yes
Bay area	26% (der.)		Yes
Salt Lake County		61.0%	*
Average of Studies Without	23.8%	26.1%	

Major Problems

est. = estimated

der. = derived

* No problems, but excluded for other reasons. See note 273, supra.

*435 Two cross-checks can be made to these estimates, which suggest that they are, if anything, conservative assessments of the need for confessions. [FN275] First, recent studies in Britain have reached similar conclusions. Perhaps the most detailed information on the need for confessions in England comes from Baldwin and McConville, who took a sample of 1000 cases (500 guilty pleas, 500 not-guilty pleas) to two highly respected assessors, who independently evaluated the importance of any statements obtained from the accused to a successful prosecution. [FN276] The first assessor estimated that, without the statements, 21.2% of all cases would fail to reach even a prima facie level and an additional 3.3% would probably result in an acquittal. [FN277] Combining these figures produces a necessity estimate of 24.5% of all cases. The second assessor estimated that 21.0% would not reach a prima facie standard and an additional 10.8% would result in an acquittal, [FN278] for a necessity estimate of 31.8%. [FN279] The assessors also evaluated the overall importance of the statement to the prosecution's case as a whole. In the 500 not-guilty cases, the first assessor thought that in 29.5% the accused's statements made "all the difference between a strong case and no case"; the second assessor put the figure at 31.8%. [FN280] In the 500 guilty pleas, the first assessor thought that the statements made all the difference in 32.4%; the second assessor estimated the figure to be 27.5%. [FN281] Assuming that the difference between having "a strong case" and "no case" is equivalent to determining whether a confession is necessary to convict, these estimates suggest a necessity figure of between 27.5% and 32.4%.

Julie Vennard reported similar results for contested trials in English magistrates' courts for simple assault and small property offenses. [FN282] She did not report a necessity figure, but did present evidence on the extent to which confessions were involved in *436 obtaining convictions. Within the direct evidence cases, there was a 100.0% conviction rate with confessions and a 76.6% rate without confessions. [FN283] It might be argued that the difference -- 24.4% -- reflects the extent to which confessions are necessary for conviction. Similarly, within the circumstantial evidence cases, there was a good 85.7% conviction rate with confessions and a 51.5% rate without. [FN284] This suggests a 34.2% necessity rate. In sum, the British data fully confirm the estimate made here that confessions are needed to convict about 23% to 26% of the time.

A second confirmation of the accuracy of the estimate comes from various studies of the "attrition rate" of criminal cases after arrest, which generally finds that more than 25% of all cases are dropped, many for lack of evidence (e.g., lack of a confession). A study performed in the District of Columbia found that insufficiency of the evidence was the reason for rejection at screening in 34% of all cases. [FN285] A five-city study found that evidence problems accounted for a large proportion of rejections of felony cases at screening, ranging from 17% in Cobb County, Georgia to 56% in Salt Lake City, Utah. [FN286] Based on a review of these and other studies, Brian Forst estimates that 38% of all adult felony arrests in the country are weeded out by the prosecutor. [FN287] This prosecutorial screening accounts for three-fourths of the adult felony cases that fail to end in conviction. [FN288] Forst notes that "the vast majority of all felony cases dropped by the prosecutor are rejected due to insufficiency of the evidence." [FN289] Given this estimate of a significant percentage of rejections of cases for insufficient evidence and adding in the percentage of cases with sufficient evidence only because of the presence of a confession, an estimate that confessions are needed in around 23% to 26% of all cases to convict seems, if anything, too low. More generally, the case attrition data suggests that Miranda inflicts its cost precisely in this area where the system is weakest, by *437 diminishing the confession rate and thus reducing the evidentiary strength of the prosecution's case. [FN290]

III. Calculating Miranda 's Costs

The data reviewed in the preceding sections should allow us to make a general estimate of Miranda's costs in terms of lost cases. To be sure, in view of the limited number of studies, one must approach this endeavor with some caution. Nonetheless, there is probably considerable heuristic value in making a rough calculation of Miranda's impact on the criminal justice

system. [\[FN291\]](#)

A. Direct Costs in Terms of Lost Cases

As explained in Part I, the appropriate method for assessing Miranda's effects is to look at the number of cases that are "lost" due to Miranda. [\[FN292\]](#) Expressed as a formula, the direct costs of Miranda in terms of the percent of lost convictions per year can be determined as follows:

(1) change in confession rate because of Miranda (in terms of suspects confessing/suspects questioned)

x (2) cases in which confessions are needed to convict (in terms of confessions needed/suspects confessing). [\[FN293\]](#)

The absolute number of criminals who might escape conviction because of Miranda can be determined by multiplying that percentage figure by the absolute number of criminal suspects questioned.

The preceding sections provide some tentative estimates that allow a preliminary estimate of the costs of Miranda. For an estimate of the change in the confession rate, I will use the average of the reliable before-and-after Miranda studies, which report a mean 16% reduction in the confession rate; for an estimate of the importance of confessions, I will use the average of the reliable studies on the subject, *438 which report that confessions are needed in 24% of cases involving confessions. [\[FN294\]](#) Combining these figures produces the following result:

$16\% \times 24\% = 3.8\%$ In other words, the existing empirical data supports the tentative estimate that Miranda has led to lost cases against almost four percent of all criminal suspects in this country who are questioned.

In addition to the cautions about these figures noted elsewhere in this Article, one definitional point should be emphasized. These "lost cases" are not necessarily the same as lost convictions. What these figures estimate is the additional number of cases in which, due to Miranda, a defendant did not confess and that confession was needed to convict. It may be that some viable criminal cases that are presented to prosecutors will be dismissed or pled down for reasons that have nothing to do with the Miranda decision. Nonetheless, most of the lost cases assessed here are probably cases that would "stick," that is, cases that would have ultimately resulted in a conviction. [\[FN295\]](#) While studies suggest that many cases are lost due to attrition as they work their way through the criminal justice system, the main reason for that attrition is evidentiary weakness in the case. [\[FN296\]](#) A confession shores up a weak case unlike any other single piece of evidence, [\[FN297\]](#) and prosecutors are probably particularly disinclined to plead down cases with confessions. [\[FN298\]](#)

While defenders of Miranda may argue that a 3.8% "cost" is acceptable given Miranda's benefits, critics will respond that the apparently small percentage figure multiplied across the run of criminal cases constitutes a large number of criminals. Although I will defer until Part VI full discussion of whether Miranda's costs are high or low, it might be useful to calculate an absolute number of criminal cases lost because of Miranda. To estimate such a number, it is necessary to multiply the percentage figure previously reported (3.8%) by the number of suspects interrogated. No national (and few if any local) statistics are available on the number of suspects interrogated. A surrogate number is the number of suspects arrested for particular crimes. Statistics on the number of "persons arrested" each year in *439 this country are readily available in the Federal Bureau of Investigation's annual Uniform Crime Reports ("UCR"). [\[FN299\]](#)

Persons arrested seems to be an appropriate figure for extrapolation. [\[FN300\]](#) Although "arrest" can be defined differently by various police agencies, [\[FN301\]](#) the operational definitions for reporting purposes seem to coalesce around events such as "brought to the station" [\[FN302\]](#) or "booking." [\[FN303\]](#) These appear to be definitions that would correspond with police opportunities for custodial interrogation. [\[FN304\]](#) Indeed, the definition of arrest might understate the number of custodial

situations, not only because some arrests are not reported, [\[FN305\]](#) but also because some police agencies commonly interrogate a suspect at the stationhouse without considering this to be an arrest. [\[FN306\]](#)

Using arrest figures also has the advantage of corresponding roughly to the statistics used to calculate confession rates. For example, the Pittsburgh study examined all files for cases cleared by the detective branch. [\[FN307\]](#) Cases are typically cleared by an "arrest." The New York County study used the slightly different figure of confessions "used in presenting cases to [the] grand jury," but such presentment typically occurred only "after arrest." [\[FN308\]](#) The Philadelphia study used "individuals arrested" as the base measure. [\[FN309\]](#) The Seaside City study involved cases in which "suspects were actually arrested and incarcerated by the Seaside City Police Department." [\[FN310\]](#)

***440** Using arrest figures, we can calculate total lost cases as follows. For 1993 (the most recent year for which statistics are available), the UCR 's Crime Index reports 754,110 arrests for violent crimes and 2,094,300 arrests for property crimes. [\[FN311\]](#) Multiplying the Miranda cost figure (3.8%) by the UCR index arrest figures suggests that in 1993 Miranda produced roughly 28,000 lost cases against suspects for index violent crimes and 79,000 lost cases against suspects for index property crimes. The violent crime figure can be divided into specific crimes, specifically 880 murder and nonnegligent manslaughter cases, 1400 forcible rape cases, 6500 robbery cases, and 21,000 aggravated assault cases.

These lost numbers only reflect crimes counted in the FBI's crime index. The FBI also compiles an estimated total number of arrests for each year. [\[FN312\]](#) Using the same methods, additional lost cases in 1993 for crimes outside of the crime index were more than 500,000, including: 57,000 lost cases for driving under the influence; 44,000 lost cases for assaults (not including aggravated assault); 42,000 lost cases for drug offenses; 19,000 lost cases for forgery and fraud; 12,000 lost cases for vandalism; and 9000 lost cases for weapons violations (carrying, possessing illegally, etc.).

B. Indirect Costs in Terms of More Lenient Plea Bargains

Based on the empirical evidence, we can calculate a rough estimate not only of Miranda's direct costs (in terms of lost cases), but also indirect costs (changes in case disposition resulting from plea bargaining). Any assessment of the effects of Miranda on the criminal justice system would be incomplete if it did not consider plea bargaining. In the United States, the great majority of criminal cases are resolved by a guilty plea rather than a trial. [\[FN313\]](#) The literature suggests that in most jurisdictions, 70% to 90% of all felony cases are resolved by a plea of guilty or its functional equivalent. [\[FN314\]](#) Many, though not ***441** all, [\[FN315\]](#) of these guilty pleas will result from plea negotiations or plea "bargaining."

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

The empirical research suggests that the strength of the government's case is an important factor in plea bargaining. For example, David Neubauer's study of "Prairie City" found strength of the prosecution's case to be one of three factors that play a major role in plea bargaining and concluded that the facts of the case are a "prime consideration[]." [\[FN316\]](#)

A confession can strengthen the prosecution's case considerably. A confession is "direct" evidence of a defendant's guilt and thus is generally superior to indirect or circumstantial evidence. [\[FN317\]](#) Indeed, the Supreme Court has recognized that "a defendant's confession is probably the most probative and damaging evidence that can be admitted against him. The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct." [\[FN318\]](#) Accordingly we can hypothesize that any reduction in the rate at which police obtain confessions ***442** would increase defendants' success in plea bargaining. [\[FN319\]](#) This was a hypothesis advanced by Justice

White in his Miranda dissent. [\[FN320\]](#)

Anecdotal evidence suggests that the hypothesis is accurate. As one police officer has explained, "getting a confession . . . puts a case on an entirely different track so to speak. The district attorney will always charge a suspect and prosecute a case if there's a confession, and the district attorney will also be less likely to accept a plea or make a reduced plea himself." [\[FN321\]](#) On the other hand, when confessions are unavailable, notorious plea bargains sometimes result. [\[FN322\]](#)

The available empirical evidence also supports the hypothesis. Detailed information on plea bargaining and confessions comes from David Neubauer's study of confessions in "Prairie City," which concluded that "the presence or absence of a confession has a marked effect on the outcomes of the plea bargaining process. A defendant who has confessed . . . received fewer concessions from the prosecutor when he pleads guilty." [\[FN323\]](#) Neubauer reported data for property crimes and violent crimes. [\[FN324\]](#) For property crimes, of those suspects who confessed, 69% pled to the original charge as compared to 45% who did not -- a 24% difference. [\[FN325\]](#) For violent crimes, 24% of those *443 who confessed pled to the original charge, while 18% of those who did not confess did so -- a 6% difference. [\[FN326\]](#)

Peter Nardulli, James Eisenstein, and Roy B. Flemming also found that confessions affected the guilty plea process. They conducted a sophisticated regression analysis of guilty pleas in three states in a sample involving several thousand cases. One of the variables in their equations measured confessions. [\[FN327\]](#) They found that defendants who had confessed were less likely to receive a reduction in the number of counts charged against them. [\[FN328\]](#) At the same time, Nardulli and his colleagues found no relation of confessions to charge reductions, reductions in the primary charge, or reductions in the magnitude of the projected sentence to be served by the defendant. [\[FN329\]](#) The effects of confessions were more pronounced when the data were disaggregated into four groups of counties defined by the extent of plea bargaining practices. In three of the four groups, confessions had some effect on charge or count reductions. [\[FN330\]](#)

The Yale Project also reports data suggesting the importance of confessions to plea bargaining. In 9 cases in which the defendant had confessed and was unable to bargain for a lower charge, the defense attorneys attributed this outcome to the confession. [\[FN331\]](#) In 16 more confession cases, the prosecutor simply would not bargain at all. [\[FN332\]](#) Bargaining was successful in reducing the charge in only 15 of the 49 confession cases (30.6%), whereas charges were reduced or nolle *444 prossed in 16 of the 26 cases (61.5%) in which the defendant had not talked to the police. [\[FN333\]](#)

Recent data reported by Richard Leo also suggest that incriminating statements have a significant effect on the plea bargaining process. In his study of cases in the California Bay area, he found that "[s]uspects who provide incriminating information to detectives are significantly more likely to be treated differently at every subsequent stage of the criminal process" [\[FN334\]](#) Although Leo did not collect data on charge disposition in particular, he found that suspects who incriminated themselves "were 24% less likely to have their cases dismissed" and "25% more likely to have their cases resolved by plea bargaining." [\[FN335\]](#)

Finally, the most recent research on this issue is my 1994 Salt Lake County study. It found that defendants who confessed were less likely to receive concessions in plea bargaining. For example, of suspects whom police successfully questioned, 30.6% pled to charges at the same level as were initially filed, compared to only 15.4% for suspects invoking Miranda rights, 9.4% for suspects questioned unsuccessfully, and 10.8% for suspects not questioned. [\[FN336\]](#)

Miranda has one possible offsetting effect to lenient dispositions that should be examined. The plea bargain literature contains some suggestions that defendants who confess to police may receive lighter sentences. [\[FN337\]](#) The theory might be that defendants who confess "are further along the path of reformation than those who do not repent" *445 and thus deserve credit at sentencing. [\[FN338\]](#) While the theory appears tenable, the limited empirical evidence cuts against it. [\[FN339\]](#)

Although confessions may appear to affect only a small percentage of plea bargained cases, a basis for concern appears when we realize that plea bargaining implicates a substantial proportion of criminal cases in this country. Based on the calculation discussed in the preceding section, Miranda appears to have reduced the confession rate by approximately 16%. In all of these cases, the prosecution has a weaker hand from which to bargain. Indeed, the previous section concluded that in roughly one out of four of these cases (24%), the entire case would be "lost" because the prosecution would not have sufficient evidence to convict. [\[FN340\]](#) In the remaining three out of four cases in which a confession is lost, the defendant may receive a more favorable disposition through a plea bargain.

Although the empirical data here are much more limited than those examined on confession rates, it is possible to provide some very rough quantitative estimate of Miranda's effects on plea bargaining. To do this, assume that Neubauer's observed effects in Prairie City apply equally across the country. [\[FN341\]](#) Specifically, we can generalize from his findings that in property cases approximately 19% fewer suspects *446 who did not confess pled to the original charge; [\[FN342\]](#) in violence cases, 6% fewer suspects who did not confess pled to the original charge and 13% fewer pled to reduced charges. [\[FN343\]](#) Taking these percentages and taking the 16% reduction in the confession rate from Miranda discussed previously leads to the conclusion that, because of Miranda, roughly 3.0% fewer property offenders plead guilty to the original charge; 1.0% fewer violent offenders plead guilty to the original charge; and 2.1% fewer plead guilty to reduced charges (a total of 3.1%). [\[FN344\]](#) To come up with a general approximation of the total number of cases affected, we can use again the 1993 FBI arrest figures [\[FN345\]](#) for index crimes of 754,110 arrests for violent crime and 2,094,300 arrests for property crimes. Multiplying the percentages derived here suggests that in 1993 there were 67,000 pleas to reduced charges in property cases and 24,000 pleas to reduced charges in violence cases attributable to Miranda. [\[FN346\]](#)

IV. Problems with Generalizing

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

Before examining the validity of these generalizations, however, it might be useful to briefly recall the types of claims that have been made about Miranda by the decision's defenders. They have exhibited no hesitancy in generalizing from a few studies purporting to show little impact from the decision to nationwide conclusions. [\[FN347\]](#) As will be seen, the extrapolations made in this Article are more defensible.

A. Generalizations on Confession Rates

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

An agnostically inclined critic might argue that we simply do not know anything about other areas. After all, there are "virtually endless variations, large and small, overt and subtle, from one local law enforcement jurisdiction to another."

(Cite as: 90 Nw. U. L. Rev. 387)

[\[FN348\]](#) From a public policy perspective, such criticism seems unpersuasive. To be sure, more and better studies in various parts of the country would add to our knowledge about Miranda's effects. But in the absence of such studies, policy makers must do the best they can with the data at hand.

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

[\[FN349\]](#)

*448 This consistency is obtained, however, only by looking at the seven urban area studies. The eighth study, conducted in Seaside City, California, found only a modest 2.0% reduction in the confession rate. Seaside City is a residential community within the Los Angeles metropolitan area and thus is "not confronted with the same crime problems as those encountered by [police] departments in large metropolitan areas." [\[FN350\]](#) One possible hypothesis is that Miranda has more substantial effects on the confession rates in cities, effects that dissipate beyond urban frontiers.

Support for the cities-are-affected-more hypothesis can be found in a 1968 survey conducted by Cyril Robinson. [\[FN351\]](#) Robinson surveyed police departments in various jurisdictions across the country to assess the impact of the Miranda decision. He found that while both "city police" and "small city police" thought that Miranda had reduced confessions, city police noticed the greatest change. [\[FN352\]](#)

That Miranda has a larger effect on major urban areas is suggested by several considerations. Big-city police are under the heaviest caseload pressure. As a result, they might be less able to take advantage of effective but time-consuming stratagems for avoiding Miranda's effects. [\[FN353\]](#) For example, they might not have the luxury of time to conduct noncustodial interviews outside of the Miranda strictures. [\[FN354\]](#) Another possible factor is that if Miranda has a greater effect on serious violent crimes, as suggested below, [\[FN355\]](#) urban law enforcement agencies that handle a disproportionate number of such cases would be more substantially affected. Finally, it may be, as Robinson suggests, that outside the major cities there are "closer relationships *449 among police, attorneys, and courts" that mean court decisions have less effect on police practices. [\[FN356\]](#)

To test the hypothesis that Miranda affected the confession rate more in larger cities, one can regress confession rate changes after Miranda against the population of the jurisdiction. The data for the regression were the reliable confession rate data, that is, data from (in order of ascending population) "Seaside City," New Haven, New Orleans, Kansas City, Pittsburgh, Philadelphia, Chicago, and New York. [\[FN357\]](#) As suggested by Figure 1, a regression of the logarithm of the city population and the change in the confession rate produced a strong, statistically significant relation between the two variables. [\[FN358\]](#)

Figure 1

*450 While the foregoing analysis suggests that Miranda has differential effects on the confession rate in cities of varying sizes, that problem is not as substantial for estimating Miranda's nationwide costs as it might first appear. Major urban areas contain much of this country's crime and, consequently, many of the criminal interrogations. One measure of this fact is found in the Uniform Crime Reports, which reports that in 1993 the 63 largest cities in the country (those with populations over 250,000) contained only 19.2% of the country's population but 31.6% of the index crimes and 43.1% of the country's violent crimes. [\[FN359\]](#) Thus, even if the data used here are representative only of the largest cities, they should still reflect roughly one-third of the nation's crimes and close to half of the violent crimes. Including Seaside City as one-eighth of the

(Cite as: 90 Nw. U. L. Rev. 387)

data base also serves to make the calculations more representative.

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

[\[FN360\]](#)

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

Why might a rebound occur? One theory, which we might dub the "publicity hypothesis," was ventured by Kansas City police chief (and later FBI Director) Clarence Kelley. His view was that the reduction in confession rates would probably fade with time "as the case becomes more remote [in suspects' minds]." [\[FN361\]](#)

Publicity can cut another way. A competing hypothesis suggests that awareness of Miranda has increased over time, causing more serious effects today. For example, Professors LaFave and Israel, while taking the view that the studies done in the immediate wake of Miranda show only a marginal effect on confession rates, speculate that rates may have dropped "now that Miranda has become a part of our culture and presumably the rights declared therein are more widely perceived by the public at large." [\[FN362\]](#) There is some support for the *451 hypothesis that the population has now, in effect, been "Mirandized." A 1991 public opinion poll found that 80% of Americans knew about their right to remain silent. [\[FN363\]](#) Assuming that today's criminal suspects are at least as knowledgeable as the citizenry at large, [\[FN364\]](#) this would appear to be an increase in awareness of rights. [\[FN365\]](#) If increased understanding correlates with fewer confessions, [\[FN366\]](#) confession rates may have dropped over time since Miranda. Given the two competing publicity hypotheses, we cannot determine through a priori reasoning whether publicity effects have increased or decreased Miranda's harms over time. Resort to the empirical data is our only choice.

Before turning to those data, another theory, which might be labelled the "accommodation hypothesis," should also be outlined. Sometimes it is argued that police have now "accommodated" the Miranda decision through "techniques to subvert its effects." [\[FN367\]](#) As a result, Professor Schulhofer among others argues that the before-and-after studies are "at most, irrelevant for assessing Miranda's current impact because they record its initial effects, before police had an opportunity to adjust interviewing methods and investigative practices to Miranda's requirements." [\[FN368\]](#) One of the frequently suggested accommodations springs from Miranda's application to custodial "interrogations," *452 but not police "interviews." Because of this limitation, careful observers of police behavior suggest that "[p]olice who are seeking admissions have learned how to interview rather than interrogate," thereby escaping Miranda's strictures. [\[FN369\]](#) Another often-cited accommodation is police delivery of the warnings in a manner designed to discourage suspects from invoking their rights. [\[FN370\]](#)

The accommodation hypothesis could justify a conclusion that confession rates have rebounded only if police discovered and employed these new techniques after the completion of the before-and-after Miranda studies. That the police discovered such tactics only belatedly remains unproved. Many police departments quickly received advice regarding the Miranda decision and were probably able to respond to the decision relatively promptly. [\[FN371\]](#) For example, the Miranda opinion itself explicitly suggested its limitation to custodial interrogation [\[FN372\]](#) and police were probably aware of the "interview" option around that time. [\[FN373\]](#) As another example, police in New Haven just a month or two after the decision were trying to "de-fuse" the warnings by bureaucratic delivery or other similar devices. [\[FN374\]](#) The Miranda decision was also

preceded by earlier decisions by the Court and other courts, and police probably had considerable pre- Miranda experience to draw upon in formulating their response. [\[FN375\]](#)

***453** Even if accommodating tactics spread and improved over time, at best they would ameliorate, not eliminate, Miranda's harmful effects. The possibility of a shift away from interrogations to casual "interviews," for example, would not work for the significant proportion of police business involving suspects who must be taken immediately into custody, either because they pose a danger to the community or a risk of flight. Moreover, even when police can interview suspects, it is not clear that they will be as successful in obtaining confessions. It appears that the privacy of the interrogation room is an important ingredient in obtaining confessions. [\[FN376\]](#) I have done the only empirical research on this question and found that custodial questioning is more likely to produce a confession (56.9% vs. 30.0% for noncustodial questioning, a statistically significant difference). [\[FN377\]](#)

Even if police tactics for dealing with Miranda have improved over time, it is also important to recognize a competing hypothesis we can label the "compliance hypothesis": that police compliance with Miranda may also have improved, thereby increasing Miranda's costs. As noted above, the early studies may not have captured all of Miranda's harms because some police did not actually follow the requirements of the decision. [\[FN378\]](#) Since then, police have more closely adhered to Miranda's requirements. [\[FN379\]](#) Police forces have been carefully trained in the Miranda rules [\[FN380\]](#) and now receive better information about compliance. [\[FN381\]](#) The increasing professionalization of police forces might also contribute to this trend. [\[FN382\]](#) One might therefore conclude that, as police have complied more strictly with the Miranda rules, confession rates have dropped even further than shown in the ***454** early studies. [\[FN383\]](#) Some evidence supports this position. [\[FN384\]](#) If this hypothesis is true, then the 3.8% cost figure estimated in this Article is too low. The cost estimate is based on studies concluded just a year or so after Miranda, not long enough to capture later reductions in the confession rate.

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

- (a) Empirical data from the before-and-after studies. -- The limited empirical data from around the time of Miranda (decided on June 13, 1966) offer no support for the rebound argument. The only before-and-after study to track confession rates over a substantial period of time is the Seaside City study. [\[FN385\]](#) While the study found only a modest reduction in confession rates after Miranda (2% to be exact), the study offers an illuminating five-year progression of confession rates over time: 1964 -- 67%; 1965 -- 70%; 1966 -- 77%; 1967 -- 71%; 1968 -- 61%. [\[FN386\]](#) The data show steadily increasing confession rates until 1966, the year of Miranda, followed by steadily declining confession rates, reaching a substantially lower rate in 1968, the last year studied. While Witt cautioned against attributing this year-to-year decline solely to Miranda, [\[FN387\]](#) the data at least offer no support to those looking for a rebounding confession rate over time. [\[FN388\]](#)

The Pittsburgh study contains data from a shorter time period that also support the conclusion that Miranda's effects did not dissipate. The Pittsburgh study rests on two sets of data: one from shortly ***455** after the decision (exactly when is not made clear in the article) and a second, more recent set drawn from June 20 through September 5, 1967 -- more than one year after Miranda. [\[FN389\]](#) While the first set showed a drop in the confession rate of 16.2%, the second set showed a larger drop of 21.4%. [\[FN390\]](#) The authors noted that the second figures "involve more recent cases so perhaps the confession rate continues to decline as suspects become more aware of their rights." [\[FN391\]](#) While an alternative explanation was that the

(Cite as: 90 Nw. U. L. Rev. 387)

small sample (173 suspects) was simply unrepresentative, [\[FN392\]](#) at a minimum the Pittsburgh confession rate data provide no support for the rebound thesis. [\[FN393\]](#)

The only other multi-year data available on confession rates come from the Yale Law Journal study, which found that confession rates declined approximately 10 to 15% from 1960 to 1966. [\[FN394\]](#) Unfortunately, the Yale data terminate in the summer of 1966 and thus are of little use for determining Miranda's long-term effects. In sum, the before-and-after studies contain no evidence of a rebound in confession rates over time.

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

Even taking a longer time horizon, it is hard to find any empirical data supporting the notion that confession rates have rebounded to pre- Miranda levels. [\[FN395\]](#) The confession rates found in later studies do not seem, on average, to be as high as pre- Miranda rates, generally falling below 50%. For example, David Neubauer reported that in 1968 in "Prairie City," a medium-sized city in central Illinois, suspects gave damaging statements in 46% of all cases. [\[FN396\]](#) Lawrence Leiken interviewed fifty suspects held in the Denver jail in 1969. Sixteen of *456 the fifty defendants (32.0%) reported that they had made a damaging statement. [\[FN397\]](#) Gary LaFree found that an average of 40.3% of all cases contained confessions in a sample drawn from six cities (El Paso, Texas; New Orleans, Louisiana; Seattle, Washington; Delaware County, Pennsylvania; Tucson, Arizona; and Norfolk, Virginia) during 1976 and 1977. [\[FN398\]](#) A study by Floyd Feeney, Forrest Dill, and Adrienne Weir in 1979 found that in Jacksonville, Florida of suspects for robbery, burglary, and felony assault, 32.9% confessed and an additional 18.4% admitted being at the scene of the crime. [\[FN399\]](#) Assuming generously that an on-the-scene admission is always an incriminating admission, [\[FN400\]](#) the percentage of incriminating statements in Jacksonville might be as high as 51.3%. [\[FN401\]](#) In San Diego, California, the study found that of suspects for the same crimes, 20.3% confessed and an additional 16.2% admitted being at the scene of the crime. [\[FN402\]](#) Therefore, a total of 36.6% might be viewed as incriminating themselves.

Two recent studies of confession rates have been completed. In 1993, Richard Leo observed, either in person or on videotape, 182 interrogations in the Bay area of California. [\[FN403\]](#) He found that 64.3% of the suspects gave incriminating information of some type. [\[FN404\]](#) However, he used a very broad definition of what was incriminating, [\[FN405\]](#) and *457 for comparison with other studies the more relevant figure is the 41.8% who gave either a confession or partial admission. [\[FN406\]](#) Even this rate is likely significantly overstated as a measure of overall police success, [\[FN407\]](#) because of both the study's narrow focus on stationhouse interrogation by detectives [\[FN408\]](#) and the study's sampling methodology. [\[FN409\]](#) In 1994, my research assistant and I collected data on confessions and incriminating statements in cases submitted for prosecution to the Salt Lake County Attorney's Office. [\[FN410\]](#) In 33.3% of the cases, the suspects either confessed, gave incriminating statements, or were locked into a false alibi. [\[FN411\]](#)

*458 While these studies report varying results, it is hard to read the figures as proving that confession rates have rebounded to pre- Miranda levels. If anything, they support the conclusion that rates have continued to fall. [\[FN412\]](#) For comparison, the confession rate data I have been able to find, from both before and after Miranda, are set out in Table 3. [\[FN413\]](#) Comparing these rates from various jurisdictions is extremely difficult because of varying definitions of "confessions" and differences in police practices. But it is hard to see in the data support for those who claim that confessions are now obtained as often as before Miranda. [\[FN414\]](#)

Table 3 -- Pre- and Post- Miranda Confession Rates

Pre-Miranda			Post-Miranda		
City	Year	Confession Rate	City	Year	Confession Rate
Pittsburgh	1966	48.5%	Pittsburgh	1967	29.9%
New York County	1966	49.0%	New York County	1966	14.5%
Philadelphia	1964	45% (est./der.)	Philadelphia	1967	20.4% (der.)
'Seaside City'	1964	68.9%	'Seaside City'	1968	66.9%
New Haven	1960	58 - 63% (est.)	New Haven	1966	48.2%
D.C. - total	1966	21.5%	D.C. - total	1967	20.0%
Kings County	1966	45% (est./der.)	Kings County	1966	29.5% (der.)
New Orleans	1966	40% (est.)	New Orleans	1967	28.2%
Los Angeles	1965	40.4%	Los Angeles	1966	50.2%
City A, CA	1960	58.1%	New York -- Manhattan	1967	16.8%
City B, CA	1960	88.1%	New York -- Manhattan	1967	23.7%
Detroit	1961	60.8%	'Prairie City'	1968	46.0%
Detroit	1965	58.0%	Denver	1969	32.0%
Sacramento	1961	46.9%	Six City Sample	1977	40.3%

Baltimore	1961	30.9%	Jacksonville	1979	32.9%
White Plains	1961	84.7%	Jacksonville -incl. on-scene	1979	51.3%
Dayton	1961	73.8%	San Diego	1979	20.3%
Atlanta	1961	47.0%	San Diego-incl. on-scene	1979	36.6%
Newark	1961	77.0%	Bay area - all	1993	63.8%
Kings County	1961	42.4%	Bay area- incriminating	1993	41.8%
			Bay area - adjusted	1993	38.7%
			Salt Lake County	1994	33.3%

est. =

estimated

der. = derived

***460** (c) The effect of doctrinal changes since Miranda. -- Another gambit sometimes tried by Miranda's defenders is to argue that Miranda doctrine has now been scaled back by the more conservative Burger and Rehnquist Courts. [\[FN415\]](#) This approach can skirt the empirical studies on confession rates by instead observing court opinions and arguing that the rules have since changed in favor of the police.

The premise of this position -- that Miranda has been significantly restricted -- is open to challenge. While recently the Court has decided more Miranda issues in favor of the police than suspects, the decisions have often been narrow ones involving peripheral questions. [\[FN416\]](#) The core Miranda apparatus is the same today as it was on June 13, 1966, the day the decision was announced. The prevailing marginal philosophy found in the more recent decisions is perhaps best expressed by Chief Justice Burger's statement in 1980 that "[t]he meaning of Miranda has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule Miranda, disparage it, nor extend it at this late date." [\[FN417\]](#) Several respected commentators seem to suggest that, on balance, the core requirements of Miranda have not been substantially cut back since its pronouncement. [\[FN418\]](#)

The one area where there perhaps has been some significant doctrinal movement in favor of law enforcement is in the custody area. In several decisions, the Court has limited the circumstances in which a suspect will be considered to be subject to "custodial" interrogation, which is the triggering event for the Miranda regime. [\[FN419\]](#)

While we cannot say concretely how much difference doctrinal changes in the definition of "custody" might make, we can say that there are some offsetting doctrinal shifts that must be considered as well. The prime example is the Court's decision in *Edwards v. Arizona*, [\[FN420\]](#) which "reinvigorated Miranda in an important respect." [\[FN421\]](#) In *Edwards*, the Court reaffirmed a blanket prohibition of police-initiated resumption of interrogation after a suspect invoked the right to counsel. [\[FN422\]](#) In recent years, the Court "has not merely reaffirmed but actually expanded the scope of this protection" [\[FN423\]](#) The *Edwards* line of cases is particularly significant for present purposes because its blanket prohibition of questioning is precisely the kind of rule that has the most effect on confession rates. [\[FN424\]](#) Similarly, the Court "gave the key term 'interrogation' a fairly generous reading in *Rhode Island v. Innis*." [\[FN425\]](#)

One is thus left with competing doctrinal shifts and no solid empirical evidence concerning whether the changes have had a noticeable effect on confession rates. My impression, however, is that these changes have made relatively little difference in the day-to-day conduct of police interrogation. One example is provided by the "public safety exception" to *Miranda*. In 1984, in *New York v. Quarles*, [\[FN426\]](#) the Court held that police could dispense with *Miranda* warnings in situations involving an immediate threat to public safety. Shortly after the decision, commentators predicted that the decision might portend a significant change in police questioning. [\[FN427\]](#) Yet four years after the decision, a law review note could find only 27 published appellate cases in all of the federal and state courts in the country discussing the public safety exception, [\[FN428\]](#) a tiny number when one considers how frequently *Miranda* issues arise. Only eight of the decisions clearly applied the exception as the sole ground for admitting evidence. [\[FN429\]](#) Most of these eight cases involved reflexive police questioning (often involving the location of weapons) rather than deliberate attempts to use public safety concerns to skirt *Miranda*'s requirements. My data *462 from Salt Lake County also suggest that public safety questioning is quite rare. [\[FN430\]](#) The available information fails to provide evidence of new police interrogation practices designed to capitalize on the "public safety" exception to increase confession rates. [\[FN431\]](#)

In sum, there is no persuasive evidence that confession rates have, over time, rebounded to pre- *Miranda* levels. To be sure, this question deserves further study. It is startling to discover that we have so little useful data on such a basic question as the rate of confessions in this country. [\[FN432\]](#) Hopefully scholars will begin to probe this area.

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

It might be useful first to canvas the specific offenses covered in the eight before-and-after studies relied on for the extrapolation. The Pittsburgh study covered homicide, forcible sex, robbery, burglary (including receiving stolen goods), and auto larceny. [\[FN433\]](#) The Philadelphia study covered "the most serious offenses, such as homicide, robbery, rape and burglary, and some other offenses, such as aggravated assault and battery and larceny." [\[FN434\]](#) The New York County study examined "almost all felony cases in New York County except homicides." [\[FN435\]](#) The Seaside City study reviewed "murder, forcible rape, robbery and burglary." [\[FN436\]](#) The New Haven study reviewed a range of what were apparently felony offenses. [\[FN437\]](#) The Kansas City, Kings County, and New Orleans studies also apparently involved a wide range of criminal *463 offenses. [\[FN438\]](#) The studies thus cover a broad range of offenses, which should facilitate generalizations.

The extrapolation across offenses may in fact understate *Miranda*'s costs. The limited empirical data suggest that *Miranda*'s harmful effects may be more substantial for the most serious crimes, especially crimes of violence. The only before-and-after data broken down by type of crime come from the Pittsburgh study, which found that while confession rates dropped 16.9% overall, the rate in homicide cases fell 27.3% and in robbery cases 25.7%. [\[FN439\]](#) Smaller reductions were observed for

auto larceny (21.2%), burglary and receiving stolen goods (13.7%), and sex offenses (0.5%). [FN440] Greater impact on police success in the most serious cases was also observed in Britain when new interrogation regulations were imposed there. [FN441]

While the Pittsburgh study is the only before-and-after data on whether Miranda affected serious crimes more, indirect support for the proposition comes from the post-Miranda confession data, which show generally lower confession rates for the most serious crimes. My study of Salt Lake County in 1994 found more confessions by property offenders than violent offenders, although the difference was not statistically significant at the standard 95% confidence level. [FN442] Neubauer's study in "Prairie City" found that confession rates were much lower for crimes of violence than for property crimes. [FN443] The D.C. study found that statement rates were generally lower for offenses *464 against persons. [FN444] The Vera Institute study in New York City in 1967 found that denials were more likely than admissions for offenses against the person while admissions were more likely than denials for property, instrumentality (e.g., possession of burglar's tools or illegal weapons), and narcotics offenses. [FN445] Data from Chicago in 1967 also suggest that violent offenders are more likely to invoke either their right to counsel or their right to silence. [FN446] The American studies suggesting lower confession rates for more serious crimes are consistent with more detailed data available from Britain reporting that serious offenders are less likely to confess. [FN447] On the other hand, the New Haven study found some (statistically insignificant) suggestion that interrogation-rate success increased as the crime became more serious, which was attributed to more vigorous interrogation in more serious crimes. [FN448]

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

the professionals say nothing. No alibis. No explanations. No expressions of polite dismay or blanket denials. . . . For anyone with experience in the criminal justice machine, the point is driven home by every lawyer *465 worth his fee. Repetition and familiarity with the process soon place the professionals beyond the reach of a police interrogation. [FN449]

The available empirical research supports this conclusion. The Prairie City study found that, of those with a prior felony conviction, only 36% confessed, compared to 59% without. [FN450] For violent crimes, the differential was even more substantial: only 15% with prior convictions confessed, compared to 45% without. [FN451] The study also found that suspects with prior convictions were less likely to execute a waiver of rights form, with 68% of those with records waiving compared to 80% of those without. [FN452] The New Haven study similarly found that "prior record tends to reduce the likelihood of success." [FN453] Interrogation was successful for 41% of the suspects with a previous arrest, compared to 60% without. [FN454] Recent data from the Bay area also found "a suspect with a felony record . . . was almost four times as likely to invoke [Miranda rights] as a suspect with no prior record" [FN455] Data from Britain also support the conclusion that "hardened criminals" are more likely to take advantage of procedural rights and less likely to confess. [FN456] However, my study in Salt *466 Lake City found no relation between prior record and interrogation success. [FN457]

Taken together, the available studies suggest that, if anything, the calculation reported here may misleadingly understate Miranda's harms by averaging all crime categories together -- transferring some of the lost cases from the more serious violent crime category to the less serious property crime category, and obscuring Miranda's more harmful effects on the prosecution of repeat criminals. This is of particular concern in view of the difficulty of the criminal justice system in bringing violent, professional offenders to justice. [FN458]

B. Generalizations on the Necessity for Confessions

Turning from confession rates to necessity rates, the reader will recall the earlier estimate that a confession is needed for conviction in 24% of all cases. [\[FN459\]](#) Like confession rates, this necessity estimate was derived by averaging the reliable studies from around the country. Like confession rates, the extrapolation requires justification on three points: generalizing across jurisdictions, generalizing across time, and generalizing across offenses.

1. Generalizing Across Jurisdictions. -- The necessity estimate used in this Article comes from a few studies: Pittsburgh, Seaside City, New York County, and Los Angeles, as shown previously in Table 2. The necessity estimates from these various jurisdictions are not widely divergent. The same rough convergence is noted even if one includes the studies found to have problems: taking all the studies that report data on all cases, the necessity figures range from a low of 10.3% to a high of 28.3%; for studies reporting data on confession cases, the necessity figures range from 8.2% to 25.9%. [\[FN460\]](#)
In contrast to confession rates, where big cities seem to have been more adversely affected by Miranda's requirements, confession necessity figures show no obvious relation to city size.
2. Generalizing Across Time. -- This Article takes research on the need for convictions in the 1960s and then applies it to generate *467 estimates for the 1990s. Has the importance of confessions changed over time?

One area worth exploring is whether improved investigative techniques have made reliance on confessions obsolete. Indeed, one of the underlying rationales for Miranda and related decisions was that police reliance on confessions discouraged the use of other, more scientific methods of investigation. [\[FN461\]](#) With recent advances in investigative techniques -- such as DNA analysis, fiber and hair comparisons, and similar technologies [\[FN462\]](#) -- it might be argued that confessions are even less necessary than when Miranda was handed down. A related argument might be that police agencies have devoted more resources to physical evidence collection since Miranda. [\[FN463\]](#)

While the application of scientific techniques has advanced, it is unclear that this would make an appreciable difference in the need for confessions to convict. [\[FN464\]](#) The "confession necessary" category of cases likely embraces those with the least physical or other evidence. Improved techniques for analyzing evidence will have the smallest effect on these cases.

Even looking at the broad run of cases, the empirical literature suggests that scientific improvements have not altered the proof available to prosecutors in a significant percentage of cases. For example, studies suggest that fingerprints rarely solve crimes. [\[FN465\]](#) Along the same lines, studies suggest that other evidence susceptible to scientific analysis, such as paint chips and bloodstains, is collected in only a small percentage of cases. [\[FN466\]](#)

The British seem to have performed the most extensive empirical research on this subject, which quantifies the conclusion that forensic techniques are of limited usefulness in obtaining convictions. Perhaps the most detailed investigation was done by John Baldwin and Michael McConville, who concluded in 1980 that "forensic evidence was either not available or was unimportant in 95 per cent of all cases *468 within the sample and, in the other five per cent, it was buttressed by supplementary incriminating evidence." [\[FN467\]](#) At the same time, Baldwin and McConville noted that confessions were highly important to ultimate outcomes. [\[FN468\]](#) When McConville gathered additional data on the role of forensic science thirteen years later, he also found a minor role for scientific evidence: "[S]cientific or forensic evidence appears to play a statistically insignificant part in the identification of suspected offenders." [\[FN469\]](#)

My point here is not to denigrate innovative police investigative techniques, but to show that scientific analysis can be brought to bear on such a small fraction of cases that improvements over time could not explain away a continuing need for confessions. Indeed, forensic improvements might actually increase the need for confessions, by enhancing the ability to identify possible suspects but leaving police with the need to obtain sufficient evidence to prove guilt beyond a reasonable doubt. [\[FN470\]](#) In short, it seems unlikely that the march of science has, since the 1960s, significantly changed the need for confessions.

Even if improvements in science have made some dent in the need for confessions, other factors may have more than offset that gain. If the Miranda assumption that cases can be solved without confessions is correct, it is clear that this will require an expenditure of additional police resources. [\[FN471\]](#) While greater police diligence in investigation might have been sanguinely prescribed in the mid-1960s, [\[FN472\]](#) today such a suggestion seems rather divorced from the burgeoning crime rates and limited police resources. For example, a widely cited *469 statistic during the recent debate on the federal crime bill was that in 1961 there was only one reported felony for every American police officer; by 1990, that number had risen to 4.6 felonies per officer. [\[FN473\]](#)

David Simon's book *Homicide* captures the current police environment, at least in major urban areas. He describes the plight of the District of Columbia homicide squad as "[a]wash in a deluge of violence . . . [with] no time for follow-up investigation, no time for pretrial preparation, no time for anything but picking up bodies." [\[FN474\]](#) Such workload pressures affect not only street detectives, but also forensic laboratories. [\[FN475\]](#) In such an environment, quick solutions to crimes through interrogations might take on greater importance. [\[FN476\]](#) In this connection, it is interesting that the most recent field research on police interrogations found that "virtually every detective to whom I spoke insisted that more crimes are solved by police interviews and interrogations than by any other investigative method." [\[FN477\]](#)

Finally, the necessity for confessions may have increased over time because prosecutors now have more difficulty persuading juries to convict. Some troubling anecdotal evidence along these lines comes again from David Simon's 1988 book about criminal justice in Baltimore. He reports that in that year, 55 homicide defendants faced a trial by jury; 25 (or 45%) were acquitted. [\[FN478\]](#) While Simon attributes some of this to racial animosities, he believes that the more telling factor in "crippl[ing] the jury system in Baltimore" is television, which has perceptibly raised the functional burden of proof for prosecutors:

Television ensures that criminal juries are empaneled with ridiculous expectations. Jurors want to see the murder -- see it played out in front of their eyes on videotape in slow motion or, at the very least, see the guilty party fall to his knees at the witness stand, begging for mercy. Never mind that fingerprints are recovered in less than 10 percent of criminal cases, the average juror wants fingerprints on the gun, fingerprints on the knife, fingerprints on every door handle, window, and house key. [\[FN479\]](#) Simon reports that, "[a]s a consequence, city juries have become a deterrent of sorts to prosecutors, who are willing to accept weaker pleas or tolerate dismissals rather than waste the city's time and money on cases involving defendants who are clearly guilty, but who *470 have been charged on evidence that is anything less than overwhelming." [\[FN480\]](#)

Misimpressions from television are not the only malady in the criminal justice system that has grown worse with time. For example, witness intimidation seems to be a more serious problem, [\[FN481\]](#) with the result that confessions may now be more important. [\[FN482\]](#) Also it is possible that urban juries may have become more distrustful of police testimony or less likely to convict for other reasons. [\[FN483\]](#) In such an environment, the estimate of confessions needed to convict in 23.8% of all cases seems unreasonably low.

Fully consistent with this conclusion is my own data from Salt Lake County -- the only data on this subject collected in at least 20 years -- which found that confessions were much more important in 1994 than suggested in earlier studies. [\[FN484\]](#)

3. Generalizing Across Offenses. -- The final generalization made in the necessity-for-confessions estimate is that the necessity will be the same for all offenses. The offenses on which the estimate is based have been set out earlier. [\[FN485\]](#) It is possible, of course, that the need for confessions might vary by offense.

The available evidence suggests that confessions may be needed to convict more often for burglary, robbery, and crimes of violence generally. The Detroit study found that confessions were needed most for robbery and burglary cases. [\[FN486\]](#) The Pittsburgh study also provided such data, finding that confessions were most often needed for robbery and burglary charges. [\[FN487\]](#) A British study found that if confessions were excluded from the prosecution's case, all offense types would have been weakened, but robbery and burglary charges would have been weakened more than any other. [\[FN488\]](#)

Other than these studies, we are left with only the speculations of various commentators to explain the necessity of confessions for various*471 offenses. David Neubauer has read the confession data as suggesting that confessions are more often needed to convict for serious, violent crimes, perhaps because police are more likely to have physical evidence in property cases. [\[FN489\]](#) Some empirical evidence supports Neubauer's differential evidence hypothesis. [\[FN490\]](#) William Stuntz has reached the same conclusion, apparently by applying a different methodology. Noting that prosecutors drop more cases against violent offenders and that fewer violent offenders are ultimately convicted, [\[FN491\]](#) he concludes that violent felonies are "the category of cases where incriminating statements from the defendant probably matter most." [\[FN492\]](#)

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

V. The Legitimacy of the Concept of a "Cost" to Miranda

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

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

In the empirical debate over the costs of the search and seizure exclusionary rule, defenders of the rule have made the plausible argument that the concept of a "cost" is simply inappropriate. A case that is lost, either because the police did not unreasonably search or because the results of such a search were later suppressed, is simply the logical consequence of the Fourth Amendment. As retired Justice Potter Stewart explained, "[I]n many of the cases in which exclusion is ordered, police officers would not have discovered the evidence at all *472 if they had originally complied with the fourth amendment." [\[FN493\]](#) A similar argument might be tried against my assessment of Miranda's costs: that I have simply calculated the costs of complying with the Fifth Amendment's prohibition against compelled self-incrimination.

Whatever force such an argument might have in the exclusionary rule context [\[FN494\]](#) disappears in the Miranda context. Miranda's costs are quite different than those stemming from the Fourth Amendment. Miranda's costs are generated regulations on police not required by the Constitution and to which reasonable alternatives clearly exist.

The Supreme Court has now made clear that the Miranda rules are not themselves constitutional rights or requirements. Rather, they are only "suggested safeguards" whose purpose is to reduce the risk that the Fifth Amendment's prohibition of

(Cite as: 90 Nw. U. L. Rev. 387)

compelled self-incrimination will be violated in custodial questioning. This means that the police can violate Miranda without actually violating the Fifth Amendment -- without, that is, having compelled a defendant to become a witness against himself. As explained in *Michigan v. Tucker*, [FN495] Miranda established a "series of recommended 'procedural safeguards' The [Miranda] Court recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." [FN496] Thus, in *Tucker*, the Court excused noncompliance with Miranda because failure to provide a full set of warnings "did not abridge respondent's constitutional privilege . . . but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege." [FN497] To obtain a confession in violation of *Miranda* is not necessarily -- or even usually -- to obtain a coerced confession in violation of the Fifth Amendment. [FN498]

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

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

Undoubtedly, police coerced confessions from suspects before *Miranda*. It is also conceivable that police abuses declined over time after *Miranda*, although whether the decline is attributable to the decision is highly disputable. [FN499] For purposes of determining *Miranda*'s costs, however, we need only consider a limited issue: whether any significant portion of the drop in the confession rate found in the before-and-after studies is attributable to police abandonment of unconstitutionally coercive tactics within a few months or a year after the *Miranda* decision. Such a conclusion is unlikely for at least three reasons.

First, genuinely coerced confessions were, statistically speaking, rare at the time of *Miranda*. [FN500] Changes of the magnitude suggested here (in the neighborhood of a 16% reduction in confessions, or roughly one out of every six criminal cases) seem unlikely to have occurred because of the disappearance of coercion in the immediate wake of the decision. To be sure, we cannot consult an FBI Report on the number of coerced confessions each year, yet some reputable assessments allow a ballpark estimation to be made.

To develop our estimate, it is useful to consider coerced confessions in historical perspective. In 1931 the National Commission of Law Observance and Enforcement, headed by George W. Wickersham, reported that the "third degree," that is, "the employment of methods which inflict suffering, physical or mental upon a person, in order to obtain from that person information about a crime" was widespread throughout the United States. [FN501] Following the publication of the Wickersham Report, the Supreme Court, among other institutions, *474 took a greater interest in preventing such police abuses. In *Brown v. Mississippi*, [FN502] the Court for the first time used the Fourteenth Amendment Due Process Clause to reverse a state conviction involving a clearly coerced confession. Later cases continued to signal that the Court would review suspects' claims of coerced confessions -- a fact that discouraged police from using coercive interrogation methods. [FN503]

The Wickersham Report was followed by not only increased judicial regulation of the interrogation process but also increased police professionalization. For example, FBI Director J. Edgar Hoover began a movement to train police in scientific techniques of crime detection. [FN504] Training and awareness of legal norms increased so that by the mid-1940s most police chiefs in America had openly condemned the use of third-degree tactics. [FN505] Police interrogation manuals also began telling police that brutality was an ineffective way to obtain confessions. [FN506] Police professionalization thus

had its start well before Miranda and was considerably developed by 1966. [\[FN507\]](#)

As the result of these twin restraining developments -- judicial oversight and police professionalization -- coercive questioning methods began to decline in the 1930s and 1940s, [\[FN508\]](#) and by the 1950s their use had, according to a leading scholar in the area, "diminished considerably." [\[FN509\]](#) For example, observers for the American Bar Foundation Study, who witnessed interrogations in police departments in Michigan, Wisconsin, and Kansas in 1956 and 1957, found that use of coercion during custodial questioning (whether physical or psychological) was exceptional. [\[FN510\]](#) When the Supreme Court began issuing more detailed rules for police interrogation in the 1960s, it was dealing *475 with a problem "that was already fading into the past." [\[FN511\]](#) Chief Justice Warren's majority opinion in Miranda, while citing the Wickersham Report and other historical records of police abuses, acknowledged that they are "undoubtedly the exception now" and that "the modern practice of in-custody interrogation is psychologically rather than physically oriented." [\[FN512\]](#) At the time of the Miranda decision, the President's Commission on Law Enforcement and the Administration of Justice reported that "today the third degree is almost nonexistent" and referred to "its virtual abandonment by the police." [\[FN513\]](#) In January 1966, the Los Angeles District Attorney's office reported that they found no involuntary confessions among cases that they rejected for prosecution or presented to a judge at a preliminary hearing. [\[FN514\]](#) In the summer of 1966 in New Haven, when detectives were generally operating under pre-Miranda rules, [\[FN515\]](#) the student observers saw no undue physical force used by the detectives and doubted "that many of them would employ force as a calculated tool to pry out a confession. . . . [F]ew are such crusaders against crime that they feel physical violence is justified to get a confession." [\[FN516\]](#) The empirical surveys thus provide solid support for Professor Gerald Rosenberg's assessment: "Evidence is hard to come by but what evidence there is suggests that any reductions that have been achieved in police brutality are independent of the Court and started before Miranda." [\[FN517\]](#)

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

In the great majority of in-custody interrogations observed, the possibility of coercion appeared slight. In many instances the suspect is merely confronted with the evidence against him or with evidence inconsistent with his prior statements and is asked to give an explanation. Often he is just given an opportunity to admit to other outstanding offenses recited to him. Lengthy, continuous questioning is the exception rather than the rule. In practice the interrogating detective often terminates the questioning after a brief period to appear in court or elsewhere on other cases or to check upon the statements already given by the suspect. [\[FN518\]](#) Similarly, the student observers in New Haven in 1966, assessing all forms of police "tactics," found "a low level of coerciveness in most questioning." [\[FN519\]](#)

Indirect confirmation of the statistical scarcity of all forms of coercion is provided by statistics on motions to suppress confessions. Even if a coerced confession is obtained, "such confessions are typically withdrawn and challenged at a pretrial voluntariness hearing." [\[FN520\]](#) If coerced confessions were prevalent before Miranda, we should find frequent challenges to the voluntariness of confessions. [\[FN521\]](#) The very limited data from around the time of Miranda suggest that such challenges were rare. The Los Angeles study found that in 1965 prosecutors rejected only about one percent of police requests for complaints because of inadmissibility of the defendant's statements [\[FN522\]](#) and courts, at the preliminary hearing stage, rejected less than two percent. [\[FN523\]](#) To be sure, these data do not indicate the percentage of cases in which defendants claimed that they had been coerced and, in view of the *477 difficulties of proving police coercion, the fact that the courts frequently admitted confessions is not incontrovertible proof that they were voluntary. Nonetheless, these figures fail to provide support for the theory that disappearing coercion was a significant factor in explaining changes in confession rates around the time of Miranda.

(Cite as: 90 Nw. U. L. Rev. 387)

Beyond the relative infrequency of coercion, a second factor suggesting that the confession rate reductions reported here did not stem from the disappearance of coerced confessions comes from the nature of the Miranda rules themselves. Miranda was not particularly well tailored to prevent coerced confessions. Justice Harlan's point in his Miranda dissent has never been effectively answered: "The new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion. Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers." [\[FN524\]](#) It is not clear why police using rubber hoses before Miranda would have shelved them afterwards -- at least in the generally short time period following the decision during which the confession rate changes were observed. [\[FN525\]](#) Isolated instances of police brutality have been reported after Miranda. [\[FN526\]](#) Less extreme forms of coercion might have continued as well. [\[FN527\]](#)

The relation of Miranda to the elimination of such practices remains unclear and unproved. To be sure, under Miranda police must obtain a waiver of rights. But once a valid waiver is obtained, police are relatively unconstrained. Shortly after Miranda, Neal Milner studied the police response in Wisconsin and found that "generally most interrogations continued to operate under rules formalized prior to the Miranda decision." [\[FN528\]](#) As the Office of Legal Policy concluded, after a waiver, "Miranda is . . . virtually worthless as a safeguard against specific interrogation practices that were characterized as abusive in the Miranda decision . . ." [\[FN529\]](#) This is not an isolated finding, as there appears to have been "general agreement among writers on the *478 subject that Miranda is an inept means of protecting the rights of suspects . . ." [\[FN530\]](#)

A final point cutting against the disappearance of coercion as an explanatory factor is empirical research in other countries with observers and videotape equipment to guard against police abuses. As shown previously, in those countries police obtain confessions at rates comparable to the pre-Miranda rates in the United States (in excess of 60%), even though coercion in violation of constitutional norms was not observed. [\[FN531\]](#)

In light of all three of these factors -- the virtual nonexistence of the third degree and minimal coerciveness of questioning around the time of Miranda, the ineffectiveness of the Miranda rules in preventing coercion, and international empirical confirmation that high confession rates are obtainable without coercion [\[FN532\]](#) -- it seems quite unlikely that a reduction in coercion had much to do with the confession rate drops that form the basis of the Miranda cost estimate. [\[FN533\]](#)

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

If the confession rate decline after Miranda cannot be explained by a reduction in coercive questioning, it might still be defended as the result of protecting innocent persons in the criminal justice system. [\[FN534\]](#) For example, if Miranda prevented a large number of false confessions, this would be a virtue, not a vice. More generally, if Miranda protected an appreciable number of innocents from being convicted, the decision might be defensible even if guilty persons escaped. [\[FN535\]](#)

It seems unlikely that Miranda's costs can be defended on such grounds. Setting aside the immediate rejoinder that there are better ways than Miranda of regulating police questioning to protect innocents [\[FN536\]](#) and that Miranda has retarded the search for these superior alternatives, [\[FN537\]](#) Miranda's defenders have yet to establish that the decision does much for innocent suspects.

Turning specifically to the question of false confessions, the psychological literature has developed a typology of false confessions, identifying two main types apart from the coerced false confession just discussed: the coerced-internalized false confession and the voluntary false confession. [\[FN538\]](#) The Miranda rules would do little to prevent false confession of either type.

The coerced-internalized false confession arises when "suspects come to believe during police interviewing that they have

committed the crime they are accused of, even though they have no actual memory of having committed the crime." [FN539] While it is impossible to quantify precisely the extent of false confessions, the few bizarre cases reported of such situations seem unlikely to account for even a tiny fraction of the reported confession rate drops. [FN540] Even if the cases were statistically significant, persons susceptible to such confessions are particularly unlikely to be helped by the Miranda rules because *480 they trust the police [FN541] and, at least initially, are likely to want to waive their Miranda rights to convince the police of their innocence. [FN542]

A voluntary false confession is "offered by individuals without any external pressure from police," often because of the publicity associated with the crime. [FN543] For example, over 200 persons reportedly "confessed" to the famous Lindbergh kidnapping. [FN544] The Miranda rules seem unlikely to dissuade such confessions.

It has sometimes been argued that proof of the significance of false confessions comes from examining their role in the conviction of innocent persons. For example, Jerome H. Skolnick and Richard A. Leo have suggested that false confessions "are one of the leading sources of erroneous conviction of innocent individuals." [FN545] However, even within the already tiny fraction of tragic cases involving innocents who are convicted, it appears that false confessions of all types play only a small role. The support for Skolnick and Leo's assertion is the Bedau-Radelet "study" of allegedly innocent persons convicted in capital cases, [FN546] which has been refuted elsewhere. [FN547] Even taking the study at face value, however, it found "coerced or other false confessions" to be responsible for erroneous convictions in 49 out of 534 cases -- less than 10%. [FN548]

Skolnick and Leo attempt to demonstrate a serious problem with wrongful convictions by citing the work of C. Ronald Huff, Arye Rattner, and Edward Sagarin for the proposition that a "conservative estimate" of wrongful convictions each year in this country is 6000. [FN549] However, the Huff study is flawed in its conclusion. Read properly, *481 the study suggests the more likely estimate -- particularly using "conservative" assumptions -- of roughly 350 wrongful convictions each year in this country, [FN550] a total error rate of approximately .02% [FN551] (roughly one in 5000). Combining 350 wrongful convictions with the Bedau-Radelet estimate that 10% of such convictions stem from false confessions produces a total of around 35 wrongful convictions from false confessions each year. Even this number might be too high, because Huff and his colleagues did not find false confessions to be among the major factors contributing to the already small number (comparatively speaking) of wrongful convictions. [FN552] While each such wrongful conviction is an undeniable tragedy, these calculations show that false confessions could not play any significant role in the Miranda cost estimate calculated here. [FN553]

*482 Miranda not only fails to do much about false confessions but, speaking more generally, may in fact positively harm innocent persons by making it more difficult to separate guilty defendants from innocent ones. As Professor William Stuntz has argued, "it seems likely that making government investigation easier improves the welfare of innocent defendants." [FN554] Stuntz explains in some detail that prosecutors face the difficult task of separating guilty suspects from innocent ones. Given that prosecutors operate in a world of imperfect information, "innocent defendants stand to gain a great deal if there are low-cost separating mechanisms available to the government after suspects are identified or arrested but before trials. . . . [V]arious common police interrogation tactics [] can plausibly serve as such mechanisms." [FN555]

The claim here is not that Miranda makes it more difficult for innocent suspects to give their alibis and explanations to police officers during questioning. Presumably innocent persons could waive their rights and talk to police as well after Miranda as before. [FN556] The claim is that, for suspects who do not convince police of their innocence, Miranda perversely may make it more likely that they will be convicted and unjustly punished. [FN557]

To see how this might happen, consider the case load of a hypothetical prosecutor before and after Miranda. Before Miranda, the prosecutor has 100 cases to handle, 60 with confessions and 40 without. [FN558] After Miranda, the confession rate drops at least 15%, [FN559] so now the prosecutor handles 45 cases with confessions and 55 without. Assume further that, both before and after Miranda, there is one innocent defendant among the 100 cases. [FN560] The prosecutor does not know which defendant is innocent -- other than that the innocent defendant did not confess. It seems plausible that the prosecutor will *483 have less success in culling the innocent defendant from a pool of 55 nonconfessors than from a pool of 40 nonconfessors. After all, needles are harder to find in bigger haystacks. [FN561] To be sure, our innocent defendant might gain an acquittal at trial. But we are concerned here with the odds innocent persons would be unjustly convicted, either before Miranda or after. Other things being equal, Miranda might make the prospects worse for such defendants.

A related possibility is that Miranda reduces information that might be useful to innocent defendants in clearing themselves. Presumably, the confessions that are lost under Miranda might have prevented police from charging the wrong person or, if charges were filed, might have contained information an innocent could use to establish his innocence. Judge Friendly made an analogous point about the costs of the privilege against self-incrimination, explaining that "[a] man in suspicious circumstances but not in fact guilty is deprived of official interrogation of another whom he knows to be the true culprit" [FN562] The same loss of evidence results when a suspect invokes his Miranda rights. In sum, it seems hard to justify Miranda because of its role either in specifically preventing false confessions or more generally in preventing the conviction of innocent persons.

VI. Assessing Miranda in Light of Its Costs

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

A. Miranda's Costs in Perspective

One possible response to the costs of Miranda calculated in this Article is that, all things considered, they are quite small. After all, it might be argued, "only" 3.8% of cases are lost due to Miranda. My *484 reaction is quite different. We should be concerned about the total number of lost cases from such a percentage. [FN563] Roughly 28,000 arrests for serious crimes of violence and 79,000 arrests for property crimes slip through the criminal justice system due to Miranda, and almost the same number of cases are disposed of on terms more favorable for defendants. [FN564]

The Supreme Court has reached the same conclusion in modifying the Fourth Amendment exclusionary rule. In creating a good faith exception to the exclusionary rule, the Court cited statistics tending to show that the rule resulted in the release of between 0.6% and 2.35% of individuals arrested for felonies. [FN565] The Court concluded that these "small percentages . . . mask a large absolute number of felons who are released because the cases against them were based in part on illegal searches or seizures." [FN566] Miranda's lost cases are 160% to 630% of those from the exclusionary rule. [FN567] Moreover, while the costs of the exclusionary rule are sometimes said to be simply the price of complying with the constitutional prohibition of unreasonable searches, the costs of Miranda stem from restrictions that are not constitutionally required and for which reasonable alternatives exist. This suggests that reforming Miranda deserves a higher priority from court reformers than reforming the search and seizure exclusionary rule.

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

change in the handling of almost four percent of all criminal cases. Reducing Miranda's costs thus is more important than any of these hotly debated proposals.

*485 Still another suggestion of the seriousness of Miranda's costs comes from taking the perspective of victims of crime. [FN568] Concern for victims suggests that society is obligated to do its best to avoid the kinds of miscarriages of justice as when a confessed killer walks out of a courtroom with a "big smirky grin" on his face because of what can fairly be described as a Miranda technicality. [FN569] While cases in which confessions are suppressed under Miranda allow us to put a human face on Miranda's costs, far more often Miranda means that a confession will not be obtained, with the result that a crime will go unsolved or unpunished. How do we tell the victims of these crimes that their suffering doesn't count? [FN570] Quantification of costs is important, but the calculus here stops well short of conveying the human toll involved in murders that go unpunished, rapists that remain at large, and treasured heirlooms and other stolen property that are never recovered. As Professor Caplan has concluded, the statistical studies "reduce crime to something remote and abstract, a string of numbers, an event that one reads about in the newspapers, something that happens in another part of town. There is no hint of rape as a nightmare come alive, or robbery as a ruinous matter." [FN571]

A final way of showing the significance of Miranda's harms is the simple truism that an unnecessary cost is a cost that is too high. Given that Miranda is only one way of structuring custodial interrogation, even one inappropriately released defendant is one too many. [FN572] If Miranda's costs can be reduced without sacrificing other values, they should be reduced -- and as quickly and completely as possible. To argue against considering reform of Miranda on the grounds that its cost is small has always struck me as equivalent to arguing against curing diabetes because its toll is smaller than that from cancer. Yet surely no one in the medical profession is stopping a quest to cure a particular disease because the relative cost, compared to other human miseries, is small. Instead, the medical profession can tell the legal profession that it is moving forward on a broad range of fronts to solve all manner of medical problems. In contrast, in the area of the law governing confessions, we in the legal profession can report only that we are frozen in a 1960s conception of the optimal resolution of *486 the issue. The fact that there has been no substantial change since Miranda is attributable either to Miranda's foresight or our lack of progress -- the costs documented in this Article strongly suggest the later.

B. Moving Beyond Miranda

The analysis so far will strike some as incomplete because I have simply calculated Miranda's costs without acknowledging any of the possible benefits. In view of the need to enforce the Fifth Amendment prohibition of coerced confessions, Miranda's costs are "unnecessary" only if other alternatives serve Fifth Amendment values equally well. This already lengthy Article is not the place for a detailed consideration of the alternatives to Miranda. [FN573] But to make my case that Miranda's costs are largely unnecessary, I want to briefly outline one alternative approach that can protect the other values thought to be served by Miranda while at the same time minimizing Miranda's costs.

Miranda's defenders have argued that any change in the decision's requirements would "roll back the clock" to an outmoded day and age. But time has passed these Warren Court warriors by -- they are, in effect, advocating a 1966 solution to the problem of preventing coerced confessions when the 1990s offer superior solutions. Consider, then, videotaping of interrogations as an alternative to Miranda.

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

interrogations. [\[FN574\]](#) Other commentators have since recommended videotaping. [\[FN575\]](#)

***487** Videotaping interrogations would certainly be as effective as Miranda in preventing police coercion and probably more so. The Miranda regime appears to have had little effect on the police misconduct that does exist. [\[FN576\]](#) In contrast, videotaping, when used, has often reduced claims of police coercion and probably real coercion as well. [\[FN577\]](#) To be sure, police conceivably could alter tapes [\[FN578\]](#) or deploy force off-camera. [\[FN579\]](#) But if you were facing a police officer with a rubber hose, would you prefer a world in which he was required to mumble the Miranda warnings and have you waive your rights, all as reported by him in later testimony? Or a world in which the interrogation is videorecorded and the burden is on law enforcement to explain if it is not; where date and time are recorded on the videotape; where your physical appearance and demeanor during the interrogation are permanently recorded? Videotaping is the clear winner. Not surprisingly, those who are most concerned about police brutality have seen videotaping as a means of control. [\[FN580\]](#)

***488** Recording confessions also promises to be effective in preventing not only physical coercion but also in detecting, if not preventing, other fine points of coercion as well. In this regard, it is interesting that some of the most detailed assessments of voluntariness have come in cases of recorded interrogations, which permitted judges to parse implicit promises and threats made to obtain an admission. [\[FN581\]](#) Recording also allows a review of police overbearing that might not be revealed in dry testimony. [\[FN582\]](#) Taping is thus the only means of eliminating "swearing contests" about what went on in the interrogation room. [\[FN583\]](#)

Videotaping also promises to offer more effective protection against the more esoteric problem of false confessions induced by noncoercive police questioning. A complete record of the proceedings promises to be the most effective means of identifying such cases. [\[FN584\]](#) A recent story in the American Lawyer regarding three false confessions to involvement in the murders of nine people at a Thai Buddhist temple near Phoenix provides a good example. [\[FN585\]](#) Police obtained and taped these false confessions in apparent compliance with ***489** Miranda following lengthy questioning. While the real killers were discovered before the innocent men stood trial, the American Lawyer concluded that the tapes would have been their only hope:

Only these tape recordings gave the suspects any chance of defending themselves at trial. Only the tapes reliably document how much information was fed to the suspects before they repeated it back. Only the tapes document all the inaccuracies in the suspects' statements. Only the tapes document the manner in which investigators steered the suspects toward tidying up the details of their confessions. Only the tapes document the suggestiveness of the questions and the ambiguity of the answers. Police reports provide none of this information. [\[FN586\]](#)

While recording maintains, and in many ways exceeds, Miranda's supposed benefits of deterring coercion and preventing false confessions, it has the advantage over Miranda of not significantly impeding law enforcement. [\[FN587\]](#) In 1992 the National Institute of Justice (NIJ) published a nationwide survey of a representative sample of police agencies about videotaping interrogations. [\[FN588\]](#) The survey found that about one-sixth of all police and sheriffs' departments in the United States videotaped at least some confessions. [\[FN589\]](#) The survey found that 59.8% of the agencies believed that they obtained more incriminating information from suspects, 26.9% the same amount, while 13.2% thought they obtained less. [\[FN590\]](#) Also, 8.6% thought suspects were more willing to talk to police, 63.1% thought there was no difference, while 28.3% reported suspects less willing to talk. [\[FN591\]](#) Videotaping also had many other benefits, such as improving police interrogation practices, rendering confessions more convincing, facilitating their introduction into evidence, assisting prosecutors in negotiating more acceptable plea bargains and obtaining guilty pleas, and helping in securing convictions. [\[FN592\]](#) Taping had not proved to be a significant financial burden. [\[FN593\]](#)

*490 The striking conclusion of the NIJ survey was that

97 percent of all departments in the nation which are videotaping either confessions or full interrogations find videotaping "very useful" (65.8%) or "somewhat useful" (31.3%). An additional 2.5 percent of the agencies find this use of electronic technology "neither harmful nor helpful," and less than 1 percent cited the practice of videotaping as "somewhat harmful." [FN594] This ringing endorsement of videotaping is particularly striking because in many departments detectives initially resisted the innovation only to be won over by its benefits. [FN595]

One qualification to this endorsement should be noted. In many of the jurisdictions surveyed, the videotaping was at the discretion of the interrogating detective. [FN596] It is possible that a mandatory videotaping regime might be more problematic for law enforcement.

Recent and substantial experience with a mandatory recording requirement in Britain suggests that such a requirement would not significantly harm police efforts to obtain confessions. In 1988, a Code of Practice took effect that generally required that police tape-record interviews with suspects. [FN597] A 1993 review of the requirement by the Royal Commission on Criminal Justice reported that "[b]y general consent, tape recording in the police station has proved to be a strikingly successful innovation providing better safeguards for the suspect and the police officer alike." [FN598] No significant adverse effect on obtaining confessions has been observed in the empirical studies specifically focusing on taping, and in fact police obtain more confessions and information about other offenses when interrogations are taped. [FN599] According to one survey, 91% of police officers approve of the practice, with 65% reporting "very favorable" views about it. [FN600]

*491 A carefully monitored study of mandatory videotaping of confessions in Canada suggests the same conclusion. Police obtained confessions or admissions in 68% of their interviews, even with videocameras running. [FN601] The study concluded that "[t]he videotaping process does not appear to inhibit suspects from making confessions or admissions" [FN602]

The only specific controlled empirical study in the United States also suggests that a taping requirement does not harm the confession rate. In 1967, the Vera Institute made a comparison of audiotaped police interrogations in one New York City precinct with standard interrogation in other comparable precincts. More admissions were obtained in the taped precinct. [FN603] The same result is suggested by my 1994 Salt Lake County study. Although not based on a "controlled" sample, my study found that suspects were just as likely to confess when police videorecorded the questioning. [FN604]

A final indication that mandatory taping does not inhibit suspects is found in Alaska. The Alaska Supreme Court in 1985 imposed a requirement that all custodial interviews be recorded on audio tape. [FN605] I have seen reports of several interviews with law enforcement officers in that state which suggest that the recording has not been harmful to the confession rate. An Alaskan appellate judge was quoted recently as saying "I've seen no indication that the requirement has been onerous *492 or unworkable." [FN606] The judge also noted that officers now frequently carry portable microcassette recorders to record every potential contact with a suspect, a policy that often preserves other damaging evidence against suspects. [FN607]

My reading of the available empirical information is that a mandatory videotaping requirement would not noticeably inhibit suspects from confessing and would produce significant collateral benefits for law enforcement. However, further study of this question is warranted, as some law enforcement concerns have been expressed about such a requirement. For example, 28.3% of police agencies in the NIJ survey thought that suspects were somewhat less willing to talk on videotape. [FN608] Similarly the current edition of the Inbau interrogation manual discourages taping confessions. [FN609] This is slender evidence on which to build a case against taping from a law enforcement perspective, particularly when factoring in the

possibility of covert taping to avoid inhibiting suspects. [\[FN610\]](#) But to obviate any objection from law enforcement, a reasonable, interim compromise could be tried: Allow police to depart from Miranda (under the conditions outlined below) if they videotape the interrogation; if not, they can continue to operate under the Miranda rules. This compromise would allow police to shift to the alternative if they thought it would be more effective. It would also develop a body of empirical evidence that would be useful in developing future policy recommendations.

2. Minimizing Miranda 's Costs. -- Miranda's defenders might be prepared to concede that videotaping has many advantages but argue that police should comply with both Miranda and videotaping requirements. But such an approach single-mindedly pursues the goal of eliminating coerced confessions without considering the countervailing costs identified in this Article. The Court has described Miranda as "a carefully crafted balance designed to fully protect both the defendants' and society's interests." [\[FN611\]](#) An approach that strikes a reasonable balance between maximizing benefits and minimizing costs would be to require taping to prevent police coercion while at the *493 same time relaxing the features of the Miranda regime that extract the greatest costs in terms of lost confessions. The existing empirical literature allows us to identify the particularly harmful features of Miranda. These features can then be modified, without disturbing the other protections. In particular, the Miranda warnings can be retained without significantly lowering the confession rate, while the waiver and questioning cutoff rules should be eliminated, as they cause the bulk of Miranda's harms.

(a) Warnings. -- Simply advising suspects of their right to remain silent does not appear to be the critical factor in the post- Miranda decline in the confession rates. The best evidence of this fact comes from the experience of law enforcement agencies following the Escobedo decision, when many police agencies began giving various warnings [\[FN612\]](#) without substantial effects on confessions. At the annual meeting of the National Association of Attorneys General, held in May 1966 (after Escobedo but shortly before Miranda), the "clear consensus" was that Escobedo had had little effect on the rate of confessions and that confession rates remained constant even in those states where Escobedo had been extended to require the police to warn suspects of their rights. [\[FN613\]](#) For example, J. Joseph Nugent, Attorney General of Rhode Island, reported that warning suspects of their rights to counsel and to remain silent along with obtaining written waivers had not affected confession rates. [\[FN614\]](#) In New Jersey in February 1966, the Essex County prosecutor reported that confession rates remained stable even though police had been advising suspects of their rights since June 1964. [\[FN615\]](#) A related indication that warnings per se were not responsible for the change in the rates comes from the practice of the FBI, which gave warning of the right to remain silent without apparent adverse effect. [\[FN616\]](#)

The available empirical evidence confirms that warnings have comparatively little effect on confession rates. In Detroit, there was, at most, a 2.8% drop in the confession rate after police began warning *494 suspects of their rights under Escobedo [\[FN617\]](#) -- from 60.8% of all cases in 1961 to 58% of all cases in 1965. [\[FN618\]](#) In Pittsburgh, a substantial decline occurred

(Cite as: 90 Nw. U. L. Rev. 387)

in the confession rate after Miranda, even though it was the pre- Miranda practice of the detectives to warn suspects of their right to remain silent and to, at some point, advise suspects that they would receive counsel. [\[FN619\]](#) In New Haven, the Yale Law Journal reported no support in its data for the claim that warnings of rights caused a decline in police success at obtaining confessions. [\[FN620\]](#) Finally, in Philadelphia, an estimated 90% of arrested suspects made statements before Escobedo, 80% (estimated) after Escobedo when police gave limited warnings, 68.3% when police gave more extended warnings as required by the Third Circuit, and 40.7% when police followed Miranda. [\[FN621\]](#) Thus, the biggest drop followed not the imposition of warning requirements, but rather the imposition of the Miranda requirements.

A final indication that warnings can be given to suspects without significantly harming the confession rate comes from studies in Britain and Canada. Historically, both countries gave warnings to suspects about their right to remain silent, but achieved much higher confession rates than found in America. [\[FN622\]](#) In structuring less costly alternatives to Miranda, eliminating warnings of rights need not be the main focus of reform.

(b) Waiver and questioning cut-off requirements. -- While the warnings are perhaps the most famous (and least harmful) part of the Miranda decision, the decision also made important changes in requiring that police obtain an affirmative waiver of rights from suspects before conducting any custodial questioning and that police stop questioning whenever a suspect invoked his right to counsel or right to silence. These changes seem to have been responsible for some significant *495 portion of the drop in confessions, as every study suggests that some suspects cannot be questioned at all because of these Miranda rules. The available historical data on invocation of Miranda rights are set out in the footnote here, arranged in order of largest to smallest possible impact. [\[FN623\]](#) The percentages vary widely (from 77% to 4%, averaging somewhere around 20% [\[FN624\]](#)). In addition to the historical data, two recent studies suggest that about 20% of suspects cannot be questioned because of Miranda. In 1993, the Bay area study found *496 that 22% of suspects invoked their Miranda rights. [\[FN625\]](#) In 1994, my Salt Lake County study found that 16.3% of suspects given Miranda warnings invoked their rights initially. [\[FN626\]](#)

The fact that a significant proportion of suspects invoke their Miranda rights certainly marks these requirements of Miranda as responsible for a good part of the confession rate decline. In the absence of such rules, officers could be expected to successfully persuade some suspects to make incriminating statements. [\[FN627\]](#) And these raw percentages do not measure any reduction in questioning effectiveness due to the fact that officers need to avoid giving a suspect reason to terminate an interview. [\[FN628\]](#) It must be remembered that 20% of all suspects represents a huge number of criminal cases. Using the same methodology employed earlier, [\[FN629\]](#) if 20% of suspects invoke their Miranda rights, police cannot question in any way approximately 550,000 criminal suspects each year. In modifying Miranda, then, the waiver and questioning cut-off rules along with the prophylactic right to counsel [\[FN630\]](#) should be the main targets for reform.

3. The Replacement for Miranda. -- In light of the benefits of videotaping and the costly features of Miranda, what might a replacement for Miranda look like?

Suspects could continue to be advised of their rights, as follows:

- (1) You do not have to say anything.
- (2) Anything you do say may be used as evidence.

(Cite as: 90 Nw. U. L. Rev. 387)

(3) You have the right to be represented by a lawyer when we bring you before a judge.

(4) If you cannot afford a lawyer, the judge will appoint one for you without charge.

(5) We are required to bring you before a judge without unnecessary delay. [\[FN631\]](#) While adding a new, fifth warning that is not required by Miranda, the modified warnings would dispense with the Miranda offer of counsel, [\[FN632\]](#) identified as a particularly harmful aspect of Miranda and, in any event, a right that has proved to be purely theoretical since police always terminate questioning rather than finding a lawyer. [\[FN633\]](#) Also, the alternative would dispense with the requirement that police obtain an affirmative waiver of rights from suspects, another particularly harmful feature of Miranda. However, police could continue to ask suspects whether they understood the rights communicated to them, since nothing in the empirical literature identifies this aspect of Miranda as being particularly harmful. Also eliminated would be the requirement that police immediately terminate an interview whenever the suspect requests an end to the interview or an opportunity to meet with counsel. These features have been identified as harming the confession rate. [\[FN634\]](#)

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

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

One final point should be made in favor of this proposal. Since police are still required to give modified warnings and since they will be videotaped while conducting interrogations, police will not gain the mistaken impression that any judicial supervision of the interrogation process has ended.

*498 C. Miranda 's Greatest Cost

No doubt some will find this alternative to Miranda to be too favorable for police. Others may argue that it is still too restrictive. [\[FN635\]](#) But this kind of discussion, which has been virtually nonexistent since 1966, demonstrates Miranda's greatest cost. Beyond the release of dangerous criminals, the undeniable tragedy of the Miranda decision is that it has blocked the search for superior approaches to custodial interrogation -- alternatives that might better protect not only society's interest in apprehending criminals but also criminal suspects' interests in preventing coercive questioning. [\[FN636\]](#) Miranda itself seemed to invite exploration of alternatives, explaining that "[o]ur decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform." [\[FN637\]](#) The Court's invitation, however, was in reality empty because it did not specify what alternatives would be deemed acceptable. [\[FN638\]](#) In the quarter-century since Miranda, reform efforts have been virtually nonexistent. As the Office of Legal Policy concluded:

The Miranda decision has petrified the law of pre-trial interrogation for the past twenty years, foreclosing the possibility of developing and implementing alternatives that would be of greater effectiveness both in protecting the public from crime and in ensuring fair treatment of persons suspected of crime. . . . Nothing is likely to change in the future as long as Miranda remains in effect and perpetuates a perceived risk of invalidation for any alternative system that departs from it. [\[FN639\]](#)

(Cite as: 90 Nw. U. L. Rev. 387)

This period of stagnation in the United States should be contrasted with reform efforts in other countries where varying modification of interrogation rules have been made or recommended. [\[FN640\]](#) It seems difficult to quarrel with the assessment that "the police interrogation *499 process in the United States would benefit from a comparable effort." [\[FN641\]](#)

The time has come for the Supreme Court to allow serious exploration of less costly ways of regulating police interrogation. As *Miranda* itself recognized, the Court's announced rules are not necessarily the best accommodation of the various concerns. [\[FN642\]](#) This Article suggests that the requirements imposed by the Court in 1966 continue to exact a heavy toll in lost cases -- a toll that could be substantially reduced under reasonable alternatives. Justice Harlan's dissent in *Miranda* recognized this possibility, explaining that while the Court's change by judicial fiat might have the benefit of being speedy, other approaches "when they come would have the vast advantage of empirical data and comprehensive study." [\[FN643\]](#)

This Article has tried to begin the effort in that direction by comprehensively surveying the available empirical literature on *Miranda*'s costs and by preliminarily surveying such literature on videotaping as a replacement. If nothing else, this Article may highlight areas for future academic research. More importantly, perhaps it is not too optimistic to think that this Article might serve as something like a petition for rehearing on behalf of those who have borne *Miranda*'s social costs. Justice White's dissent in *Miranda* recognized the fact that "[i]n some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets . . . to repeat his crime whenever it pleases him." [\[FN644\]](#) He continued, "There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case." [\[FN645\]](#) While this Article cannot identify *Miranda*'s specific victims, it should at least prove that they are numerous and that their victimization could have been avoided under reasonable alternatives to *Miranda*. As our criminal justice system prepares to enter the next century, one hopes that the Court will take advantage of this new knowledge and permit Congress and the states to craft better regimes for regulating police questioning of suspects.

[\[FN6\]](#). Associate Professor, University of Utah College of Law. Dean Lee Teitelbaum, Ahkil Reed Amar, Craig Bradley, Kingsley Browne, Lionel Frankel, Joseph Grano, Richard Leo, William Pizzi, William Stuntz, Gordon Van Kessel, and Welsh White provided helpful comments on an earlier draft. I gratefully acknowledge the support of the University Research Committee and the College of Law Faculty Development Committee, and of the research librarians and their assistants at the College of Law, who patiently tracked down various obscure references.

[\[FN1\]](#). [Miranda v. Arizona, 384 U.S. 436, 542 \(1966\)](#) (White, J., dissenting).

[\[FN2\]](#). Welsh S. White, [Defending Miranda : A Reply to Professor Caplan, 39 Vand. L. Rev. 1, 20 \(1986\)](#) (noting "widely shared perception that *Miranda*'s effect on law enforcement has been negligible").

[\[FN3\]](#). 1 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* 484 (1984 & Supp. 1991) (citation omitted).

[\[FN4\]](#). See, e.g., Janet E. Ainsworth, In [a Different Register: The Pragmatics of Powerlessness in Police Interrogation, 103 Yale L.J. 259, 299 n.200 \(1993\)](#) ("Most later commentators have agreed with the conclusions of these early studies, finding that *Miranda* has had little negative effect on criminal prosecutions."); Lawrence Herman, [The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation, 48 Ohio St. L.J. 733, 737 n.31 \(1987\)](#) ("[M]ost of the studies tend to show that *Miranda* has not significantly affected the rate of confession"); Yale Kamisar, [Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano, 23 U. Mich. J.L. Ref. 537, 585 \(1990\)](#) ("As twenty-five years of life with *Miranda* has demonstrated, however, the *Miranda* dissenters' fears [of harm to law enforcement] did not prove justified."); Irene M. Rosenberg & Yale L. Rosenberg, [A Modest Proposal for the Abolition of Custodial Confessions, 68 N.C. L. Rev. 69, 114 n.259 \(1989\)](#) ("[I]t seems reasonably clear that the great weight of empirical evidence supports that conclusion that *Miranda*'s impact on the police's ability to obtain confessions has not been significant.") (internal quotation omitted); see also

ABA Special Comm. on Criminal Justice in a Free Soc'y, *Criminal Justice in Crisis* 27 (1988) ("Miranda does not have a significant impact on law enforcement's ability to solve crime or to prosecute criminals successfully.").

[FN5]. See, e.g., Frank W. Miller et al., *Cases and Materials on Criminal Justice Administration* 519 (4th ed. 1991) ("[T]he available evidence suggests that [Miranda's] impact was relatively slight."); Stephen A. Saltzburg & Daniel J. Capra, *American Criminal Procedure: Cases and Commentary* 523 (4th ed. 1992) ("In many jurisdictions, [Miranda] has had very little measurable effect."); Christopher Slobogin, *Criminal Procedure: Regulation of Police Investigation -- Legal, Historical, Empirical and Comparative Materials* 346 (1993) ("Miranda [has] changed interrogation ... probably only a little.").

[FN6]. See, e.g., National Inst. of Justice, U.S. Dep't of Justice, *Criminal Justice Research Report -- The Effects of the Exclusionary Rule: A Study in California* (1982); 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; Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule: An Empirical Assessment*, 1983 *Am. B. Found. Res. J.* 585.

[FN7]. 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, 6-7 \(1986\)](#) (concluding that debates on interrogation questions "often reflect emotion or personal feeling rather than a reliance upon empirical evidence and logic").

[FN8]. The editors of the *Harvard Law Review* concluded that such a question is "both unanswered and perhaps unanswerable." *Developments in the Law -- Confessions*, 79 *Harv. L. Rev.* 938, 945 (1966). The editors of the *Yale Law Journal* called this assessment "characteristic[]" of the Harvard editors. Project, *Interrogations in New Haven: The Impact of Miranda*, 76 *Yale L.J.* 1519, 1521 n.4 (1967) [hereinafter *Yale Project*].

[FN9]. Davies, *supra* note 6, at 622 (discussing Fourth Amendment exclusionary rule).

[FN10]. [Moran v. Burbine](#), 475 U.S. 412, 433 n.4 (1986).

[FN11]. See, e.g., Yale Kamisar, *The "Police Practice" Phases of the Criminal Process and the Three Phases of the Burger Court: Rights and Wrongs in the Supreme Court, 1969 - 86*, in *The Burger Years* 143, 150 (Herman Schwartz ed., 1987) (noting that striking a balance "is the way Miranda's defenders -- not its critics -- have talked about the case for the past twenty years").

[FN12]. Cf. Davies, *supra* note 6, at 626 (noting that "there is no empirical content to this 'balancing' approach to considering costs and benefits" of the search and seizure exclusionary rule).

[FN13]. Office of Legal Policy, U.S. Dep't of Justice, *Report to the Attorney General on The Law of Pre-Trial Interrogation* 126 (1986) [hereinafter *OLP Pre-Trial Interrogation Report*] (internal quotation omitted). The report is reprinted in 22 *U. Mich. J.L. Ref.* 437 (1989).

[FN14]. *OLP Pre-Trial Interrogation Report*, *supra* note 13, at 127. Other miscarriages resulting from suppression of confessions under Miranda are found in *id.* at 122-27; H. Richard Uviller, *Tempered Zeal: A Columbia Law Professor's Year on the Streets with the New York City Police* 206 - 07 (1988).

[FN15]. Nardulli, *supra* note 6, at 601 (table 12).

[FN16]. Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, 1987 *U. Ill. L. Rev.* 223, 233 (table 8).

(Cite as: 90 Nw. U. L. Rev. 387)

[FN17]. Floyd Feeney et al., Arrests Without Conviction: How Often They Occur and Why 144 (1983). Of 619 arrests for burglary and robbery, they found that "there was some kind of exclusion problem involving a confession or admission" in only sixteen cases, a suppression motion filed in only six cases, and a suppression motion granted in only three cases, none which caused a case to be lost. *Id.* There were two other cases in which prosecutors rejected charges because of confession problems. *Id.* The figure referred to in the text assumes that these two cases can be attributed to Miranda (one involved a confession that was arguably the fruit of an illegal street detention).

[FN18]. See Bureau of Justice Statistics, U.S. Dep't of Justice, Prosecutors in State Courts, 1992, at 6 (1993) (table 9) (finding 15% of prosecutor's offices experienced dismissals of cases because of self-incrimination problems); Comptroller General of the U.S., Impact of the Exclusionary Rule on Federal Criminal Prosecutions 8 (1979) (4.4% of federal defendants filed motion to suppress confession); Floyd Feeney & Adrienne Weir, The Prevention and Control of Robbery: A Summary 56 (1974) (finding no problems with admissibility of confessions in samples of robbery cases); Peter W. Greenwood et al., Prosecution of Adult Felony Defendants: A Policy Perspective 67 (table 44), 74 (table 49) (1976) (finding that no cases were rejected by prosecutors for filing because of "unlawfully obtained statements" in felony cases for possession of dangerous drugs; for all cases, 1% or less were dismissed at the preliminary hearing for "improper advisement of rights"); see also Michael Zander & Paul Henderson, Royal Comm'n on Criminal Justice, Crown Court Study (1993) (British study finding that confessions are challenged in only about 5% of all cases).

[FN19]. See Thomas Y. Davies, Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal, 1982 Am. B. Found. Res. J. 543, 616 (finding confession issues raised in 20.4% of criminal appeals, but only 1.8% of claims were successful); Karen L. Guy & Robert G. Huckabee, Going Free on a Technicality: Another Look at the Effect of the Miranda Decision on the Criminal Justice Process, 4 Crim. J. Res. Bull. 1, 2 (1988) (finding Miranda issue raised in 9% of appeals, but only 5.6% of claims were successful, for a reversal rate of .51% for all criminal appeals).

[FN20]. Mathew Lippman, A Commentary on Inbau and Manak's "Miranda v. Arizona -- Is It Worth the Cost?" (A Sample Survey, with Commentary, of the Expenditure of Court Time and Effort), Prosecutor, Spring 1989, at 37. Lippman inadvertently shrinks the costs even further by transposing the cost estimate from .071% to .017%. See *id.*

[FN21]. Paul Marcus, [A Return to the "Bright Line Rule" of Miranda](#), 35 Wm. & Mary L. Rev. 93, 143 (1993) (cross-referencing study by Nardulli); see also Peter D. Baird, Critics Must Confess, Miranda Was the Right Decision, Wall St. J., June 13, 1991, at A17 (citing Nardulli numbers for the point that few confessions founder at trial).

[FN22]. Nardulli, *supra* note 6, at 606; see Feeney & Weir, *supra* note 18, at 56; Charles E. Silberman, Criminal Violence, Criminal Justice 262- 65 (1978); Guy & Huckabee, *supra* note 19, at 2.

[FN23]. Joseph D. Grano, Confessions, Truth, and the Law 202 (1993) (citing Stephen J. Markman, [The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering Miranda,"](#) 54 U. Chi. L. Rev. 938, 945 - 47 (1987)).

[FN24]. To add this figure as a cost of Miranda assumes that confession is suppressed as the result of a Miranda violation, not as the result of a Fifth Amendment voluntariness violation. See generally *infra* notes 493 - 98 and accompanying text (discussing distinction between Miranda violation and Fifth Amendment violation). This assumption seems reasonable, since genuinely coerced confessions are quite rare. See *infra* notes 499 -533 and accompanying text; see also Feeney et al., *supra* note 17, at 145 (table 15 - 4) (finding that of 619 confessions, 16 had admissibility problems, only 3 of which related to voluntariness); Vera Inst. of Justice, Taping Police Interrogations in the 20th Precinct, N.Y.P.D. (1967) (finding that of statements obtained in 275 recorded interrogations, none could be said to be "involuntary").

[FN25]. See *infra* notes 293 -312 and accompanying text (concluding that cost of Miranda measured by lost cases is 3.8%, which is more than 50 times larger than the .071% cost estimate made by Nardulli).

[FN26]. See, e.g., Charles H. Whitebread & Christopher Slobogin, *Criminal Procedure: An Analysis of Cases and Concepts* 382 (3d ed. 1993).

[FN27]. See Davies, *supra* note 6, at 634 ("The effect of the rule should be calculated by looking at the percentage of all arrests (or of all arrests in particular crime categories) that are declined because of illegal search problems.").

[FN28]. See, e.g., Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 Mich. L. Rev. 1319, 1383 (1977) (relying on discussions with police officers in assessing Miranda's effect on law enforcement).

[FN29]. This Article will generally use "confession" as encompassing not only outright admissions of guilt but also incriminating statements. See George C. Thomas III, *Is Miranda a Real-World Failure?: A Plea for More (and Better) Empirical Evidence*, 43 UCLA L. Rev. (forthcoming 1996) (employing similar terminology). In describing specific empirical studies, this Article will generally try to follow the terminology used by the study.

[FN30]. Cf. Yale Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 Cornell L.Q. 436, 462- 69 (1964) (discussing before-and-after assessments to measure effect of court decisions).

[FN31]. See, e.g., *infra* note 412 (noting difference that arrest practices can make in confession rates).

[FN32]. Richard H. Seeburger & R. Stanton Wettick, Jr., *Miranda in Pittsburgh -- A Statistical Study*, 29 U. Pitt. L. Rev. 1, 6 -7, 11, 13 (1967).

[FN33]. *Id.* at 8.

[FN34]. The study defined "confessions" as "all admissions (oral or written) to police officers which were self-incriminating and contained no self-serving declarations which would substantially lessen the offense and all admissions which were helpful to the police's case even if they contained such self-serving declarations." *Id.* at 10.

[FN35]. This Article uses percentages in an unconventional way because of the need for a change in the confession rate to calculate Miranda's costs. See *supra* notes 26 -27 and accompanying text. As a result, it refers to the difference between, say, a 30% confession rate and a 20% confession rate as a 10% "drop" or "reduction" in the rate rather than as a 33% reduction in confessions. The net effect of this unusual terminology may be to misleadingly understate Miranda's effects, as this example illustrates.

[FN36]. Seeburger & Wettick, *supra* note 32, at 12 (table 2).

[FN37]. *Id.* at 13 (table 3).

[FN38]. The reasons for the even larger drop in 1967 are discussed *infra* notes 389 - 93 and accompanying text.

[FN39]. See, e.g., Yale Kamisar et al., *Modern Criminal Procedure: Cases, Comments and Questions* 599 n.c (8th ed. 1994); Stephen J. Schulhofer, [Reconsidering Miranda](#), 54 U. Chi. L. Rev. 435, 457 (1987); White, *supra* note 2, at 18.

[FN40]. See, e.g., Kathleen B. Brosi, *A Cross-City Comparison of Felony Case Processing* 52 (1979) (finding conviction

(Cite as: 90 Nw. U. L. Rev. 387)

rates varying from 21% to 62% in various jurisdictions); see also Isaac Ehrlich & George D. Brower, *On the Issue of Causality in the Economic Model of Crime and Law Enforcement: Some Theoretical Considerations and Experimental Evidence*, 77 *Am. Econ. Rev.* 99, 104 (1987) (finding conviction rate data to be of poor quality).

[FN41]. Cf. Markman, *supra* note 23, at 946 n.20 (noting problems with relying on conviction rate data to assess Miranda's effects); Ian McKenzie & Barrie Irving, *The Right to Silence*, 4 *Policing* 88, 102- 03 (1988) (finding similar defects in arguments about interrogation relationship to convictions in Britain).

[FN42]. Professor Oaks has made an analogous point in the search and seizure area. See Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 *U. Chi. L. Rev.* 665, 688 - 89 (1970) (concluding that effect of exclusionary rule must be measured by considering not only what happens to filed cases but also cases that are "no-papered" by prosecutors).

[FN43]. See Seeburger & Wettick, *supra* note 32, at 24 (noting that a way to "reconcile" the declining confession rate with stable conviction rates is to look at cases that "are being thrown out at the arraignment and grand jury levels").

[FN44]. *Id.* at 24.

[FN45]. *Id.* The only other post- Miranda indictment figures I have been able to locate also show declining indictment rates. In Richmond, Virginia, indictments fell 10% after Escobedo and 20% after Miranda. *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. 249* (1967) [hereinafter *Controlling Crime Hearings*] (statement of James T. Wilkinson, Commonwealth's Attorney for Richmond, Va.).

[FN46]. See *infra* notes 293 -312 and accompanying text (estimating Miranda's cost in "lost cases" to be around 3.8%). The percentages are not exactly comparable because they use different denominators: persons interrogated in the first instance and indictments sought in the second.

[FN47]. See Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 *UCLA L. Rev.* (forthcoming 1996) (documenting screening by prosecutors of disproportionate number of nonconfession cases).

[FN48]. See Brosi, *supra* note 40, at 12 (noting that prosecutors rejected cases for filing at rates ranging from 9% to 57% in five cities); Feeney et al., *supra* note 17, at 21 (noting that California case attrition rate is 43% if measured from the point of police arrests, but only 26% if measured from prosecutorial filing and 14% if measured from cases reaching upper court); Brian Forst et al., *What Happens After Arrest?: A Court Perspective of Police Operations in the District of Columbia* 67 (1977) (finding 21% prosecutorial rejection rate in District of Columbia).

[FN49]. See Feeney et al., *supra* note 17, at 21-22.

[FN50]. The Pittsburgh study authors concluded: "While the figures covering Pittsburgh's clearance rate between January 1, 1965 and July 31, 1967 do not require the conclusion that Miranda has had an impact on the ability of the Pittsburgh police to solve crime, there has been a decline in the clearance rate from the first half of 1966. One of several possible explanations for this is the imposition of the Miranda requirements on the Pittsburgh police." Seeburger & Wettick, *supra* note 32, at 24.

[FN51]. See Federal Bureau of Investigation, U.S. Dep't of Justice, *Uniform Crime Reporting Handbook* 41- 42 (1984) (defining "cleared" crime for purposes of the Uniform Crime Reports).

[FN52]. See [Dunaway v. New York, 442 U.S. 200 \(1979\)](#).

[FN53]. Professor Kamisar later asked Professor Seeburger whether the study lent support to the "claim that Miranda had damaged law enforcement." Yale Kamisar, *Landmark Ruling's Had No Detrimental Effect*, Boston Globe, Feb. 1, 1987, at A27. Seeburger replied: "Absolutely not." *Id.* In reaching this conclusion, Professor Seeburger was apparently misled by his conviction rate and clearance rate findings, which are inaccurate measures of Miranda's harmful effects for the reasons explained here.

[FN54]. A related point to be made about the Pittsburgh study is that it appears to have examined only files of cases that had been cleared. See Seeburger & Wettick, *supra* note 32, at 6. Thus, it is not clear whether they would have had the uncleared files to examine, including files for uncleared cases in which the failure to clear was attributable to Miranda.

[FN55]. White, *supra* note 2, at 19.

[FN56]. See American Law Inst., *A Model Code of Pre-Arrest Procedure: Study Draft No. 1 134 (1968)* [hereinafter ALI Report] (attributing confession rate drop to "full compliance" with Miranda).

[FN57]. See, e.g., Schulhofer, *supra* note 39, at 456 & n.56 (1987) ("[M]any studies have shown that the degree of compliance with Miranda's requirements ... has been high.").

[FN58]. The study's authors offered the qualitative conclusion that they had proved that " Miranda has not impaired significantly the ability of the law enforcement agencies to apprehend and convict the criminal." Seeburger & Wettick, *supra* note 32, at 26. While this opinion probably shows nothing more than their "ideological affinities for the Miranda decision," Markman, *supra* note 23, at 947, it is in any event irrelevant to our question of determining Miranda's quantitative effects.

[FN59]. Controlling Crime Hearings, *supra* note 45, at 1120 (statement of District Attorney Frank S. Hogan).

[FN60]. *Id.*

[FN61]. *Id.* (1280 out of 2610 defendants).

[FN62]. *Id.* (figure derived from raw data: 354 out of 2448 defendants). Professor Dripps has possibly mistakenly described the study as involving "only the frequency of any statement by the suspect," not necessarily statements "useful in establishing guilt." Donald A. Dripps, *Foreword: Against Police Interrogation -- And the Privilege Against Self-Incrimination*, 78 J. Crim. L. & Criminology 699, 722-23 n.91 (1988). Hogan is clear in describing the study as involving "incriminating statements," a phrase he uses interchangeably with "admissions or confessions." Controlling Crime Hearings, *supra* note 45, at 1120.

[FN63]. Schulhofer also contends that the "data for pre- Miranda and post-Miranda periods were not compiled by comparable methods . . ." Schulhofer, *supra* note 39, at 457. He may have the New York County study confused with another study, as the basis for his contention is unclear. See Controlling Crime Hearings, *supra* note 45, at 1120 (noting that gathering of statistics for the study began six months before Miranda and continued for six months after).

[FN64]. Stephen J. Schulhofer, *The Fifth Amendment at Justice: A Reply*, 54 U. Chi. L. Rev. 950, 955 (1987).

[FN65]. But cf. Vera Inst. of Justice, *Felony Arrests: Their Prosecution and Disposition in New York City's Courts* 17 (1977) (referring to the "sometimes extended period" of time in New York City between arraignment and grand jury action).

[FN66]. Controlling Crime Hearings, *supra* note 45, at 1120.

[FN67]. Markman, *supra* note 23, at 946 n.19. Schulhofer does not believe that New York prosecutors would have presented inadmissible testimony to grand juries because the New York rules provided that "[t]he grand jury can receive none but legal evidence." N.Y. Crim. Proc. Law s 249 (1958) (superseded by [N.Y. Crim. Proc. Law s 190.30\(1\) \(McKinney 1993\)](#), effective Sept. 1, 1971), cited in Schulhofer, *supra* note 64, at 955 n.21. But it seems clear that New York prosecutors did exactly that in at least some cases following Miranda. See F. David Anderson, Confessed Killer of Six Goes Free -- Judge in Brooklyn Conforms Reluctantly with High Court Ruling, N.Y. Times, Feb. 21, 1967, at 41 (noting that the grand jury indicted Jose Suarez on November 4, 1966 and that the prosecutor dismissed charges one week later, conceding that, apart from the inadmissible confession, "[t]here is no other evidence").

[FN68]. Controlling Crime Hearings, *supra* note 45, at 1120. This is also the way Hogan's report was interpreted at the time. See Peter Kihss, Hogan Calls Ruling Curbing Confession a Shield for Crime, N.Y. Times, July 13, 1967, at 1.

[FN69]. Controlling Crime Hearings, *supra* note 45, at 1121 (providing a tabulation "of all suspects questioned in homicide cases since Miranda" from June 13, 1966 to June 13, 1967).

[FN70]. *Id.* at 1122 ("This represents a marked change from pre- Miranda times when ... rarely did a suspect refuse to make any kind of statement, even if it was only to protest his innocence.").

[FN71]. See Vera Inst. of Justice, Monitored Interrogations Project Final Report: Statistical Analysis 2, 7 (1967); see also Vera Inst. of Justice, *supra* note 24.

[FN72]. Vera Inst. of Justice, *supra* note 71, at 2, 39.

[FN73]. The two studies appear to be based on roughly similar definitions of incriminating statements. Compare *id.* at 8 (study collected information on "confession" or "admission") with Controlling Crime Hearings, *supra* note 45, at 1120 (study collected information on "confession or admission of guilt").

[FN74]. Vera Inst. of Justice, *supra* note 71, at 11. The study showed that 68.3% of suspects refused to make any statement. *Id.*

[FN75]. *Id.* at 40. The study showed that 58.9% of suspects refused to make any statement. *Id.*

[FN76]. Also, the Vera Institute figures may not be directly comparable to Hogan's figures because the former involve the percentage of all cases in which police obtained a confession or admission, rather than the percentage of cases presented to the grand jury that contained a confession or admission. Even assuming that prosecutorial and grand jury screening disproportionately weeds out weaker cases without confessions, however, it seems hard to imagine that anything close to Hogan's reported 49% pre- Miranda rate could have been achieved with a confession rate to police as low as reported by the Vera Institute.

[FN77]. Controlling Crime Hearings, *supra* note 45, at 200 - 01.

[FN78]. *Id.* at 200.

[FN79]. [378 U.S. 478 \(1964\)](#).

[FN80]. See generally Kamisar et al., *supra* note 39, at 436 n.i (discussing interpretation of Escobedo by law enforcement). Specter describes them only as "post- Escobedo warnings." Controlling Crime Hearings, *supra* note 45, at 200. Initially these warnings included an offer of appointed counsel. When four out of five suspects answered "yes" when asked "Do you want a lawyer?," the Philadelphia police quickly changed to a more limited advice of rights. *Id.*

[FN81]. Controlling Crime Hearings, *supra* note 45, at 200.

[FN82]. [United States ex rel. Russo v. New Jersey, 351 F.2d 429 \(3d Cir. 1965\)](#). The Third Circuit denied a petition for rehearing on October 13, 1965. *Id.* The Philadelphia police apparently began complying with the decision a few days later. See Controlling Crime Hearings, *supra* note 45, at 200.

[FN83]. Controlling Crime Hearings, *supra* note 45, at 200 (1550 suspects refused out of 4891 individuals arrested). The statement in the text is derived by subtracting refusals from individuals arrested to come up with the number of individuals who gave statements.

[FN84]. *Id.* at 201 (table) (3095 suspects refused to give statements after warnings out of a total of 5220 arrests). It appears that the Philadelphia police complied with the Miranda requirements. See *id.* at 206.

[FN85]. See Dripps, *supra* note 62, at 722-23 n.91.

[FN86]. Controlling Crime Hearings, *supra* note 45, at 200.

[FN87]. See Seeburger & Wettick, *supra* note 32, at 13 (table 3) (indicating that out of 99 suspects willing to talk, 46 confessed).

[FN88]. Vera Inst. of Justice, *supra* note 71, at 40.

[FN89]. See Feeney et al., *supra* note 17, at 143 (table 15 -2) (noting that in Jacksonville, of 148 interrogated suspects who talked, 81 (55%) confessed; in San Diego, of 136 interrogated suspects who talked, 51 (38%) confessed); Cassell & Hayman, *supra* note 47 (noting that 73 of 152 suspects (48.0%) who gave statements gave incriminating statements); Richard J. Medalie et al., Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda, 66 Mich. L. Rev. 1347, 1369 (1968) (indicating that out of statements related to the charge that could be characterized, 37 of 78 (46% were "inculpatory"); 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, 325 (1973) (table 3) (noting that of 211 post- Miranda interrogated suspects who talked, 105 (50%) confessed or admitted guilt and 60 (28%) gave incriminating evidence); Yale Project, *supra* note 8, at 1566 (table 12) (noting that of 91 interrogated suspects, 50 (54.9%) confessed or gave incriminating evidence).

[FN90]. This assumption probably understates Miranda's effects, as it is quite likely that Miranda affected confessions more than other types of statements. See Thomas, *supra* note 29.

[FN91]. This number corresponds roughly with the (apparently) pre- Escobedo confession rate for Philadelphia: 50% confessions in cases in which the defendant was convicted and sentenced to at least two years. Brief of National District Atty's Ass'n, Amicus Curiae, app. at 3, [Miranda v. Arizona, 384 U.S. 436 \(1966\)](#) (No. 759) [hereinafter Brief of the National District Atty's Ass'n].

[FN92]. Harold E. Pepinsky, A Theory of Police Reaction to Miranda v. Arizona, 16 Crime & Delinq., 379, 382 (1970).

While Specter was certainly a critic of the Miranda opinion, he was objective enough to testify that he opposed a constitutional amendment overruling the decision. Controlling Crime Hearings, *supra* note 45, at 202. Moreover, Specter later expressed his view that police had become accommodated to Miranda and that he saw no need to reverse the decision. Kamisar, *supra* note 53, at A27.

[FN93]. Pepinsky, *supra* note 92, at 382; see also Schulhofer, *supra* note 64, at 955 & n.23 (making same argument).

[FN94]. See Controlling Crime Hearings, *supra* note 45, at 201 (sample size involving more than 5000 arrests).

[FN95]. Pepinsky, *supra* note 92, at 382- 83; see also Schulhofer, *supra* note 64, at 955 (adopting this argument).

[FN96]. Pepinsky, *supra* note 92, at 383.

[FN97]. While separate arrest data are not available on Philadelphia, national arrest rates for serious crimes as collected by the FBI apparently fell during the period of the Philadelphia study. The national arrest rates (national index arrests/national index crimes) were: 1965 = .298; 1966 = .268; 1967 = .261. See Federal Bureau of Investigation, Crime in the United States: Uniform Crime Reports 1965 - 67 (1966 - 68) (arrest tables; crime index tables).

It should also be noted that Professor Pepinsky believed, after reviewing the Philadelphia, Los Angeles, Pittsburgh, and D.C. studies that, while suspects were still often confessing, "the confession rate has probably declined somewhat since Miranda, [and] this decline is probably attributable to the Miranda warnings." Pepinsky, *supra* note 92, at 385.

[FN98]. Witt, *supra* note 89, at 322.

[FN99]. *Id.* at 323.

[FN100]. *Id.* at 325. Witt looked at whether the officers were "successful" in their interrogation, which he defined as obtaining a signed confession, an oral admission of guilt, a signed incriminating statement, or some type of verbal incriminating evidence or other useful material for conviction through interrogation. *Id.* at 325 n.43.

[FN101]. *Id.* at 323.

[FN102]. *Id.* at 325.

[FN103]. Witt reports no separate figures for suspects requesting counsel or declining to execute waivers. Unless such situations are covered by the generic categories "suspect refused to talk" or "interrogation unproductive," see *id.* at 325 (table 3), it is possible that Seaside police simply violated Miranda's requirements in these areas.

[FN104]. See *id.* at 325 n.41 (discussing *People v. Dorado*, the California Supreme Court's predecessor to *Miranda*); see also *infra* notes 170 -71 and accompanying text (discussing *Dorado*).

[FN105]. This fact undercuts George Thomas's reading of the Seaside City data as suggesting that Miranda warnings had a "double-effect" of simultaneously encouraging suspects to talk to police while discouraging admissions of guilt. The data showed that suspects were less likely to make an outright admission after *Miranda* but more likely to make incriminating statements. Thomas believes that the *Miranda* warnings 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 discourage admissions because "even the most superficial understanding of the warnings communicates that statements will be used in court." Thomas, *supra* note 29. However, because the Seaside City police apparently began giving warnings in

January 1965 (when Dorado was decided), the Seaside City data do not support Thomas's hypothesis. See Witt, *supra* note 89, at 325 (table 3) (noting that oral incriminating evidence fell sharply in 1965). Thomas's hypothesis also conflicts with data from New York County, Philadelphia, Kansas City, and Brooklyn, which suggest that statements of all kinds fell as Miranda warnings and procedures were introduced. See Cassell & Hayman, *supra* note 47 (criticizing Thomas's position). But see George C. Thomas III, Plain Talk about the Miranda Empirical Debate: A "Steady-State" Theory of Confessions, 43 UCLA L. Rev. (forthcoming 1996) (responding to Cassell and Hayman).

[FN106]. Yale Project, *supra* note 8, at 1613.

[FN107]. *Id.* at 1527.

[FN108]. *Id.* at 1532.

[FN109]. *Id.* at 1573.

[FN110]. *Id.*

[FN111]. *Id.* at 1644 (53/110) (derived from data in table A).

[FN112]. *Id.* at 1574.

[FN113]. *Id.*

[FN114]. *Id.*

[FN115]. *Id.* In assessing whether Miranda has reduced the number of confessions, it is not clear why this factor (and perhaps the factor that interrogations have become "less hostile," see *supra* text accompanying note 114) should be ignored.

[FN116]. Yale Project, *supra* note 8, at 1613.

[FN117]. *Id.* at 1550 (25 suspects of 118 questioned received full Miranda warnings).

[FN118]. See *infra* notes 612-30 and accompanying text (finding Miranda's costs mostly attributable to waiver and questioning cutoff rules).

[FN119]. Yale Project, *supra* note 8, at 1551.

[FN120]. See *id.* at 1551 n.84 (providing text of "waiver of rights" card).

[FN121]. See *id.* at 1552 (reporting that police often would read rights, "then immediately shift to a conversational tone to ask, 'Now, would you like to tell me what happened?' ").

[FN122]. See *id.* at 1617-25 (Appendix A, containing form to be completed by student observer, contains 69 questions, but no question specifically regarding waiver of rights).

[FN123]. See *id.* at 1527 (admitting that "[s]ince the project was conceived before the Miranda decision, trial observations began two weeks prior to its announcement"); see also Liberty and Security: A Contemporary Perspective on the "Criminal Justice Revolution" of the 1960s, Proceedings of the Third Annual Symposium of the Constitutional Law Resource Center

117 (Const. L. Resource Center, Drake U. L. Sch. ed., Apr. 4, 1992) (participant in study reports that "[t]he Ford Foundation had given [us] a grant to study the effects of the Escobedo case and while the design of that study was being worked on, Miranda was decided").

[FN124]. See Yale Project, supra note 8, at 1552 (reporting that when suspect showed interest in a lawyer, police "usually managed to head him off simply by not helping him to locate one"); id. at 1555 (reporting that "many of the suspects who tried ... half-heartedly to end the questioning were coaxed into talking").

[FN125]. See OLP Pre-Trial Interrogation Report, supra note 13, at 63 n.91 (noting that the study is of little value "in assessing the effects of Miranda's system").

[FN126]. Yale Project, supra note 8, at 1533.

[FN127]. Id. at 1571.

[FN128]. Id. One of the eight other suspects confessed to police after receiving advice from a lawyer. Id.

[FN129]. Id. at 1578.

[FN130]. See supra note 57 and accompanying text.

[FN131]. (3  10)/81 = 16.0%. This understates the effect of the Miranda rules because there were probably grounds for suppressing some of the other confessions under Miranda as well. Yale Project, supra note 8, at 1558 & n.97.

The study also reported the "paradoxical[]" effect that detectives were more successful with suspects who received some warning of rights as compared to those who received no warnings. Id. at 1565. However, this finding is probably meaningless because the detectives questioned "many" of the unwarned suspects "only in a desultory manner" and may have been more interested in obtaining statements from the warned suspects. See id. at 1565 - 66.

[FN132]. A later "postscript" to the New Haven project does not contradict this conclusion. A faculty note in the Yale Law Journal reported on the success of FBI agents in interrogating draft protestors at Yale who had deposited their draft cards at the Justice Department as part of a Vietnam War protest. John Griffiths & Richard E. Ayres, Faculty Note, A Postscript to the Miranda Project: Interrogation of Draft Protestors, 77 Yale L.J. 300, 301 (1967). The note reported that initially most of the protestors approached by the FBI agents gave incriminating statements but later, following a campus-wide publicity effort regarding the right to remain silent, most protestors did not. See id. at 312. The study says little about Miranda's general effects. The questioning by the FBI agents was "non-custodial" and therefore not covered by Miranda's rules. See id. More important, it is hard to generalize from data about a suspect "who committed his 'crime' openly and willfully, as an act of civil disobedience," id. at 300, to the more typical world of criminals who seek to avoid detection. See ALI Report, supra note 56, at 125 (concluding that the "special nature of the suspects and of the suspected criminal activity ... make it inappropriate to generalize from that situation").

[FN133]. Richard J. Medalie et al., Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda, 66 Mich. L. Rev. 1347 (1968).

[FN134]. Id. at 1351.

[FN135]. Id. at 1354. The study does not appear to report the nature of the crimes charged against the individuals. The study does, however, assert that the population was "representative of the District defendant population in demographic

characteristics." Id. at 1357.

[FN136]. Id. at 1359.

[FN137]. Id. at 1414 (table E-1) (comparing pre- Miranda defendants with total post- Miranda defendants). One possible explanation for the drop in the confession rate is that the rate at which D.C. police interrogated suspects dropped after Miranda as well. Id. at 1364 - 65 (interrogation rate 55% before Miranda, 48% after).

[FN138]. See supra notes 86 - 91 and accompanying text. The D.C. study itself found that, of statements related to the charge that could be characterized as inculpatory or exculpatory, 37 of 78 (46%) were "inculpatory." Medalie et al., supra note 133, at 1369 (table 6).

[FN139]. See, e.g., White, supra note 2, at 19 n.99 (concluding that study shows that Miranda has no harmful effects).

[FN140]. Medalie et al., supra note 133, at 1364.

[FN141]. Royal Comm'n on Criminal Procedure, Report 98 (1981).

[FN142]. Medalie et al., supra note 133, at 1351 (table 1), 1361 n.55.

[FN143]. Id. at 1366 n.68 (stating that the police stopped interrogation in 13 of 26 cases and either ignored the defendant's wishes, asked the defendant to reconsider, or threatened the defendant in the other 13 cases).

[FN144]. Id. at 1365 (finding that more than half of the defendants "maintained that they had been interrogated before the attorneys arrived at the police station. Indeed, even the police themselves admitted to the attorneys that they had interrogated close to one quarter of the [defendants represented by the project's volunteer attorneys] before the attorneys arrived").

[FN145]. Richard Angelo Leo, *Police Interrogation in America: A Study of Violence, Civility and Social Change* 321 n.17 (1994) (unpublished Ph.D. dissertation, Univ. of Calif. at Berkeley) (citing Medalie et al., supra note 133, at 1418 (table E-7)). Leo's informative dissertation will be published in part as *Inside the Interrogation Room: A Qualitative and Quantitative Analysis of Contemporary American Police Practices*, 86 *J. Crim. L. & Criminology* (forthcoming Winter 1996); *The Impact of Miranda Revisited*, 86 *J. Crim. L. & Criminology* (forthcoming Spring 1996).

[FN146]. Leo, supra note 145, at 321 n.17. This problem means that the noncompliance rate was artificially inflated by approximately 100%. Assuming that the 52% of post- Miranda suspects not interrogated included all of the suspects who did not receive warnings, then the 30% of all suspects who in fact received all four Miranda warnings, see supra note 140 and accompanying text, would constitute 62.5% of the suspects who were interrogated (derived by dividing 30%/48%). Similarly, while only 7 of 85 (8.2%) suspects were asked to waive their rights, this constituted 17.1% of the interrogated suspects.

[FN147]. For example, Leo notes that the study's findings on suspects' understanding of the Miranda right to counsel categorized suspects' responses of "that means just what it says" as a "misunderstanding" of the Miranda right. Leo, supra note 145, at 337 n.25 (citing Medalie et al., supra note 133, at 1374 n.102). It is hard to argue with Leo's assessment that "[a]gain, one must question the integrity of " the analysis. Id.

[FN148]. Medalie et al., supra note 133, at 1347, 1394 - 96.

[FN149]. Id. at 1373 (table 9) (total post- Miranda defendants).

[FN150]. Id.

[FN151]. Id. (table 9) (55% figure from total post- Miranda statements in "neither silence nor counsel" warning category; 41% figure derived by combining "silence" and "counsel alone" categories, in which 23 of 56 suspects gave statements).

[FN152]. Other parts of the pre- Miranda and post- Miranda figures are inconsistent in some ways. For example, the pre- Miranda figure for confessions by suspects who received no warnings was 39%, substantially lower than the post- Miranda 55% figure. Id. (table 9) (pre- Miranda defendants in "neither silence nor counsel warning" category).

[FN153]. Id. at 1372 (table 8). These numbers may all be artificially low, since many of these suspects were never interrogated, see *supra* notes 145 - 47 and accompanying text, and therefore may never have had an opportunity to request counsel.

[FN154]. One of the participants in the attorney-representation project reported after three months experience that " 'in the vast majority (over 95%) of these cases, the police have not continued the interrogation of the accused after counsel has been contacted.' " Medalie et al., *supra* note 133, at 1390 (quoting J. Hennessey & L. Bernard, Comments Addressed to Those Participating in the Miranda Project, in Junior Bar Section, Supplement No. 2 to Miranda Kit, Sept. 30, 1966, at 2). Interviews with participating attorneys revealed that interrogation in their presence occurred in only 12% of the cases and that defendants gave statements to the police in 10% of the cases even after having been advised by their attorneys to remain silent. Id. at 1391. Even in these cases, the suspects had frequently given statements to the police before the attorney arrived. Id. at 1391 n.162 (59% of suspects said they had given previous statements).

[FN155]. Seeburger & Wettick, *supra* note 32, at 26 n.51. Some corroboration of this figure is provided by a letter from New Orleans Superintendent Giarruso to the American Law Institute, which stated that between September 7, 1966, when use of a waiver of rights form began, until August 31, 1967, 1173 of 5098 persons taken into custody -- about 23% -- waived their rights. ALI Report, *supra* note 57, at 140; see also Wayne E. Green, Police vs. "Miranda ": Has the Supreme Court Really Hampered Law Enforcement?, *Wall St. J.*, Dec. 15, 1966, at 16 (according to Giarruso, 40% of suspects made statements after Miranda, although not all statements were incriminating).

[FN156]. Seeburger & Wettick, *supra* note 32, at 26 n.51.

[FN157]. Based on a sampling of guilty pleas in felony cases, in New Orleans in 1961 an estimated 78% of 700 guilty pleas involved confessions, which would suggest an estimated total of 546 confessions. Brief of the National District Atty's Ass'n, *supra* note 91, at 19a. An additional 22 confessions were found in cases that went to trial. Id. Assuming the 50% ratio of confessions to all cases holds for cases going to trial, see *supra* notes 86 - 90 and accompanying text, then the total confession rate can be estimated as 76.3% ((546 + 22) / (700 + 44)). This figure is based on a sample of cases that went all the way to a trial or guilty plea. The confession rate in police arrests is presumably lower, because weaker cases (often those not involving confessions) will be screened out along the way. See *supra* notes 40 - 49 and accompanying text. Nonetheless, the 76.3% confession rate in completed cases suggests that the pre- Miranda estimate of a 40% confession rate in police arrests is reasonable. See generally *infra* Table 3 (collecting available data on pre-Miranda confession rates, most of which are higher than 40%).

[FN158]. Green, *supra* note 155, at 16. It is possible that Kelley was not referring to a 12% change in the confession rate (e.g., from 60% to 48%) but rather a change in the number of confessions (e.g., from 60% to 52.8% -- 12% fewer confessions).

[FN159]. My reading of the brief account of this study is that Kelley may have been referring to a 12% drop in incriminating statements. In this paragraph concerning confession rates in general, the immediately preceding sentence describes another study as involving statements, with the notation added that not all of these involved confessions. See *id.* No such qualifier was added to Kelley's description.

[FN160]. See *supra* notes 86 - 89 and accompanying text.

[FN161]. Controlling Crime Hearings, *supra* note 45, at 223 (statement of District Attorney Aaron Koota).

[FN162]. *Id.* at 223.

[FN163]. See *supra* notes 86 - 89 and accompanying text.

[FN164]. The 45% figure appears to be a reasonable estimate for other reasons. In 1961 in Kings County, 125 of the 3107 "felony dispositions" were sampled. "Felony dispositions" was defined to include the 2695 guilty pleas plus the 412 pleas of not guilty that resulted in a trial. Of the 125 cases sampled, confessions were obtained in 53 cases -- a rate of 42.4%. Brief of the National District Atty's Ass'n, *supra* note 91, at 29a. These data understate the rate of confessions because the cases in which no information was available about confessions were simply placed in the "no confession" category. *Id.* Similarly, in November 1965 Koota examined 1971 worksheets for indictments. The "confession" stamp appeared on 1105, or about 56%. ALI Report, *supra* note 56, at 144.

[FN165]. Donald Janson, Homicides Increase in Chicago, But Confessions Drop by 50%, *N.Y. Times*, July 24, 1967, at 24 (reporting remarks at national conference of defense lawyers at Northwestern University School of Law).

[FN166]. See Theodore Souris, Stop and Frisk or Arrest and Search -- The Use and Misuse of Euphemisms, 57 *J. Crim. L., Criminology & Police Sci.* 251, 263 (1966) (data from Detroit).

[FN167]. Governor Thompson's office reports that he has no further information on this study. Telephone Message from secretary for Gov. James R. Thompson (Feb. 10, 1995).

[FN168]. Controlling Crime Hearings, *supra* note 45, at 344.

[FN169]. *Id.* at 344 (721/1437).

[FN170]. [398 P.2d 361 \(Cal.\)](#) (en banc), cert. denied, [381 U.S. 937 \(1965\)](#).

[FN171]. *Id.* at 366 -72.

[FN172]. Controlling Crime Hearings, *supra* note 45, at 349.

[FN173]. *Id.* (figure rounded to 40% in original).

[FN174]. This reading of the two studies has been given by Younger himself, *id.* at 343, and by academic defenders of Miranda. See Yale Kamisar, A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test, 65 *Mich. L. Rev.* 59, 68 n.47 (1966); White, *supra* note 2, at 19 n.99. Younger, however, did report that in 1% of the cases, the police request for a complaint had to be rejected because a statement was inadmissible under Miranda requirements and other evidence was insufficient to go forward. Controlling Crime Hearings, *supra* note 45, at 345.

(Cite as: 90 Nw. U. L. Rev. 387)

[\[FN175\]](#). Evelle J. Younger, *Miranda*, 35 *Fordham L. Rev.* 255, 256 n.7 (1966) ("Firm conclusions cannot be reached on the basis of this survey. The sample ... was comparatively small and many of the replies received were incomplete or inconsistent."); *Controlling Crime Hearings*, *supra* note 45, at 349 ("[T]here appeared to be some misconception on the part of the deputies that filled in these forms as to what was desired. Many of the forms were incomplete or inconsistent and Mr. Trott attempted to resolve these problems by seeking out the deputy who filled in the form. However, this was not always possible because the name of the deputy who completed the questionnaire was not required on these forms.").

[\[FN176\]](#). The problem of accuracy of the data referred to in *supra* note 175 was mentioned in a memorandum dated January 4, 1966. See *Controlling Crime Hearings*, *supra* note 45, at 349 (memorandum from Earl Osadchey to Asst. D.A. Lynn D. Compton regarding post- *Dorado* survey). It seems likely, therefore, that the Office would have redesigned its form before distributing it to measure the effects of *Miranda* in June of 1966. The attorneys involved in the post- *Miranda* survey were apparently the same as those involved in the post-*Dorado* survey. See *id.* at 344 (memorandum of July 28, 1966 from Earl Osadchey to Asst. D.A. Lynn D. Compton regarding post- *Miranda* survey). There is no similar mention of accuracy problems in the post- *Miranda* data.

[\[FN177\]](#). Compare *Controlling Crime Hearings*, *supra* note 45, at 350 (post-*Dorado* worksheets) with *id.* at 347 (post-*Miranda* worksheets) (emphasis added).

[\[FN178\]](#). See *supra* notes 86 - 89 and accompanying text (approximately half of all statements are not confessions).

[\[FN179\]](#). *Controlling Crime Hearings*, *supra* note 45, at 344; see also Younger, *supra* note 175, at 260 n.14 ("Since this survey followed closely upon the heels of the *Miranda* decision, many of the defendants in the preliminary stage ... were arrested prior to *Miranda*, when only the *Dorado* admonition was being given.").

[\[FN180\]](#). *Controlling Crime Hearings*, *supra* note 45, at 345.

[\[FN181\]](#). Younger, *supra* note 175, at 259 ("The requirements set forth in *Dorado* nearly approached those laid down by the United States Supreme Court, a year later, in *Miranda*. The adjustment required for prosecutors in the State of California was, therefore, correspondingly small."). It is unclear whether Younger viewed *Dorado*'s waiver requirements as differing from *Miranda*'s waiver requirements.

[\[FN182\]](#). See Seeburger & Wettick, *supra* note 32, at 25 (observing that the "pre- *Miranda* cases are post- *Dorado* cases").

[\[FN183\]](#). This summary does not include the Reiss and Black study of field interrogations (not custodial interrogations) in the summer of 1966, finding that police obtained confessions at a low rate (14%) in such interrogations. Albert J. Reiss, Jr. & Donald J. Black, *Interrogation and the Criminal Process*, 374 *Annals Am. Acad. Pol. & Soc. Sci.* 47, 54 (1967). However, this reported 14% field interrogation success rate was "substantially below the figure reported for in-station interrogations where about 50 per cent of all interrogated suspects are reported to make an admission." *Id.* (apparently citing Washington, D.C. study, discussed at *supra* notes 133 -54 and accompanying text). Also, this field interrogation confession figure is of little use in assessing *Miranda*'s effects because it was obtained outside of the *Miranda* regime. 2 Donald J. Black & Albert J. Reiss, Jr., *President's Comm'n on Law Enforcement and the Admin. of Justice, Studies in Crime and Law Enforcement in Major Metropolitan Areas: Field Surveys III* 124 (1967) (finding that suspects were advised of at least one *Miranda* right in only 3% of police encounters with suspects in dispatched encounters and in 2% of those in on-view situations).

[\[FN184\]](#). See, e.g., Charles J. Ogletree, Are [Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda](#), 100 *Harv. L. Rev.* 1826, 1827 (1987) ("[M]any of the studies concluded shortly after the decision concluded that there was no

(Cite as: 90 Nw. U. L. Rev. 387)

substantial reduction in confessions."); White, *supra* note 2, at 18 -19 ("Of all the post- Miranda studies ... the Pittsburgh study was the only one to find that Miranda effected a significant decrease in the confession rate."). But see [Gerald M. Caplan, Questioning Miranda, 38 Vand. L. Rev. 1417, 1464 - 67 \(1985\)](#) (explaining that although the empirical Miranda studies "are often cited for the proposition that Miranda has had little effect on police efficiency, this characterization is inaccurate").

A quantitative way of showing that the prevailing myth is wrong is that in three of the four cities where sufficient reliable information is available to run a test of proportions, the post- Miranda decline in the confession/statement rate was statistically significant at the .05 level (Pittsburgh, New York County, Philadelphia, but not Seaside City).

[\[FN185\]](#). That is, studies without specifically identifiable "major problems." Specifically, I have excluded estimates of the confession rate change from New Haven (1960 - 66), the District of Columbia, and Los Angeles on grounds of unreliability, for reasons discussed previously. I have also excluded the Chicago homicide study because it deals with only homicide and so little is known about its details. Although I have strong doubts about the reliability of the "Seaside City" estimate of a 2% confession rate drop, I have included it to make my cost estimate more conservative.

[\[FN186\]](#). See William T. Pizzi, *Reflections on Confessions, Truth, and the Law* (Jan. 23, 1995) (unpublished manuscript, on file with the author) (calling for comparison of Miranda with approaches in other countries).

[\[FN187\]](#). [Miranda v. Arizona, 384 U.S. 436, 486 \(1966\)](#).

[\[FN188\]](#). [Id. at 489](#).

[\[FN189\]](#). See OLP Pre-Trial Interrogation Report, *supra* note 13, at 87- 95; see also [Miranda, 384 U.S. at 521-22](#) (Harlan, J., dissenting); Ronald J. Allen et al., *Constitutional Criminal Procedure: An Examination of the Fourth, Fifth, and Sixth Amendments and Related Areas* 1222 (3d ed. 1995) ("Unfortunately, [the Court's description of the English practice] appears to be either in error or misleading.").

[\[FN190\]](#). Cf. [Craig M. Bradley, The Emerging International Consensus as to Criminal Procedure Rules, 14 Mich. J. Int'l L. 171, 175 \(1993\)](#) (observing that other countries serve as "laboratories" where different approaches can be tested).

[\[FN191\]](#). See generally Van Kessel, *supra* note 7, at 35 -72; see also OLP Pre-Trial Interrogation Report, *supra* note 13, at 88 - 89.

[\[FN192\]](#). See Barry Mitchell, *Confessions and Police Interrogation of Suspects*, 1983 *Crim. L. Rev.* 596, 598.

[\[FN193\]](#). See Michael Zander, *The Investigation of Crime: A Study of Cases Tried at the Old Bailey*, 1979 *Crim. L. Rev.* 203, 213 (figures derived from table 4).

[\[FN194\]](#). Barrie Irving, *Royal Comm'n on Crim. Proc., Police Interrogation: A Case Study of Current Practice* 75, 149 (1980) (Research Study No. 2) (39 of 60 suspects).

[\[FN195\]](#). Paul Softley, *Royal Comm'n on Crim. Proc., Police Interrogation: An Observational Study in Four Police Stations* 49, 85 (1980) (Research Study No. 4) (reporting that 47% of suspects made confessions and 13.4% made admissions).

[\[FN196\]](#). Michael McConville & John Baldwin, *The Role of Interrogation in Crime Discovery and Conviction*, 22 *Brit. J. Criminology* 165, 166 (1982) (figures derived from table 1(b)). The 71.2% figure is derived by taking 100% minus those who gave "no statement of any kind" (6.5%) minus those who gave a "non-incriminating statement" (22.3%). If one also subtracts

(Cite as: 90 Nw. U. L. Rev. 387)

those who gave "a written statement that is not a confession" (2.7%), the 71.2% figure is reduced to 68.5%. See also John Baldwin & Michael McConville, *Royal Comm'n on Crim. Proc., Confessions in Crown Court Trials* 13 -14 (1980) (Research Study No. 5) (same information contained in table 3.1(b)). In this source, the 22.3% figure for "non-incriminating statements" does not appear, but rather is subdivided into an 18.7% "accused makes verbal denial only" figure and a 3.6% "other kind of statement made by accused" figure.

[FN197]. A.E. Bottoms & J.D. McClean, *Defendants in the Criminal Process* 115 -17 (1976). Because this statistic comes from defendants who pled guilty, it is likely to be higher than other statistics reported in this Article, which involve all defendants, including those contesting guilt.

[FN198]. See *Royal Comm'n on Criminal Justice, Report 6* (1993) (remarking on "widely publicised miscarriages of justice which have occurred in recent years").

[FN199]. See *infra* note 531 (reporting high confession rates observed even where outside observers present or videocameras running).

[FN200]. See Van Kessel, *supra* note 7, at 128; see also Baldwin & McConville, *supra* note 196, at 3 (suggesting that more British suspects make admissions than American suspects).

[FN201]. See *infra* notes 396 - 411 and accompanying text.

[FN202]. See generally Michael Zander, *The Police and Criminal Evidence Act 1984* (2d ed. 1990) (describing the Code of Practice on Tape Recording and the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers); Bradley, *supra* note 190, at 183 - 86 (describing PACE interrogation rules and remedies for violations).

[FN203]. Gisli H. Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony* 324 (1992).

[FN204]. *Criminal Justice and Public Order Act, 1994, ch. 33* (Eng.). The new warning given to suspects is "You do not have to say anything. But if you do not mention now something which you later use in your defense, the court may decide that your failure to mention it now strengthens the cases against you. A record will be made of anything you say and it may be given in evidence if you are brought to trial." William E. Schmidt, *Silence May Speak Against the Accused in Britain*, *N.Y. Times*, Nov. 11, 1994, at 10. Related changes have been made in the right of juries to draw inferences from a suspect's failure to provide information during interrogation. *Criminal Justice and Public Order Act, 1994, ch. 33, s 34* (Eng.).

[FN205]. See generally Mark Schrager, *Recent Developments in the Law Relating to Confessions: England, Canada and Australia*, 26 *McGill L.J.* 435, 437, 442- 43 (1981); A. Kenneth Pye, *The Rights of Persons Accused of Crime Under the Canadian Constitution: A Comparative Perspective*, *Law & Contemp. Probs.*, Autumn, 1982, at 221, 234 -36 (1982) (discussing practices of Canadian police).

[FN206]. See Peter B. Michalyshyn, *The Charter Right to Counsel: Beyond Miranda*, 25 *Alberta L. Rev.* 190, 190 (1987); David M. Paciocco, *The Development of Miranda -Like Doctrines Under the Charter*, 19 *Ottawa L. Rev.* 49 (1987). See generally Don Stuart, *Charter Justice in Canadian Criminal Law* 183 -216 (1991) (describing Canadian interrogation rules).

[FN207]. See Alan Grant, *The Audio-Visual Taping of Police Interviews with Suspects and Accused Persons by Halton Regional Police Force, Ontario, Canada -- An Evaluation* 28 (1987); Joyce Miller, *Law Reform Comm'n of Can., The Audio-Visual Taping of Police Interviews with Suspects and Accused Persons by Halton Regional Police Force: An*

Evaluation 11 (1988) (summarizing Evaluation Paper, Grant, *supra*).

[\[FN208\]](#). Grant, *supra* note 207, at 28.

[\[FN209\]](#). See *id.* at 32 (figure derived from table 1).

[\[FN210\]](#). One difficulty in making firm conclusions from the Halton data is that they come from suburban areas, which may have higher confession rates than the urban areas typically covered in the American studies. See *infra* notes 350 -58 and accompanying text (Miranda had larger effects in urban areas). Another difficulty is that the police may have been following many of Miranda's requirements. The study reports that suspects were told they were being videotaped and "cautioned that there was no obligation to make a statement and advised of the right to counsel at that time." Grant, *supra* note 207, at 11. If the suspect declined to be taped, the taping stopped. *Id.* However, it seems likely that, at least during the period of time studied (June 1985 to June 1987), the interrogation rules in Halton were not as rigid as the Miranda requirements. See, e.g., *Regina v. Anderson*, 45 O.R.2d 225 (Ct. App. 1984) (Ont. C.A.) (right to counsel limited); *Paciocco*, *supra* note 206, at 51 (noting "developing" nature of questioning cutoff rules in 1987).

[\[FN211\]](#). *Uviller*, *supra* note 14, at 181.

[\[FN212\]](#). Compare Fred E. Inbau et al., *Criminal Interrogation and Confessions* at xiv (3d ed. 1986) ("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, No, the Ruling is Rarely an Issue in Criminal Cases, *News Press* (Fort Myers, Fla.), Feb. 8, 1987, at A23 ("[C]onfessions rarely have anything to do with convictions because all the evidence needed to convict is usually in long before anybody confesses.").

[\[FN213\]](#). See *Van Kessel*, *supra* note 7, at 112 ("Judging the importance of defendant statements in relation to other prosecution evidence is, of course, a much more difficult task than determining their frequency.").

[\[FN214\]](#). See Nathan R. Sobel, *The New Confession Standards: Miranda v. Arizona* 137 (1966) (" [M]ost confessions are obtained precisely because the defendant is already 'hooked' by the 'other evidence,' e.g., identification by the victim or possession of the 'fruits' of the crime.") (emphasis in original); *Cassell & Hayman*, *supra* note 47 (finding that police were more successful in questioning as the evidence strengthened); *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 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"); *Stephen Moston et al., The Effect of Case Characteristics on Suspect Behaviour During Police Questioning*, 32 *Brit. J. Criminology* 23, 34 (1992) (finding a "marked effect" of strength of the evidence on admissions); *Reiss & Black*, *supra* note 183, at 55 ("[P]eople admit or confess when they are aware that 'the evidence is against them.' "); *Yale Project*, *supra* note 8, at 1574 (concluding interrogation success correlated with large amount of evidence available at the time of arrest).

[\[FN215\]](#). See, e.g., *Yale Kamisar, On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 68 *Mich. L. Rev.* 929, 1000 (1995) ("[A] principal purpose -- if not the primary purpose -- of interrogation is to obtain information such as the location of physical evidence."); *Witt*, *supra* note 89, at 327-28 (discussing relation between confessions and recovery of stolen property).

[\[FN216\]](#). But cf. *Cassell & Hayman*, *supra* note 47 (finding police "rarely" obtained incriminating fruits through questioning in Salt Lake County in 1994).

[FN217]. Seeburger & Wettick, *supra* note 32, at 14.

[FN218]. *Id.* The assumption of witness cooperation probably significantly understates the true necessity rate since, in the real world, lack of witness cooperation is one of the major problems facing prosecutors. See Forst et al., *supra* note 48, at 24-25 (finding that 205 of the 1745 robbery arrests made by the Washington, D.C. metropolitan police department in 1974 were rejected or dismissed by the prosecutor due to some sort of witness problem).

[FN219]. Seeburger & Wettick, *supra* note 32, at 15 (table 4) (total confessions necessary = 156/771 or 20.2%).

[FN220]. *Id.* at 16 (table 5) (confession necessary for cases with confessions = 101/390 or 25.9%). The importance of confessions rose after *Miranda*, from 24.7% necessary in cases before the decision to 32.8% after. *Id.* The necessity estimate is corroborated by the finding that, in robbery and burglary cases, those who confessed were convicted 78.7% of the time, while those who had not confessed were convicted 54.5% of the time. *Id.* at 20. The difference (24.2%) might be regarded as a necessity figure.

[FN221]. Controlling Crime Hearings, *supra* note 45, at 1121. This number understates the importance of confessions because it fails to capture cases in which a confession was "necessary" to solve the case but later led to other corroborating evidence of the homicide. Hogan also quoted former Police Commissioner Murphy as having said that confessions were essential in 50% of the homicide arrests made in New York in 1963 and 1964. Steven V. Roberts, *Confessions Held Crucial* by Hogan, N.Y. Times, Dec. 2, 1965, at 1.

[FN222]. See Dorsey D. Ellis, Jr., *Vox Populi v. Suprema Lex: A Comment on the Testimonial Privilege of the Fifth Amendment*, 55 Iowa L. Rev. 829, 855 (1970).

[FN223]. Cf. Yale Kamisar, *Has the Court Left the Attorney General Behind? -- The Bazelon-Katzenbach Letters on Poverty, Equality and the Administration of Criminal Justice*, 54 Ky. L.J. 464, 479 n.37 (1966) (recounting telephone interview with Detroit Chief of Detectives Piersante that interrogations were not important for homicide investigations because of thorough and effective pre-arrest investigative procedures).

[FN224]. Controlling Crime Hearings, *supra* note 45, at 349, 350 (table).

[FN225]. Most of these data involve interrogations conducted before *Miranda*. See *supra* note 179.

[FN226]. Controlling Crime Hearings, *supra* note 45, at 346. Such incriminating evidence was much more important at trial, where the deputies estimated that in 40% of the cases the statement or admission was necessary for conviction. *Id.*

[FN227]. See Yale Project, *supra* note 8, at 1643.

[FN228]. Of course, it is possible that some of these acquittals were because of the defendant's innocence rather than the prosecution's failure to prove its case. Cf. *infra* notes 534- 62 and accompanying text (discussing *Miranda*'s role in protecting the innocent).

[FN229]. Yale Project, *supra* note 8, at 1642- 43. These necessity figures have also been criticized on the ground that the district attorney's office did "not indicate the criteria relied on in making this evaluation." *Id.* at 1642.

[FN230]. *Id.* at 1582- 83.

[FN231]. The matrix was as follows:
Id. at 1583 (table 19).

[FN232]. Id. at 1585 (table 20) (essential = 3/90; important = 9/90).

[FN233]. Id.

[FN234]. Id. at 1590 (table 21).

[FN235]. See id. at 1583 (table 19) (intersection of column for evidence sufficient to go to "trial" and rows for investigative alternatives "none" and "inadequate"); supra note 231. On the other hand, the editors may have erroneously categorized some cases in the "interrogation necessary" category when in fact no interrogation was needed. They report that in four cases suspects were convicted of some charge after an unsuccessful interrogation failed to produce a confession deemed "necessary." Yale Project, supra note 8, at 1587. The editors did not note whether the four convictions were to the charged offense or a lesser charge. This problem is not conclusive proof of upward bias of the necessity figure, however, because the editors did not report in how many of the interrogation "not important" cases the defendant escaped conviction.

[FN236]. Witt, supra note 89, at 324 (table 2) (75k38/478).

[FN237]. Id. at 324 n.39.

[FN238]. See Souris, supra note 166, at 263 - 64 (reprinting 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)).

[FN239]. Id. at 255, 264 (grand total table).

[FN240]. See Yale Project, supra note 8, at 1640 - 41 (citing Piersante, Confessions in Felony Prosecutions for the Year of 1961 as Compared to January 20, 1965 through December 31, 1965 (July 27, 1966) (unpublished report)).

[FN241]. Vincent W. Piersante, Panel Evaluation, in A New Look at Confessions: Escobedo -- The Second Round 145, 161 (B. James George, Jr. ed., 1967); accord Miranda Decision Said to End the Effective Use of Confessions, N.Y. Times, Aug. 21, 1966, at 52 (same figures recounted by Piersante in Boulder, Colorado speech).

[FN242]. See Yale Project, supra note 8, at 1643 n.16; see also ALI Report, supra note 56, at 142.

[FN243]. Yale Project, supra note 8, at 1642.

[FN244]. Controlling Crime Hearings, supra note 45, at 223.

[FN245]. Id.

[FN246]. Id. at 223 ("I estimate that in these instances of refusal") (emphasis added).

[FN247]. Koota, however, referred to the 100 suspects who refused to make a statement as "walking the streets," id. at 223, which suggests that other avenues of investigation were not successful.

[FN248]. Sobel, supra note 214, at 146.

[FN249]. *Id.*; see also Roberts, *supra* note 221, at 1 (calling Sobel data a "small sampling").

[FN250]. Sobel, *supra* note 214, at 146.

Judge Sobel also surveyed 2000 cases presented to the grand jury from September 1965 through February 1966 (after Escobedo but before Miranda). *Id.* at 141. He found that confessions were introduced in only 275 of the cases (13.7%), apparently because New York police officers infrequently interrogated. *Id.* at 142 (table 1), 143. Unfortunately, these data are of little use on the necessity-for-confessions question because Sobel made no attempt to determine in what percentage a confession was needed ultimately to convict at trial. See Yale Project, *supra* note 8, at 1642. Moreover, as Professors LaFave and Israel have observed, the survey "hardly demonstrates that confessions are not an important tool in modern law enforcement," for it does not show how many of the considerable number of cases disposed of by guilty plea were not contested precisely because the defendant had given a confession." LaFave & Israel, *supra* note 3, s 6.1(a), at 435 (quoting [Developments in the Law -- Confessions, 79 Harv. L. Rev. 938, 943 \(1966\)](#)). Finally, it appears that Sobel's figures for the number of confessions, which were based on prosecutors' notices of intent to use confessions, substantially undercounted the actual number of confessions. See Controlling Crime Hearings, *supra* note 45, at 687- 88 (letter from N.Y. Supreme Court Justice Miles F. McDonald); see also ALI Report, *supra* note 56, at 143 - 44.

[FN251]. Feeney et al., *supra* note 17.

[FN252]. *Id.* at 142 (table 15 -1).

[FN253]. See *id.* at 88 (table 10 -2) (listing reasons for disposition of various charges).

[FN254]. For example, assume that the courts are more likely to allow a defendant to enter a pretrial diversion program (which does not result in a conviction) when he has exhibited contrition by confessing to his crime. If so, the conviction rate for confession cases will be lower, and in turn the necessity rate will be artificially lower for this extraneous reason.

[FN255]. 5 Floyd Feeney & Adrienne Weir, *The Prevention and Control of Robbery* 7 (1973).

[FN256]. For adults, the authors report that, of 83 cases, 35 involved confessions or admissions, and in only 6 of these were the confessions or admissions "essential," for an "essentiality" figure of 7.2% (6/83). 2 *id.* at 39, 43 (tables 17 & 19). But they never analyzed the 48 cases that did not involve confessions or admissions to establish how often a confession or admission was "essential" in these cases. This oversight becomes important when one discovers that 13 of these cases involved suspects who were released without even being charged, 2 *id.* at 39 (table 17), while others involved suspects who were ultimately acquitted, 2 *id.* at 80. Because a confession or admission might often be "essential" to a case where a suspect was released for lack of evidence or acquitted, the authors' estimate of a 5 -10% necessity rate for confessions in all cases is badly flawed.

[FN257]. 5 *id.* at 43 (table 19).

[FN258]. 2 *id.* at 38.

[FN259]. 2 *id.* at 42.

[FN260]. See 2 *id.* at 42 (referring to substituting a "single, uniform standard" for assessments of "the decision for charging the suspect").

[FN261]. See 2 *id.* at 43 (table 19) (10 suspects who admitted being at the scene were released before charging; confession or admission not considered "essential to the case").

[FN262]. The authors did report that some police believed that since Miranda, robbery suspects have "clammed up" and the right to counsel during questioning was often the problem. 4 *id.* at 112.

[FN263]. Nardulli, *supra* note 6, at 601 (table 12).

[FN264]. Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, 1987 U. Ill. L. Rev. 223, 233 (table 8).

[FN265]. Leo, *supra* note 145.

[FN266]. *Id.* at 294 (table 16) (statistically significant at the .001 level).

[FN267]. Based on similar reasoning, Leo implies that all of the harmful effects of Miranda, if any, can be measured by looking at the difference between the conviction rates of suspects who in fact invoke their Miranda rights compared to conviction rates of those who do not. *Id.* at 394 - 95 & n.4. In addition to suffering from the deficiencies of relying on conviction rates, see *supra* notes 40 - 48 and accompanying text, that approach necessarily assumes that the only impact Miranda could have on the confession rate stems from suspects actually invoking their rights. The potential invocation of rights, however, may operate to reduce the confession rate even in cases where suspects never actually invoke. See, e.g., Richard A. Leo, *Police Interrogation and Social Control*, 3 Soc. & Legal Stud. 93, 99 (1994) ("police officers are keenly aware that a suspect may terminate questioning at any time during the interrogation"). Thus, Miranda's effects are more properly assessed by the methodology employed in this Article.

In any event, it is interesting that the only data on this point collected by Leo suggest that suspects who invoke their Miranda rights are less likely to be convicted (53.1% vs. 62.8%). Leo, *supra* note 145, at 279 (table 11). While the relationship was not statistically significant, *id.*, this was likely due to the difficulty of working with the small sample of suspects who invoked their rights (32 in all, divided into two categories). Moreover, Leo's data might have artificially undercounted the number of cases in which a suspect invoked Miranda rights and was not ultimately convicted. At the time Leo concluded collecting his data, it appears that perhaps 10% of the cases had not yet reached a disposition. See *id.* at 279 (table 11) (total of 162 cases with a disposition out of a sample of 182). It is likely that the cases which took the longest to resolve (and thus were disproportionately not captured in the sample) were those with the greatest possibility of an acquittal: those in which the defendant did not confess, demanded a trial, and spent considerable time preparing a defense.

[FN268]. See *supra* notes 253 -54 and accompanying text.

[FN269]. See Cassell & Hayman, *supra* note 47.

[FN270]. *Id.*

[FN271]. *Id.* One must be cautious about using the necessity figure, for the reasons given in *supra* notes 253 -54 and accompanying text.

[FN272]. I have also excluded an estimate from the New Orleans police department that 75% of their pre- Miranda confessions were necessary to obtain a conviction, see Seeburger & Wettick, *supra* note 32, at 26 n.51, on the grounds that it seems out of line with other studies.

[FN273]. I exclude my own data for these purposes because their inclusion might raise the charge of "home cooking" affecting my quantification and because my data are not yet published.

[FN274]. That is, estimates without specifically identifiable "major problems." Specifically, I exclude the studies done in Los

Angeles (post-Miranda), New York (Sobel), Detroit, Kings County (Koota), Jacksonville, San Diego, Oakland, Bay area, middle America, and Chicago for the reasons discussed earlier.

[FN275]. These estimates may also tend to understate the need for confessions because they were mostly made by academic researchers, rather than professionals in the criminal justice system familiar with the "real world" problems of obtaining a conviction. See, e.g., 2 Feeney & Weir, *supra* note 255, at 42 (police sergeants thought confessions were essential more often than researchers); Yale Project, *supra* note 8, at 1591- 92 (detectives thought confessions were necessary more often than Yale editors); cf. Cassell & Hayman, *supra* note 47 (finding confessions more often necessary than other studies when estimates of importance obtained from prosecutors).

[FN276]. See Baldwin & McConville, *supra* note 196, at 8.

[FN277]. *Id.* at 31 (figure 4.1).

[FN278]. *Id.* (figure 4.1).

[FN279]. It is possible to argue that the data support an even higher figure for necessity rates. Because English juries must agree on a guilty verdict by a close-to-unanimous vote, see *Juries Act, 1974, s 17(3)* (Eng.), one might argue that disagreement among the assessors corresponds to a not-guilty verdict. Baldwin and McConville report that for cases without a confession the two assessors agreed that 13.3% would fail to reach a prima facie standard and that 4.4% would produce an acquittal. In an additional 19.3% of the cases, one of the two assessors thought that an acquittal would result. Baldwin & McConville, *supra* note 196, at 32 (figure 4.2). Summing these figures produces a higher necessity rate of 37.0%.

[FN280]. Baldwin & McConville, *supra* note 196, at 28 (table 4:1(a)).

[FN281]. *Id.* (table 4:1(b)).

[FN282]. Julie Vennard, *Royal Comm'n on Criminal Procedure, Contested Trials in Magistrates' Courts: The Case for the Prosecution 3* (1980).

[FN283]. See *id.* at 13 (table 3:1).

[FN284]. *Id.* (table 3:1).

[FN285]. Forst et al., *supra* note 48, at 67. An additional 25% were rejected because of witness problems, *id.*, which might also be regarded as based on evidentiary weakness in the case.

[FN286]. Brosi, *supra* note 40, at 16; see also Brian Forst et al., *National Inst. of Justice, U.S. Dep't of Justice, Arrest Convictability as a Measure of Police Performance 6* (1982) (replicating these findings).

[FN287]. Brian Forst, *Prosecution and Sentencing*, in *Crime and Public Policy* 165, 166 (James Q. Wilson ed., 1983) (derived from figure 1 by excluding juvenile cases); see also Silberman, *supra* note 22, at 259 (charges dropped against 27% of all adult arrestees).

[FN288]. Forst, *supra* note 287, at 168.

[FN289]. *Id.*

[FN290]. Cf. Davies, *supra* note 6, at 679 (arguing that cases suppressed under the Fourth Amendment exclusionary rule are minor in view of "much larger effects of a variety of other causes of lost arrests").

[FN291]. Cf. *id.* at 654 (making same argument in favor of rough estimate of search and seizure exclusionary rule costs).

[FN292]. This Article makes no attempt to assess costs apart from lost cases that may stem from Miranda. For discussion of other possible costs (such as consumption of police and judicial resources and undermining public confidence in the criminal justice system), see Van Kessel, *supra* note 7, at 129.

[FN293]. This multiplication assumes that the two variables are independent. This assumption may well underestimate the effect of Miranda, because it seems likely that those who do not confess are probably those against whom the prosecution has the weakest cases. See *supra* note 214 and accompanying text (collecting evidence that suspects are more likely to confess when evidence against them is strong). Put another way, the suspects deterred from confessing may disproportionately constitute those against whom confessions are needed.

[FN294]. See *supra* notes 183-85, 272-74 and accompanying text. I use the necessity figure for confession cases (23.8%) rather than all cases (26.1%) because it produces a lower estimate of Miranda's costs.

[FN295]. Cf. Davies, *supra* note 6, at 621 (noting that lost cases under search and seizure exclusionary rule may not have involved arrests intended to "stick").

[FN296]. See *supra* notes 285 - 90 and accompanying text.

[FN297]. See *infra* notes 317 - 18 and accompanying text.

[FN298]. See *infra* notes 321 -36 and accompanying text.

[FN299]. See Fed. Bureau of Investigation, U.S. Dep't of Justice, Uniform Crime Reports, Crime in the United States 1993, at 217 (1994) (table 29).

[FN300]. Cf. Feeney et al., *supra* note 17, at 21 (arguing that arrest is the "clear choice" of alternative measures for assessing case attrition in the criminal justice system).

[FN301]. "Arrest" has apparently been defined as: (1) contacting a suspect on the street; (2) transporting a suspect to a police station; (3) detaining a suspect at a police station; (4) booking a suspect at a police station; and (5) filing charges against a suspect with a prosecutor. Lawrence W. Sherman, *Defining Arrest: Practical Consequences of Agency Differences (Part I)*, 16 *Crim. L. Bull.* 376, 376 (1980).

[FN302]. See Malcolm W. Klein et al., *The Ambiguous Juvenile Arrest*, 13 *Criminology* 78, 85 (1975) (finding that, of 45 police departments surveyed, 36 used "brought to the station" as their operational criterion for reporting a juvenile arrest; 6 more used "booking"; only 1 included "field contacts"). This survey covered juvenile offenses, where arrest reporting might be more ambiguous than for adult offenses. See Feeney et al., *supra* note 17, at 39.

[FN303]. Feeney et al., *supra* note 17, at 40 - 41 ("The most common point indicated in the literature and observed in this study as the event from which adult arrests are counted is the booking.").

[FN304]. However, police do not always avail themselves of the opportunities for questioning. See Cassell & Hayman, *supra*

note 47 (discussing cases in which police never question suspects).

[FN305]. Feeney et al., *supra* note 17, at 40.

[FN306]. See Edward L. Barrett, Jr., *Police Practices and the Law -- From Arrest to Release or Charge*, 50 Cal. L. Rev. 11, 32 (1962); Sherman, *supra* note 301, at 471.

[FN307]. Seeburger & Wettick, *supra* note 32, at 6.

[FN308]. *Controlling Crime Hearings*, *supra* note 45, at 1120.

[FN309]. *Id.* at 200 - 01.

[FN310]. Witt, *supra* note 89, at 323.

[FN311]. See Fed. Bureau of Investigation, *supra* note 299, at 217. The crime index is composed of the violent crimes of murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault and the property crimes of burglary, larceny-theft, motor vehicle theft, and arson. *Id.* at 5.

[FN312]. See *id.* at 217 (table 29).

[FN313]. See generally Herbert S. Miller et al., *National Inst. of Law Enforcement and Criminal Justice, U.S. Dep't of Justice, Plea Bargaining in the United States* (1978) (discussing prevalence of plea bargaining in the United States).

[FN314]. See Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics -- 1993*, at 536 (1994) (estimating that 91% of all felony convictions in state courts in the United States in 1990 resulted from a guilty plea); Barbara Boland et al., *Prosecution of Felony Arrests*, 1988, at 24 -29 (1988) (1988 sample of ten felony courts found proportion of guilty pleas to range from 83% to over 95%); David A. Jones, *Crime Without Punishment* 192 (1979) (among 24 states and D.C., only 6 tried more than 10% of their cases). But cf. Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 *Harv. L. Rev.* 1037, 1047-50 (1984) (collecting evidence suggesting that plea bargaining is less prevalent than generally believed).

[FN315]. See Peter F. Nardulli et al., *The Tenor of Justice: Criminal Courts and the Guilty Plea Process* 205 (1988).

[FN316]. David W. Neubauer, *Criminal Justice in Middle America* 218 -19, 241 (1974); see Miller et al., *supra* note 313, at 81; Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 *U. Chi. L. Rev.* 50, 58 (1968); Henry H. Rossman et al., *Some Patterns and Determinants of Plea-Bargaining Decisions: A Simulation and Quasi Experiment*, in *Plea-Bargaining* 77, 78, 82-83 (William F. McDonald & James A. Cramer eds., 1980); Note, [Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas](#), 112 *U. Pa. L. Rev.* 865, 901 (1964). But cf. Peter F. Nardulli, *The Courtroom Elite: An Organizational Perspective on Criminal Justice* 193 (1978) (finding that regression analysis of Chicago sample shows no relation between strength of the state's case and prosecution's decision to pursue a case to trial).

[FN317]. Jones, *supra* note 314, at 95 - 96; see Neubauer, *supra* note 316, at 199.

[FN318]. [Arizona v. Fulminante](#), 111 *S. Ct.* 1246, 1257 (1991); see Saul M. Kassin & Lawrence S. Wrightman, *Confession Evidence*, in *The Psychology of Evidence and Trial Procedure* 67, 83 - 87 (Saul M. Kassin & Lawrence S. Wrightman eds., 1985) (collecting mock jury evidence to the same effect); Gerald R. Miller & F. Joseph Boster, *Three Images of the Trial: Their Implications for Psychological Research*, in *Psychology in the Legal Process* 19, 21-22 (Bruce D. Sales ed., 1977)

(Cite as: 90 Nw. U. L. Rev. 387)

(reporting mock jury trial showing strong correlation between confession evidence and likelihood of guilty verdict); cf. David Simon, *Homicide: A Year on the Killing Streets* 454 (1991) (explaining that juries are sometimes skeptical of police testimony about confessions); Uviller, *supra* note 14, at 185 (same).

[FN319]. Some data also suggest that those who confess are less likely to go to trial. See David W. Neubauer, *Confessions in Prairie City: Some Causes and Effects*, 65 *J. Crim. L. & Criminology* 103, 110 (1974) (table 4) (finding, for violent crimes, that 3% of confessors went to trial as compared to 32% of nonconfessors); see also Baldwin & McConville, *supra* note 196, at 19 (British data showing confessors more likely to plead guilty); Softley, *supra* note 195, at 87, 91 (same); Michael Zander & Paul Henderson, *Royal Comm'n on Criminal Justice, Crown Court Study 4* (1993) (same). From this fact, one might be tempted to argue that Miranda, by reducing the confession rate, might cause court backlog by increasing the number of trials. In my view, such an outcome is unlikely because of the dynamics of plea bargaining. Instead of increasing court backlog, Miranda is more likely simply to change the concessions necessary to induce pleas -- thus maintaining a roughly constant rate of trials.

[FN320]. *Miranda*, 384 U.S. at 541 n.5 (White, J., dissenting) ("No reliable statistics are available concerning the percentage of cases in which guilty pleas are induced because of the existence of a confession or of physical evidence unearthed as a result of a confession. Undoubtedly the number of such cases is substantial.").

[FN321]. Leo, *supra*, note 267, at 99.

[FN322]. See, e.g., Markman, *supra* note 23, at 948 (after confession suppressed in *Edwards v. Arizona*, Edwards received favorable plea bargain); *Miranda v. Jogger*, Wall St. J., Feb. 1, 1991, at A10 (favorable plea given to nonconfessing defendant in celebrated case of attack on a Central Park jogger).

[FN323]. Neubauer, *supra* note 319, at 109.

[FN324]. Neubauer describes the non-property category as "crimes against the person," *id.* at 106, which were defined as "aggravated battery, death, rape, armed and unarmed robbery, narcotics, and indecent liberties with a minor." *Id.* at 104 n.***. For convenience, I will use the appellation "crimes of violence."

[FN325]. *Id.* at 110 (table 4). Slightly more of those defendants who did not confess pled to a reduced charge -- 13% vs. 9% for confessors. *Id.*

[FN326]. *Id.* (table 5). In addition, 45% of those who confessed pled to reduced charges, while 32% who did not confess did so -- a 13% difference. *Id.*

[FN327]. Nardulli et al., *supra* note 315, at 226.

[FN328]. *Id.* at 237 (table 8.3) (statistically significant at the .01 level). The study found that, overall, defendants who confessed were 4% less likely to receive a count reduction. *Id.* at 236.

[FN329]. *Id.* at 237 (table 8.3).

[FN330]. *Id.* at 254 (table 8.13).

The observed effects of confessions in plea bargaining may have been understated in all the regression equations because of a possible multicollinearity problem. The equations tended to show substantial, statistically significant relations between the physical evidence and all forms of charge concessions. *Id.* at 237 (table 8.3), 254 (table 8.13). Physical evidence and

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

[FN331]. Yale Project, *supra* note 8, at 1608.

[FN332]. *Id.*

[FN333]. *Id.*

[FN334]. Leo, *supra* note 145, at 293.

[FN335]. *Id.* at 293.

[FN336]. Cassell & Hayman, *supra* note 47 (reporting this result along with statistical significance tests). Other similar effects of confessions on plea bargaining results were also found. *Id.*

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

Information peripherally related to the role of confessions in plea bargaining comes from Neil A. Milner's study of two cities in Wisconsin, which found that convictions to lesser charges dramatically increased in Racine after Miranda but fell somewhat in Madison. Neil A. Milner, *The Court and Local Law Enforcement: The Impact of Miranda* 218 -19 (1971). Milner's data do not distinguish between conviction by trial and conviction by plea of guilty, however, and therefore are of little use for present purposes.

[FN337]. See e.g., Vera Inst. of Justice, *supra* note 24, at 15; Yale Project, *supra* note 8, at 1609.

[FN338]. Arthur I. Rosett & Donald R. Cressey, *Justice by Consent: Plea Bargains in the American Courthouse* 147, 149 -50 (1976); see also U.S. Sentencing Commission, *Guidelines Manual* s 3E1.1 (1994) (authorizing sentence reduction for "acceptance of responsibility" and listing among factors to be considered a defendant's "voluntary and truthful admission to authorities of involvement in the offense and related conduct"); cf. [Miranda, 384 U.S. at 538](#) (White, J., dissenting) (confessing may "enhance the prospects for rehabilitation").

[FN339]. See Nardulli et al., *supra* note 315, at 242 (table 8.6) (no association between a confession and lower sentences in a regression of guilty plea cases); Gary D. LaFree, *Adversarial and Nonadversarial Justice: A Comparison of Guilty Pleas and*

Trials, 23 Criminology 289, 302 (1985) (table 4), 303 (table 5), 305 (table 6) (no indication that confessions produce lower sentences in regression analysis of guilty pleas and sentence severity); Leo, supra note 145, at 293 (suspects who incriminated themselves more likely to receive punishment after conviction; suspects who waived rights more likely to receive punishment, although effect not statistically significant); Neubauer, supra note 319, at 110 -11 (no evidence that, after controlling for relevant factors, those who confess receive lighter sentences); see also Yale Project, supra note 8, at 1609 (defense attorneys generally reported that sentence bargaining was more difficult when a defendant had confessed).

[FN340]. It might be argued that, in view of plea bargaining, it is unfair to view the entire 24% as involving "lost" cases because, in some of these, the defendant might nonetheless be induced to plead guilty. An offsetting possibility, however, is the parallel possibility that in some of the 76% potentially "won" cases the prosecution might be induced to bargain the whole case away. I will assume that these two effects cancel each other, particularly in view of the fact that there are many more "won" cases to lose than "lost" cases to win.

[FN341]. I use Neubauer's study rather than Nardulli et al.'s because of possible problems (for present purposes) in the Nardulli regression. See supra note 330. Using the larger figures from my study and from the Yale Project would produce a greater effect than calculated here.

[FN342]. Neubauer found a 23% difference, but I have offset that by 4% to take account of the fact that 4% more nonconfessors than confessors (13% vs. 9%) plead guilty to reduced charges. Neubauer, supra note 319, at 110 (table 4).

[FN343]. Id. (table 5). I have used the data from table 5 because Neubauer says they are the "best gauge" of the plea differential and because they produce a more conservative estimate of plea bargaining effects. Cf. id. (table 4).

[FN344]. These figures are derived by multiplying Miranda's confession rate reduction (16.1%) by the observed plea bargaining effects.

[FN345]. Arrests appear to be the proper figure for extrapolation because Neubauer's study appears to follow defendants "from the time of arrest." Neubauer, supra note 319, at 103.

[FN346]. A plea to reduced charges does not necessarily prove that a shorter sentence will result, as the available studies have reached varying conclusions on the relation between charge of conviction and actual sentence. Compare William F. McDonald & James A. Cramer, Plea-Bargaining 126 (1980) (suggesting that sentence concessions are seldom awarded to defendants pleading guilty) and Stephen J. Schulhofer, Due Process of Sentencing, 128 U. Pa. L. Rev. 733, 757 n.97 (1980) (collecting evidence that reduced charges have little impact on sentence ultimately imposed) with Hyun J. Shin, Analysis of Charge Reduction and its Outcomes 58 - 91 (1972) (unpublished Ph.D. dissertation, State University of New York at Albany) (finding that defendants pleading guilty receive sentence concessions that are somewhat offset by parole practices) and Nardulli et al., supra note 315, at 244 (table 8.7) (finding that charge reductions affect sentencing dispositions).

[FN347]. See, e.g., Seeburger & Wettick, supra note 32, at 26 (generalizing from Pittsburgh data to the entire nation); Yale Project, supra note 8, at 1533 (arguing the New Haven data should be typical of the country). See generally supra notes 2-5 and accompanying text (collecting general pronouncements that Miranda has not harmed law enforcement).

[FN348]. Otis H. Stephens, Jr., The Supreme Court and Confessions of Guilt 174 (1973); see Barrett, supra note 306, at 25.

[FN349]. A confounding problem in assessing the costs of the search and seizure exclusionary rule is the wide variation between cities in compliance with the Fourth Amendment. See Bradley C. Cannon, Is the Exclusionary Rule in Failing

Health? Some New Data and Plea Against a Precipitous Conclusion, 62 Ky. L.J. 681, 703 -25 (1974). To the extent that inter-city variation on Miranda compliance exists, it should produce an underestimation of Miranda's costs. If police fail to comply with Miranda, that will only obtain a confession that is suppressible later. Yet that later "lost confession" will not be reflected in a lower confession rate and, therefore, will never enter the cost equation.

[FN350]. Witt, *supra* note 89, at 324 n.40.

[FN351]. 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.

[FN352]. *Id.* at 466.

[FN353]. See Van Kessel, *supra* note 7, at 118 (attributing lower Seaside City figures to, *inter alia*, "the fact that, since it confronts a less severe crime problem than the other cities studied, it has more resources to devote to the interrogation process").

[FN354]. See *infra* notes 367-73 and accompanying text (discussing noncustodial "interviews" as a way of avoiding Miranda's restraints on "interrogation"). But cf. Cassell & Hayman, *supra* note 47 (reporting that police conduct noncustodial telephone interviews to save time). That such caseload pressures increase law enforcement incentives to plea bargain cases in large cities has been documented elsewhere. See, e.g., Jones, *supra* note 314, at 192 (pleas higher in heavily populated states); 2 LaFave & Israel, *supra* note 3, at 559 (plea pressures heaviest, for serious criminals, in busy urban courtrooms). But see, e.g., Miller et al., *supra* note 313, at 65 (rural prosecutors quicker to plead).

[FN355]. See *infra* notes 439 - 48 and accompanying text.

[FN356]. Robinson, *supra* note 351, at 441.

[FN357]. See *supra* notes 183 - 85 and accompanying text (Table 1). Data from the District of Columbia and Los Angeles are not included because they are unreliable for the reasons discussed in Part II. Population data are for 1967 and come from the U.S. Dep't of Commerce, Statistical Abstract of the United States 1969, at 19 -20 (1969) (standard metropolitan statistical area), except for "Seaside City," for which the population figure comes from the author's description of the city. See Witt, *supra* note 89, at 322. The total population of New York is used for New York County and Kings County on the grounds that it more accurately reflects the urban pressures felt by New York City police and it makes no sense to subdivide population totals there on a county-by-county basis. Data from Chicago were included to provide a more substantial data base. Cf. *supra* note 185 (noting concerns about Chicago study).

[FN358]. The relation was significant at the .02 level. The adjusted R was .54.

[FN359]. Fed. Bureau of Investigation, *supra* note 299, at 190 (figures derived from table 12).

[FN360]. See, e.g., Liva Baker, *Miranda: Crime, Law and Politics* 405 (1983); Schulhofer, *supra* note 39, at 456.

[FN361]. Green, *supra* note 155, at 16.

[FN362]. LaFave & Israel, *supra* note 3, s 6.5(c), at 484 n.30; see Samuel Walker, *Sense and Nonsense About Crime: A Policy Guide* 131 (3d ed. 1994) ("Suspects are likely to be more knowledgeable [about Miranda rights] today [[[than in the 1960s], but more recent studies have not been done."); cf. David Dixon et al., *Safeguarding the Rights of Suspects in Police*

(Cite as: 90 Nw. U. L. Rev. 387)

Custody, 1 Policing & Soc'y 115, 122 (1990) (finding rapid increase in requests for legal advice by juveniles in British city from 1984 to 1987 under new interrogation regime, due in part to the spread of information).

[FN363]. Poll Finds Only 33% Can Identify Bill of Rights, N.Y. Times, Dec. 15, 1991, at 33; see Walker, supra note 362, at 130 ("most kids on the street know about" Miranda).

[FN364]. Criminals have particular incentives (avoiding prison) and information sources (criminal confederates) that might suggest they would be at least as well-informed as the general public. On the other hand, criminal suspects may be less intelligent than the general population. See James Q. Wilson & Richard J. Herrnstein, *Crime and Human Nature* 148 -72 (1985).

[FN365]. See Walker, supra note 362, at 131 (citing Medalie et al., supra note 133); see also Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 *Denv. U. L. Rev.* 1, 14 -16 (1970) (noting limited awareness of Miranda rights in 1969 sample of incarcerated suspects). But cf. William Hart, *The Subtle Art of Persuasion*, *Police Mag.*, Jan. 1981, at 14 (reporting that experienced interrogators saw "no indication that today's suspects were more sophisticated than those of past years").

[FN366]. See Griffiths & Ayers, supra note 132, at 312 (noting that refusal to make incriminating statements by draft evaders increased after they were given more information about their rights).

[FN367]. Kevin N. Wright, *The Great American Crime Myth* 140 (1985); see also Van Kessel, supra note 7, at 105 - 06. The same phenomenon has been alleged in Britain; see, e.g., Andrew Sanders et al., *Advice and Assistance at Police Stations and the 24 Hour Duty Solicitor Scheme* 56 - 66 (1989) (documenting police ploys to discourage requests for counsel under new interrogation rules).

[FN368]. Schulhofer, supra note 39, at 457; see Simon, supra note 318, at 193 -207 (discussing ways in which police have adapted to Miranda); Jerome H. Skolnick & James J. Fyfe, *Above the Law: Police and the Excessive Use of Force* 58 -59 (1993) (same); cf. David Dixon, *Politics, Research and Symbolism in Criminal Justice: The Right of Silence and the Police and Criminal Evidence Act*, 20 *Anglo-Am. L. Rev.* 27, 39 - 40 (1991) (discussing police learning to work with new interrogation regulatory regime in Britain).

[FN369]. Skolnick & Fyfe, supra note 368, at 58; Jerome H. Skolnick & Richard A. Leo, *The Ethics of Deceptive Interrogation*, *Crim. Just. Ethics*, Winter/Spring 1992, at 5; see, e.g., Uviller, supra note 14, at 52 (giving example of New York City "interview" to avoid Miranda).

[FN370]. Wright, supra note 367, at 140.

[FN371]. See Robinson, supra note 351, at 474 (86% of police departments in nationwide survey received advice about Miranda within one month of the decision).

[FN372]. Miranda v. Arizona, 384 U.S. 436, 444 (1966). After the decision, some confusion remained as to whether "focus" was also a triggering event for the Miranda rules. See Kenneth W. Graham, Jr., *What is "Custodial Interrogation"?: California's Anticipatory Application of Miranda v. Arizona*, 14 *UCLA L. Rev.* 59, 114 (1966) (discussing Miranda, 384 U.S. at 444 n.4).

[FN373]. See, e.g., 2 Black & Reiss, supra note 183 (police gave advice of rights in only 3% of field encounters); Yale

(Cite as: 90 Nw. U. L. Rev. 387)

Kamisar, "Custodial Interrogation" Within the Meaning of Miranda, in *Criminal Law and the Constitution -- Sources and Commentaries* 335, 341 (Jerold H. Israel & Yale Kamisar eds., 1968) ("I think it is quite legitimate to read Miranda as encouraging the police to engage more extensively in pre-arrest, pre-custody, pre-restraint questioning.") (remarks from CLE conference on Miranda during the summer of 1966); Medalie et al., *supra* note 133, at 1361 (guidance given to D.C. police one month after Miranda noted that "the critical point is the time the arrest is made or the person's freedom of action is limited"); James R. Thompson, *What Miranda Requires*, *Public Mgmt.*, July 1967, at 191, 196 - 97 (training bulletin distributed to the Chicago Police Department on Sept. 23, 1966 noting noncustodial questioning possibilities); see also Yale Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 *Cornell L. Rev.* 436, 452 (1964) (describing police training in pre-arrest "interview" tactics in 1958).

[\[FN374\]](#). See Yale Project, *supra* note 8, at 1552.

[\[FN375\]](#). See *supra* notes 79- 82 and accompanying text (describing pre-Miranda rulings in Philadelphia); *supra* notes 170 -71 and accompanying text (same in Los Angeles); see also Neal Milner, *Comparative Analysis of Patterns of Compliance with Supreme Court Decisions*, 5 *Law & Soc'y Rev.* 119, 128 (1970) (noting "anticipation" of Miranda by more professional police organizations).

[\[FN376\]](#). Inbau et al., *supra* note 212, at 24.

[\[FN377\]](#). Cassell & Hayman, *supra* note 47.

[\[FN378\]](#). See *supra* notes 139 - 44 and accompanying text (discussing failure to implement decision in D.C.); *supra* notes 116 -26 and accompanying text (discussing failure to implement decision in New Haven); see also Leiken, *supra* note 365, at 30 (finding allegations that Denver police ignored requests for counsel in 1969).

[\[FN379\]](#). See Van Kessel, *supra* note 7, at 102 & n.532 (collecting evidence on this point); see also Cassell & Hayman, *supra* note 47 (finding consistent police compliance with Miranda in Salt Lake County in 1994); cf. Roger C. Schaefer, *Patrolman Perspectives on Miranda*, 1971 *Law & Soc. Ord.* 81, 88 (finding both under- and over-compliance with Miranda by Minneapolis police officers in 1968).

[\[FN380\]](#). See Baker, *supra* note 360, at 404 - 05 (describing training given to police on how to implement Miranda).

[\[FN381\]](#). See, e.g., Leiken, *supra* note 365, at 10 (noting better information about and training in Miranda requirements in Denver in 1969 than in New Haven in 1966).

[\[FN382\]](#). See generally Milner, *supra* note 336, at 224 -32 (discussing relation between police professionalization and Miranda).

[\[FN383\]](#). See Markman, *supra* note 23, at 947; see also [Gerald M. Caplan, *Miranda Revisited*, 93 *Yale L.J.* 1375, 1466 - 67 \(1984\)](#) (reviewing Liva Baker, *Miranda: Crime, Law and Politics* (1983)).

[\[FN384\]](#). For example, the New Haven project observed many police practices designed to "accommodate" Miranda that were in fact impermissible. In violation of Miranda's waiver requirements, detectives would give suspects their rights "then immediately shift to a conversational tone to ask, 'Now, would you like to tell me what happened.'" Yale Project, *supra* note 8, at 1552. In violation of Miranda's right to counsel requirements, when a suspect showed an interest in counsel "the police usually managed to head him off simply by not helping him to locate one." *Id.* In violation of Miranda's questioning cut-off

rules, detectives would "coax" suspects into talking when they tried to end the questioning. *Id.* at 1555. Similarly, in New York, police did not always allow a suspect to invoke the right to silence. See Vera Inst. of Justice, *supra* note 24, at 43.

[FN385]. A pre- Miranda study in Detroit reported that the confession rate fell from 60.8% in 1961 to 58.0% in 1965. See Souris, *supra* note 166, at 255.

[FN386]. Witt, *supra* note 89, at 325 (table 3).

[FN387]. *Id.* at 326 (noting that fewer suspects were interrogated in 1968 than in earlier years).

[FN388]. Van Kessel has suggested that Seaside City's lower drop in the confession rate (only 2%) when compared to other cities should be "attributed to the fact that, by the time of the 'Seaside City' study, police were able to adapt their interrogation techniques to comply with Miranda." Van Kessel, *supra* note 7, at 118. The time-series development of the data makes this suggestion implausible.

[FN389]. See Seeburger & Wettick, *supra* note 32, at 13 & n.36.

[FN390]. *Id.*

[FN391]. *Id.* at 13 n.36.

[FN392]. *Id.* Another explanation is that the first sample included only "cleared" cases while the second sample included uncleared cases. See ALI Report, *supra* note 56, at 133.

[FN393]. Week-by-week data from the Philadelphia study from June 19, 1966 to February 19, 1967 likewise show no discernable pattern. Controlling Crime Hearings, *supra* note 45, at 201.

[FN394]. See *supra* notes 109 -15 and accompanying text (discussing Yale Project, *supra* note 8, at 1573).

[FN395]. See Markman, *supra* note 23, at 947 (concluding that the "assertion that this damage [to law enforcement] has been alleviated through the adjustment of police practices to Miranda's requirements is ... unsupported by any empirical evidence").

[FN396]. Neubauer, *supra* note 319, at 105 (table 2). This number may slightly overstate the number of incriminating statements obtained, because a few of the statements in the cases may not have been incriminating. *Id.* at 105 n.10.

[FN397]. Leiken, *supra* note 365, at 19 (table 2). Leiken defined the term "confession" as "a statement made with the realization that it might be damaging." *Id.* at 12.

[FN398]. LaFree, *supra* note 339, at 298.

[FN399]. Feeney et al., *supra* note 17, at 142 (table 15 -1).

[FN400]. The authors of the study give no definition for their category of "admitted being at the scene." In fact, a substantial number of these statements may not have been incriminating because the conviction rate for those who admitted being on the scene was not, generally speaking, significantly different than the conviction rate for those who made no statements at all. See *id.* at 142 (table 15 -1). In an earlier study using a similar methodology, the authors reported that only 15% (3 out of 20) of such on-the-scene admissions were "essential" to the case. 2 Feeney & Weir, *supra* note 18, at 38.

[FN401]. Feeney et al., *supra* note 17, at 142 (derived from table 15 -1).

[FN402]. *Id.*

[FN403]. Leo, *supra* note 145.

[FN404]. *Id.* at 268 (table 7) (117 out of 182 suspects).

[FN405]. Leo's category of "some incriminating information" was apparently expansively defined as embracing "implausible or contradictory denials that the detectives believed corroborated other evidence pointing to the suspect's guilt or that could be used successfully to impeach a suspect's credibility" *Id.* at 268 n.4 (emphasis added). Many things said by a suspect could be viewed by the detectives as potential "impeaching" information about credibility. Supporting the interpretation that some of these statements were not significantly incriminating are the facts that many of the suspects in Leo's sample (31%) were not even charged, *id.* at 273, and that prosecutors are particularly likely to charge suspects where they have strong incriminating statements. See *supra* notes 41-49 and accompanying text. Also supporting this interpretation is the lower (and relatively more objective) figure of 24.2% "confessions" in Leo's data, which corresponds roughly to the "confession" figures in other studies that suggest lower overall incriminating statement rates. See, e.g., Feeney et al., *supra* note 17, at 142; Cassell & Hayman, *supra* note 47. Leo's 76% ratio of incriminating statements to total statements is also considerably higher than reported in most other studies. Leo, *supra* note 145 (finding 76% of all statements to be incriminating). See *supra* notes 86 - 89 and accompanying text (collecting studies that support a 50% ratio).

[FN406]. Leo, *supra* note 145, at 268 (table 7) (24.2% of suspects gave confessions, 17.6% gave partial admissions).

[FN407]. Leo does not appear to claim that his statistics measure overall police success. *Id.* at 295 - 97 (drawing conclusions from his statistics but not claiming that his rate corresponds to other overall police confession rates). Others, however, have not given the study so limited a reading. See, e.g., Slobogin, *supra* note 5, at 6 (Supp. 1995) (concluding that Leo's confession rate is "comparable to pre- Miranda confession rates").

[FN408]. First, Leo's sample consisted of cases in which police actually interrogated a suspect. Leo, *supra* note 145, at 262. Accordingly, the sample excludes the presumably significant fraction of cases where police never obtained a confession because they never interrogated. See, e.g., Feeney et al., *supra* note 17, at 143 (table 15 -2) (finding that 18.5% of arrested burglary suspects in Jacksonville, Florida and 20.1% in San Diego, California are not interrogated); Cassell & Hayman, *supra* note 47 (finding that 21.0% of suspects were not interrogated in Salt Lake City). Second, Leo's study included only custodial interrogations. Yet police have, to some extent, shifted to noncustodial interrogations to avoid Miranda. See, e.g., Jerome A. Skolnick & Richard A. Leo, *The Ethics of Deceptive Interrogation*, *Crim. Justice Ethics*, Winter/Spring 1992, at 5. It appears that noncustodial interrogations are less productive than custodial interrogations. See Cassell & Hayman, *supra* note 47 (finding that noncustodial interrogations were less successful). Third, Leo only studied interrogation by detectives. See Leo, *supra* note 145, at 256 -57, 456 -57. It appears that detectives are more successful at extracting statements than are other police officers. See Feeney et al., *supra* note 17, at 144 (table 15 -3); Cassell & Hayman, *supra* note 47 (finding detectives more successful). Finally, as a measure of admissible confessions, Leo's figures must be reduced by a couple of percentage points to reflect cases in which police obtained inadmissible statements in violation of Miranda by continuing questioning after invocations of rights. See Leo, *supra* note 145, at 263. Adjusting only for these four factors so as to render Leo's study comparable to other confession studies produces an overall success rate of somewhere below 38.7%. See generally Cassell & Hayman, *supra* note 47, at app. B (explaining and defending these adjustments in greater detail).

[FN409]. Almost a third of Leo's sample (60/182) consisted of videotapes of "interrogations performed" by two Bay-area

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

[FN410]. Cassell & Hayman, *supra* note 47.

[FN411]. *Id.* 42.2% of suspects actually questioned give incriminating information. *Id.* About 4% more volunteered incriminating information that was relatively unimportant. Responding to the confession rate reported in our study, Professor Thomas claims it should be adjusted upwards to 54% for various reasons. See Thomas, *supra* note 105. We find his justifications for this adjustment unpersuasive. See Cassell & Hayman, *supra* note 47.

[FN412]. Apart from the Bay area study discussed at *supra* notes 403 - 09 and accompanying text, the only recent rate above 50% is from Jacksonville, Florida (51.3%), which includes 18.4% of suspects who merely acknowledged being at the scene. Moreover, the statement rate in Jacksonville is much higher than data gathered simultaneously under identical methodology from San Diego. The reason for the difference appears to be that "the evidentiary standard for arrest and charge is considerably higher in Jacksonville." Feeney et al., *supra* note 17, at 225. Jacksonville police apparently arrest only where there is "clear cause" while San Diego police may arrest where evidence is not as strong. If suspects are more likely to confess when the evidence against them is strong, as the empirical evidence suggests, see *supra* note 214 and accompanying text, one would expect the Jacksonville police to obtain more confessions. If this explanation for the high rates of confessions in Jacksonville is correct, the results in Jacksonville are generalizable only to jurisdictions that question a suspect following an arrest with quite strong evidence. In this respect, it may be that the lower San Diego results are more typical. See, e.g., Simon, *supra* note 318, at 448 (reporting the observation that Baltimore detectives too often "bring someone down and go at them in the interrogation room with no real ammunition").

[FN413]. All of the data have been discussed previously in this Article, with the exceptions of Cities A and B from California, see Barrett, *supra* note 306, at 43 - 44; and Sacramento through Kings County, see Brief of the National District Atty's Ass'n, *supra* note 91, at 6a-7a (column for confessions/prosecutions). The data for Sacramento through Kings County are probably not as solid as other data recounted here, as the methodology used by the National District Attorneys Association is unclear.

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

[FN414]. See generally Cassell & Hayman, *supra* note 47 (arguing that data actually supports the conclusion that confessions fell after Miranda). But cf. generally Thomas, *supra* note 105 (responding to Cassell & Hayman and arguing that there is insufficient evidence to suggest that confession rates have changed at all since Miranda). Even if the empirical evidence suggested that confession rates have now returned to pre- Miranda levels, proponents of the rebound hypothesis must also establish that any increase in confession rates is attributable to improved police abilities to minimize the effects of Miranda rather than to improved interrogation techniques generally or other factors. Put another way, if better police techniques have

boosted confession rates since 1967, that does not disprove the thesis suggested here: that confession rates would increase still further if Miranda's restrictive requirements were eliminated.

[FN415]. See, e.g., Lippman, *supra* note 20, at 37.

[FN416]. See, e.g., [Pennsylvania v. Muniz, 496 U.S. 582 \(1990\)](#) (deciding whether "booking questions" require Miranda warnings).

[FN417]. [Rhode Island v. Innis, 446 U.S. 291, 304 \(1980\)](#).

[FN418]. Kamisar et al., *supra* note 39, at 507 ("[A]lmost everyone expected the so-called Burger Court to treat Miranda unkindly. And it did -- at first. But it must also be said that the new Court has interpreted Miranda fairly generously in some important respects."); Uviller, *supra* note 14, at 207- 08 (observing that "notwithstanding some uneasiness with the Miranda doctrine, most courts have adhered to it firmly, even extending it" to other situations); Louis Michael Seidman, [Brown and Miranda, 80 Cal. L. Rev. 673, 676 & n.11 \(1992\)](#) (noting that the Burger Court extended the Miranda doctrine in several significant respects). See generally Stephen A. Saltzburg, Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts, 69 *Geo. L.J.* 151, 153 (1980) ("[T]he differences between the Warren and the Burger decisions tend to be more at the margin than at the heart of the constitutional principles for which the Warren Court is remembered.").

[FN419]. See, e.g., [Stansbury v. California 114 S. Ct. 1526, 1528 -31 \(1994\)](#) (per curiam); [California v. Beheler, 463 U.S. 1121, 1123 -26 \(1983\)](#); [Oregon v. Mathiason, 429 U.S. 492, 494 - 96 \(1977\)](#) (per curiam).

[FN420]. [451 U.S. 477 \(1981\)](#).

[FN421]. Kamisar et al., *supra* note 39, at 508.

[FN422]. Edwards, 451 U.S. at 484 - 85.

[FN423]. Ainsworth, *supra* note 4, at 103; see, e.g., [Minnick v. Mississippi, 498 U.S. 146 \(1990\)](#); [Arizona v. Roberson, 486 U.S. 675 \(1988\)](#).

[FN424]. See *infra* notes 623 -30 and accompanying text.

[FN425]. Kamisar et al., *supra* note 39, at 508 (citing [Rhode Island v. Innis, 446 U.S. 291 \(1980\)](#)).

[FN426]. [467 U.S. 649 \(1984\)](#).

[FN427]. See, e.g., [The Supreme Court, 1983 Term, 98 Harv. L. Rev. 87, 140 -51 \(1984\)](#); Marla Belson, Note, "Public Safety" Exception to Miranda : The Supreme Court Writes Away Rights, 61 *Chi.-Kent L. Rev.* 577 (1985); Mary M. Keating, Note, *New York v. Quarles: The Dissolution of Miranda*, 30 *Vill. L. Rev.* 441 (1985).

[FN428]. Daniel Brian Yeager, Note, [The Public Safety Exception to Miranda Careening Through the Lower Courts, 40 U. Fla. L. Rev. 989, 991 \(1988\)](#).

[FN429]. [United States v. Ochoa-Victoria, 852 F.2d 573 \(9th Cir. 1988\)](#); [United States v. Brady, 819 F.2d 884 \(9th Cir. 1987\)](#); [United States v. Eaton, 676 F. Supp. 362 \(D. Maine 1988\)](#); [People v. Gilliard, 234 Cal. Rptr. 401 \(Cal. Ct. App. 1987\)](#);

(Cite as: 90 Nw. U. L. Rev. 387)

[People v. Cole, 211 Cal. Rptr. 242 \(Cal. Ct. App. 1985\)](#); [State v. Turner, 716 S.W.2d 462 \(Mo. Ct. App. 1986\)](#); [Ohio v. Moore, 1987 WL 16872 \(Ohio Ct. App. 1987\)](#) (unpublished opinion); [State v. Kunkel, 404 N.W.2d 69 \(Wis. Ct. App. 1987\)](#).

[FN430]. See Cassell & Hayman, *supra* note 47 (out of a sample of 173 interrogations, only 1 involved an arguable instance of public safety questioning).

[FN431]. Cf. Craig D. Uchida et al., Police Executive Research Found., *The Effects of United States v. Leon on Police Search Warrant Practices* (1987) (finding that good faith exception to the exclusionary rule had little practical day-to-day impact on the processing of criminal cases). Uviller offers the interesting suggestion that police tend to overestimate restrictions on their authority, see Uviller, *supra* note 14, at 79, which might explain why police are reluctant to move in directions suggested by favorable court rulings.

[FN432]. See generally Thomas, *supra* note 29 (lamenting the lack of empirical data on confession rates); Cassell & Hayman, *supra* note 47 (agreeing with Thomas on this point); see also generally Thomas, *supra* note 105 (concluding that we must accept the hypothesis of a constant stream of confessions until we have more empirical evidence).

[FN433]. Seeburger & Wettick, *supra* note 32, at 6 -7. Sex crimes and auto larceny were artificially underrepresented in the sample. *Id.* at 7.

[FN434]. *Controlling Crime Hearings*, *supra* note 45, at 200.

[FN435]. *Id.* at 1120.

[FN436]. Witt, *supra* note 89, at 323.

[FN437]. See Yale Project, *supra* note 8, at 1537.

[FN438]. See *Controlling Crime Hearings*, *supra* note 45, at 223 (Kings County study of "crimes such as homicide, robbery, rape, and felonious assaults"); Green, *supra* note 155, at 16 (Kansas City study of "suspects"); Seeburger & Wettick, *supra* note 32, at 26 n.51 (New Orleans study of "persons arrested").

[FN439]. Seeburger & Wettick, *supra* note 32, at 11 (table 1). Separate data (not before-and-after data) gathered from detective's files over the summer of 1967 found the confession rate for murder to be higher than for other crimes (40% vs. 26.6% on average), but this is likely an anomaly caused by the tiny sample involved -- only two murder confessions. *Id.* at 13 (table 3).

[FN440]. *Id.* at 11 (table 1). The explanation for the small decline for sex offenses may be that the confession rate for such crimes was by far the lowest pre- Miranda rate (only 21.9%) and therefore may not have had very far to fall under the Miranda rules.

[FN441]. See Barrie L. Irving & Ian K. McKenzie, *Police Interrogation: The Effects of the Police and Criminal Evidence Act 1984*, at 95 (1989).

[FN442]. Cassell & Hayman, *supra* note 47 (47.1% of property offenders questioned successfully versus 35.2% violent offenders; sample size of 173; statistically significant only at 90% confidence level).

[FN443]. Neubauer, *supra* note 319, at 105, 111-12. Neubauer found that, in property crimes, 56% of suspects confessed,

while in nonproperty crimes, 32% confessed. *Id.* at 105 (table 2). The "non-property crimes" apparently included some nonviolent offenses, such as offenses involving narcotics and indecent liberties with a minor. *Id.* at 104 n.***; see also Thomas Grisso, *Juveniles' Waiver of Rights: Legal and Psychological Competence* 37 (1981) (finding that juvenile refusal-to-talk rate tended to be greater in cases involving offenses against persons than in property or possession cases).

[FN444]. See Medalie et al., *supra* note 133, at 1414 (table E-2). The statement rate for identified offenses is auto theft 80%; larceny-theft 62%; housebreaking 58%; assault 57%; homicide 57%; drug offenses 50%; robbery 35%; sex offenses 33%; weapons 25%. *Id.* at 1415 (table E-2).

[FN445]. Vera Inst. of Justice, *supra* note 24, at 33, 43.

[FN446]. Seeburger & Wettick, *supra* note 32, at 14 n.37. The D.C. study also found that suspects charged with property offenses are less likely to request counsel. Medalie et al., *supra* note 133, at 1416 (table E-3(2)).

[FN447]. See Michael McConville, *Royal Comm'n on Criminal Justice, Corroboration and Confessions: The Impact of a Rule Requiring that no Conviction can be Sustained on the Basis of Confession Evidence Alone* 32 (1993) (reporting that police success in obtaining confessions is strongly associated with offense type, ranging from 68.0% for taking without consent, 65.7% for theft, 64.8% for burglary, 62.5% for drug offenses, down to 39.0% in offenses involving personal violence, 36.8% in criminal damage cases, and 23.9% in public order offenses); Barry Mitchell, *Confessions and Police Interrogation of Suspects*, 1983 *Crim. L. Rev.* 596, 602 (76% confession rate for property crimes, but only 64% for crimes of violence); Stephen Moston et al., *The Incidence, Antecedents and Consequences of the Use of the Right to Silence During Police Questioning*, 3 *Crim. Behav. & Mental Health* 30, 37 (1993) (right of silence used in about 23% of serious cases, but only 8% of trivial cases). But see Baldwin & McConville, *supra* note 196, at 25 -26 (no consistent relationship found). The British data also suggest that suspects request counsel more often in more serious cases. See David Brown, *Detention at the Police Station under the Police and Criminal Evidence Act 1984*, at 22 (1989); Andrew Sanders et al., *Advice and Assistance at Police Stations and the 24 Hour Duty Solicitor Scheme* 30 (1989).

[FN448]. Yale Project, *supra* note 8, at 1647.

[FN449]. Simon, *supra* note 318, at 198 - 99. Simon suggests that the impact of Miranda is thus limited to professionals. *Id.* at 199. To make his point, Simon reports the following story:

In the late 1970s, when men by the names of Dennis Wise and Vernon Collins were matching each other body for body as Baltimore's premier contract killers and no witness could be found to testify against either, thing got to the point where both the detectives and their suspects knew the drill:

Enter room.

Miranda.

Anything to say this time, Dennis?

No, sir. Just want to call my lawyer.

Fine, Dennis.

Exit room. *Id.* at 198.

[FN450]. Neubauer, *supra* note 319, at 105 (table 2).

[FN451]. *Id.* at 105 (table 2).

[FN452]. *Id.* at 104 (table 1).

(Cite as: 90 Nw. U. L. Rev. 387)

[FN453]. Yale Project, *supra* note 8, at 1644.

[FN454]. *Id.* (figures derived from table A) (statistically significant at the .05 level); see also Grisso, *supra* note 443, at 37 (stating that for juveniles, "refusal to talk tended to increase with the number of prior felony referrals at the time of interrogation"); Hart, *supra* note 365, at 14, 16 (reporting that successful interrogators find that "[p]rofessional criminals are ... hard to question" and that "even the most finely honed tactics often fail"; "[i]f they're professionals, they pretty much know ... not to say word one").

[FN455]. Leo, *supra* note 145, at 277.

[FN456]. See Royal Comm'n on Criminal Justice, Report 51 (1993) (reporting that police found experienced criminals less likely to answer questions); Softley, *supra* note 195, at 69, 75 (observing that suspects with a criminal record are significantly more likely to exercise right to silence and to request counsel); Moston et al., *supra* note 447, at 38 (table 4) (finding that 21% of suspects with criminal history stayed silent as compared with only 9% of suspects without). But cf. Moston et al., *supra*, note 447, at 39 (table 7) (interaction of legal advice with criminal history complicates relationship). A prior record effect is reported in a 1968 Denver study. See Leiken, *supra* note 365, at 20 -21 (finding that suspects with nine or more previous arrests were slightly less likely to confess and that suspects with more than one prior felony conviction were slightly less likely to confess). However, the samples involved in reaching this conclusion are so small as to make this conclusion extremely fragile.

[FN457]. Cassell & Hayman, *supra* note 47 (finding no difference and speculating that failure to find such an effect might stem from a broad definition of "prior record").

[FN458]. Vera Inst. of Justice, *supra* note 65, at 138 (finding that "the adult criminal justice system may not be catching in its net the kind of criminal citizens worry about most -- the violent stranger").

[FN459]. See *supra* notes 272-74 and accompanying text.

[FN460]. See *supra* Table 2 (excluding Kings County and New Orleans estimates as too high and excluding Salt Lake County estimate for other reasons).

[FN461]. See *infra* note 472.

[FN462]. See, e.g., Kenneth R. Kreiling, DNA Technology in Forensic Science, 33 *Jurimetrics J.* 897 (1993); M.A. Farber, Key Fiber Evidence in Atlanta Case Could be Focus of Long Legal Battle, *N.Y. Times*, July 1, 1981, at A15.

[FN463]. See Peter W. Greenwood et al., *The Criminal Investigation Process* 144 (1977).

[FN464]. Cf. Walker, *supra* note 362, at 140 - 42 (collecting empirical evidence suggesting that improvements in detective work do not change the crime clearance rate).

[FN465]. Feeney et al., *supra* note 17, at 155 (of 400 robbery cases, 3 involved fingerprints; of 419 burglary cases, 8 involved fingerprints; of 66 assault cases, 3 involved fingerprints); Greenwood et al., *supra* note 463, at 154 (table 10 -3) (less than 2% of burglary cases solved through fingerprints); Vera Inst. of Justice, *supra* note 65, at 82 (only 1 of 20 burglary defendants apprehended through fingerprint match). See generally Walker, *supra* note 362, at 142 ("In reality ... fingerprints rarely solve crimes.").

[FN466]. See, e.g., Floyd Feeney et al., Arrests Without Conviction: How Often They Occur and Why -- Final Report -- Appendix Volume C- 45 (1983) (table C-16 -12).

[FN467]. Baldwin & McConville, *supra* note 196, at 19.

[FN468]. *Id.* at 19.

[FN469]. Michael McConville, Corroboration and Confessions: The Impact of a Rule Requiring That No Conviction Can Be Sustained on the Basis of Confession Evidence Alone 14 (1993); see also John Baldwin & Timothy Moloney, Royal Comm'n on Criminal Justice, Supervision of Police Investigation in Serious Criminal Cases 55 (1992) (observing that special forensic techniques rarely employed); Irving, *supra* note 194, at 116 -17 (reporting that police officers believe that forensic evidence rarely solves cases).

[FN470]. See Yale Project, *supra* note 8, at 1588 & n.180.

[FN471]. See Pauline Morris, Royal Comm'n on Criminal Procedure, Police Interrogation: Review of Literature 13 (1980) (Research Study No. 3); Richard H. Kuh, The "Rest of Us" in the "Policing the Police" Controversy, 57 J. Crim. L., Criminology & Police Sci. 244, 245 (1966); Van Kessell, *supra* note 7, at 129; see also Leo, *supra* note 267, at 99 (officer explained that "getting a confession makes the investigator's job a lot easier, and his work more efficient. If he gets a confession (or even good admissions) he doesn't have to spend hours tracking down witnesses, running fingerprints, putting together line-ups, etc.").

[FN472]. See, e.g., [Escobedo v. Illinois, 378 U.S. 478, 488 - 89 \(1964\)](#) ("a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation") (citing Staff of Senate Comm. on Judiciary, 81st Cong., 1st Sess., Report of Subcommittee to Investigate Administration of the Internal Security Act (Comm. Print Feb. 25, 1956) and noting "false confessions obtained during the Stalin purges of the 1930s").

[FN473]. Jonathan Rubinstein, Just Adding More Police is a Cop-Out, San Diego Union-Trib., Mar. 7, 1994, at B5.

[FN474]. Simon, *supra* note 318, at 192.

[FN475]. See *id.* at 75; see also Irving, *supra* note 194, at 116.

[FN476]. Cf. Peter W. Greenwood, The New York City Rand Inst., An Analysis of the Apprehension Activities of the New York City Police Dep't 31 (1970) (recounting conflicting data on the workload-affects-case-success hypothesis).

[FN477]. Leo, *supra* note 145, at 373.

[FN478]. Simon, *supra* note 318, at 453.

[FN479]. *Id.* at 456.

[FN480]. *Id.* at 458.

[FN481]. See Witness Intimidation Called Growing Problem, N.Y. Times, Aug. 7, 1994, at A13. See generally [Paul G. Cassell, Balancing the Scales of Justice: The Case for and Effects of Utah's Victims' Rights Amendment, 1994 Utah L. Rev.](#)

[1373, 1410](#) (collecting sources on problem of witness intimidation).

[\[FN482\]](#). See Hart, *supra* note 365, at 15 (reporting that experienced, expert interrogator in Albuquerque believes " 'the importance of interrogation is increasing because it's getting harder and harder to get witnesses to testify' ").

[\[FN483\]](#). See generally George P. Fletcher, *With Justice for Some* (1995); Skolnick & Leo, *supra* note 369, at 9.

[\[FN484\]](#). See *supra* Table 2 (confessions necessary in 61.0% of confession cases in Salt Lake County in 1994; studies in the 1960s found confessions necessary in 26%).

[\[FN485\]](#). See *supra* notes 433 -38 and accompanying text.

[\[FN486\]](#). Souris, *supra* note 166, at 263 - 64.

[\[FN487\]](#). Seeburger & Wettick, *supra* note 32, at 15 (table 4).

[\[FN488\]](#). Baldwin & McConville, *supra* note 196, at 33.

[\[FN489\]](#). Neubauer, *supra* note 319, at 106.

[\[FN490\]](#). See Forst et al., *supra* note 48, at 23, 25 (tables 3.3, 3.5) (physical evidence available in 65% of nonviolent property offenses, 50% of robbery offenses, and 32% of other violent offenses). However, Forst and his colleagues also report that two lay witnesses are available for slightly more robberies and other crimes of violence than for property crimes. *Id.* at 23 (table 3.3) (48% for robbery, 39% for other violent offenses, 36% for nonviolent property offenses).

[\[FN491\]](#). William J. Stuntz, [Lawyers, Deception, and Evidence Gathering, 79 Va. L. Rev. 1903, 1932 \(1993\)](#) (citing U.S. Dept't of Justice, *Sourcebook of Criminal Justice Statistics* 546 (table 5.53) (Timothy J. Flanagan & Kathleen Maguire eds., 1991)).

[\[FN492\]](#). *Id.*

[\[FN493\]](#). [Potter Stewart, The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Colum. L. Rev. 1365, 1394 \(1983\)](#); see Davies, *supra* note 6, at 630 ("[T] he exclusionary rule itself generates no cost beyond the implicit tradeoff in the Fourth Amendment between the apprehension of criminals and the preservation of civil liberties.").

[\[FN494\]](#). But see [Akhil R. Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 793 - 95 \(1994\)](#) (suggesting difficulties with this position).

[\[FN495\]](#). [417 U.S. 433 \(1974\)](#).

[\[FN496\]](#). *Id.* at 443 - 44.

[\[FN497\]](#). *Id.* at 446; see [Withrow v. Williams, 113 S. Ct. 1745, 1752- 53 \(1993\)](#) (collecting numerous cases describing Miranda rights as " 'prophylactic' in nature").

[\[FN498\]](#). For further explanation of this point, see generally Grano, *supra* note 23, at 173 - 98; Paul G. Cassell, *The Costs of the Miranda Mandate : A Lesson in the Dangers of Inflexible, "Prophylactic" Supreme Court Inventions*, 28 *Ariz. St. L.J.*

(forthcoming 1996).

[FN499]. See infra notes 511-19 and accompanying text.

[FN500]. Of course, even isolated instances of coerced confessions should be strongly condemned.

[FN501]. National Comm'n on Law Observance and Enforcement, Report on Lawlessness in Law-Enforcement 3 (1931); see also Emanuel H. Lavine, *The Third Degree: A Detailed and Appalling Expose of Police Brutality* (1930); Note, *The Third Degree*, 43 Harv. L. Rev. 617 (1930).

[FN502]. [297 U.S. 278 \(1936\)](#).

[FN503]. Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 *Crime, Law & Soc. Change* 35, 52 (1992) ("Although Miranda is the most famous confession case, it was Brown that exercised the greatest influence on coercive practices").

[FN504]. Leo, *supra* note 267, at 97.

[FN505]. Leo, *supra* note 503, at 49.

[FN506]. See Hart, *supra* note 365, at 8 ("Ironically, ... even more credit [for reducing brutality] should go to the authors of interrogation manuals [than to the courts]. They convinced cops that not only was violence bad, but that there was no need to resort to it.") (quoting University of Michigan law professor Yale Kamisar).

[FN507]. See generally Thomas J. Deakin, *Police Professionalism: The Renaissance of American Law Enforcement* (1988) (discussing the professionalization of American police forces); Robert M. Fogelson, *Big-City Police* 219 (1977) ("[M]ost departments had been pretty much transformed in the thirty-years or so since the Wickersham Commission report of 1931.").

[FN508]. Leo, *supra* note 267, at 38.

[FN509]. *Id.* at 51.

[FN510]. Leo, *supra* note 145, at 357 (citing American Bar Foundation Study Documents, Univ. of Wisconsin, Madison, Criminal Justice Library).

[FN511]. Fred P. Graham, *The Self-Inflicted Wound* 22 (1970); see Fred E. Inbau & James P. Manak, *Miranda v. Arizona -- Is it Worth the Cost?*, *Prosecutor*, Spring 1988, at 31, 36.

[FN512]. [Miranda v. Arizona, 384 U.S. 436, 447, 448 \(1966\)](#); see also [id. at 450, 499](#) (Clark, J., dissenting) ("[T]he examples of police brutality mentioned by the Court are rare exceptions to the thousands of cases that appear every year in the law reports.").

[FN513]. President's Comm'n on Law Enforcement and Admin. of Justice, *The Challenge of Crime in a Free Society* 93 (1967); see James Q. Wilson, *Varieties of Police Behavior* 48 (1968); Leo, *supra* note 503, at 52.

[FN514]. *Controlling Crime Hearings*, *supra* note 45, at 350, 351.

[FN515]. See *supra* notes 116 -26 and accompanying text.

(Cite as: 90 Nw. U. L. Rev. 387)

[FN516]. Yale Project, *supra* note 8, at 1549.

[FN517]. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 326 (1991). Professor Gerald M. Caplan has suggested that "[b]efore Miranda, charges of physical force, questioning in relays, and sustained incommunicado detention were common; after Miranda, they became far less frequent.... [Miranda] curbed the police in their historic excesses" Caplan, *supra* note 383, at 1382- 83. He acknowledges that "this observation cannot be documented by reference to particular studies," but asserts that it "does not seem controversial." *Id.* at 1383 n.38. For the reasons given in this Article, Caplan's opinion is controversial; indeed, given the empirical evidence collected here, it is incorrect. The timing on this scenario fails, as it attributes changes in police behavior that were occurring well before Miranda (and perhaps continuing at times distant from Miranda) to the decision itself.

[FN518]. Wayne R. LaFave, *Arrest: The Decision to Take a Suspect into Custody* 386 (1965); see also Barrett, *supra* note 306, at 42 (reporting California data in 1960 that most interrogations lasted under two hours).

[FN519]. Yale Project, *supra* note 8, at 1558.

[FN520]. Saul M. Kassir & Lawrence S. Wrightsman, *Confession Evidence*, in *The Psychology of Evidence and Trial Procedure* 67, 77 (Saul M. Kassir & Lawrence S. Wrightsman eds., 1985).

[FN521]. Such challenges are rarely made today and even more rarely granted. See *supra* notes 15 -19 and accompanying text (discussing small numbers of motions to suppress).

[FN522]. See Younger, *supra* note 175, at 256 (table I) (reporting that prosecutors rejected 2 out of 202 requests for complaints because statement "not admissible due to Dorado," the California predecessor to Miranda).

[FN523]. *Id.* at 257 (2 of 139 confessions not received). These two were rejected for reasons other than the Dorado requirements, *id.*, suggesting that they may have been rejected because of voluntariness concerns.

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

[FN524]. *Miranda v. Arizona*, 384 U.S. 436, 505 (1966) (Harlan, J., dissenting).

[FN525]. See Rosenberg & Rosenberg, *supra* note 4, at 78 ("A nationwide epidemic of ruthless police interrogation could be eradicated by distributing small printed cards to the alleged culprits and instructing that the contents be read to apprehensive suspects."); Evelle J. Younger, *Prosecution Problems*, 53 A.B.A. J. 695, 698 (1967) (" Miranda will not affect the brutal or perjurious policeman -- he will continue to extract confessions without reference to the intonations of the Supreme Court; and when he testifies, he will simply conform his perjury to the latest ground rules.").

[FN526]. See White, *supra* note 2, at 13.

[FN527]. Leiken, *supra* note 365, at 22 (finding that defendants claimed, after Miranda, that police had made promises or threats to get confessions).

[FN528]. Milner, *supra* note 336, at 227.

[FN529]. OLP Pre-Trial Interrogation Report, *supra* note 13, at 98.

[FN530]. *Id.*; cf. George C. Thomas, III & Marshall D. Bilder, Aristotle's Paradox and the Self-Incrimination Puzzle, 82 J. Crim. L. & Criminology 243, 278 (1991) (noting the paradoxical quality of the Miranda debate in which the decision's defenders frequently argue that it has had little effect).

[FN531]. See, e.g., Bottoms & McClean, *supra* note 197, at 115, 16 (94% British admission rate among defendants pleading guilty; only 4% claimed that police forced them to confess); Irving, *supra* note 194, at 133, 148 (65% British confession rate with observers present; no physical violence of any kind observed and no formal complaints of maltreatment); Irving & McKenzie, *supra* note 441, at 93 - 94 (64% British admission rate with observers present despite "virtual elimination" of persuasive questioning tactics under new reform rules); Miller, *supra* note 207, at 38, 65 (71.6% Canadian confession rate with videocameras running and short periods of questioning; no cases of police misbehavior on tape and "[i]f anything, police questioning appears to be excessively careful to avoid all possible suggestions of force, threats, inducements, or the creation of an atmosphere of oppression"; allegations of misconduct before taping not a major problem); Softley, *supra* note 195, at 80, 85 (61% British confession rate with observers present; in many cases, no special tactics noted; police never resorted to use or threat of physical violence and psychological pressure not extreme).

[FN532]. One other reason for doubting that the disappearance of coercion affected confession rates is that the interrogation literature suggests that coercion may actually hinder police efforts to obtain confessions. Inbau et al., *supra* note 212, at 5 (explaining that verbal or physical abuse of a suspect "can severely hinder a subsequent interrogation by a competent interrogator"); Hart, *supra* note 365, at 10 (reporting that expert FBI interrogator believes " '[w]hen an interviewer starts getting aggressive and shouting, most people clam up.... Taking a hard, forceful line often creates more barriers' "); cf. O. John Rogge, Why Men Confess 198 (1959) ("[T]he KGB looks upon direct physical brutality as an ineffective method of obtaining the compliance of the prisoner. Its opinion in this regard is shared by police in other parts of the world.") (internal quotation omitted).

[FN533]. Note that the claim is limited to the argument that the confession rate drops found in the before-and-after studies from 1966 to 1967 are not explained by a reduction in coerciveness. One could believe that police interrogation has generally become less coercive over the last several decades and still accept this claim.

[FN534]. See, e.g., Ellis, *supra* note 222, at 848; cf. [George C. Thomas III, An Assault on the Temple of Miranda, 85 J. Crim. L. & Criminology 807, 814 \(1995\)](#) (calling for more research on this question).

[FN535]. To be useful for public policy purposes, the claim would have to be that Miranda has some special effect in preventing the conviction of innocent defendants, not just defendants generally, as making prosecution more difficult always might help some innocent person avoid conviction. See Sidney Hook, Common Sense and the Fifth Amendment 32-33 (1957); see also Stephen J. Schulhofer, Some Kind Words for the Privilege Against Self-Incrimination, 26 Val. U. L. Rev. 311, 331 (1991).

[FN536]. See *infra* notes 577- 86 and accompanying text (discussing value of videotaping in protecting innocent persons).

[FN537]. See *infra* notes 636 - 45 and accompanying text (advancing this argument).

[FN538]. See, e.g., Gudjonsson, *supra* note 203.

[FN539]. *Id.* at 228.

[FN540]. Cf. Yale Project, *supra* note 8, at 1611 (reporting that "most detectives claim an innocent man has never confessed in New Haven"). Again, this is not to suggest that any such case is anything other than a great tragedy.

[FN541]. See Gudjonsson, *supra* note 203, at 232 (noting common personality factor of false confessors of "good trust of people in authority"); Gisli H. Gudjonsson, One Hundred Alleged False Confession Cases: Some Normative Data, 29 *Brit. J. Clinical Psychol.* 249, 249 (1990) (finding alleged false confessors highly suggestible and compliant).

[FN542]. See, e.g., Gudjonsson, *supra* note 203, at 252 (discussing case of Peter Reilly, who did not exercise his Miranda right to a lawyer because "I hadn't done anything wrong"); Roger Parloff, 1993: False Confessions, *Am. Law.*, Dec. 1994, at 33, 34 (reporting that suspect who would later give false confession waived rights because "I had nothing to hide"). See generally Corey J. Ayling, Comment, Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions, 1984 *Wis. L. Rev.* 1121, 1194 - 98 (arguing that Miranda rules have limited utility in preventing false confessions).

[FN543]. Gudjonsson, *supra* note 203, at 226.

[FN544]. Note, Voluntary False Confessions: A Neglected Area in Criminal Administration, 28 *Ind. L.J.* 374, 380 n.26 (1953).

[FN545]. Skolnick & Leo, *supra* note 369, at 3, 8.

[FN546]. Hugo A. Bedau & Michael L. Radelet, [Miscarriages of Justice in Potentially Capital Cases](#), 40 *Stan. L. Rev.* 21, 57 (1987) (table 6).

[FN547]. See [Stephen J. Markman & Paul G. Cassell, Protecting the Innocent: A Response to the Bedau-Radelet Study](#), 41 *Stan. L. Rev.* 121 (1988).

[FN548]. Bedau & Radelet, *supra* note 546, at 57.

[FN549]. Skolnick & Leo, *supra* note 369, at 10 (citing C. Ronald Huff et al., *Guilty Until Proven Innocent: Wrongful Conviction and Public Policy*, 32 *Crime & Delinq.* 518, 523 (1986)).

[FN550]. Huff and his colleagues' "conservative" estimate is based on a survey of judges, prosecutors, and others familiar with the Ohio and American criminal justice systems, in which most of the respondents indicated that the number of wrongful convictions in the United States was more than "never" and "less than one percent." Huff, *supra* note 549, at 523 (table 2). From these data, Huff and his colleagues simply attached the value of .5% (one in 200) to the estimated number of wrongful convictions. Of course, the range covered by the response "less than one percent" extends as low as .0001% (one in a million). Huff and his colleagues offer no good reason for estimating the value to be .5% rather than .0001%. Indeed, the only specific estimate of a total number of wrongful convictions came from a judge in Ohio who, based on his familiarity with all of the state's major cities, suggested that he had the "strong suspicion that each year in Ohio, at least one or two dozen persons are convicted of crimes of which they are innocent." *Id.* at 522. Assuming that a "strong suspicion" standard is appropriate here, one can combine a conservative estimate of a "dozen" wrongful convictions each year in Ohio with the fact that approximately 3.6% of all index crimes are committed in Ohio, see Fed. Bureau of Investigation, *supra* note 299, at 60 - 62 (table 4), to suggest that approximately 333 (12 x (1/3.6%)) wrongful convictions occur around the country each year.

[FN551]. The error rate can be derived using the methodology of Huff and his colleagues, see Huff et al., *supra* note 549, at

(Cite as: 90 Nw. U. L. Rev. 387)

523, as follows: total 1993 arrests for index offenses = 2,848,400, see Fed. Bureau of Investigation, *supra* note 299, at 217; conviction rate = 50%; total convictions, therefore, are 1,424,200. Dividing wrongful convictions (350) by total convictions produces an error rate of .02%. The error rate would be about four times lower if one used total arrests rather than arrests for only index crimes.

[FN552]. Eyewitness identification was found to be the major factor, responsible for nearly 60% of the cases of wrongful conviction in their data base. Huff et al., *supra* note 549, at 524. Police error was the next most important factor, but they offered no examples of error corresponding to confessions. See *id.* at 528 -29. "False confessions" were mentioned briefly at the end of the catalogue of causes of errors as a factor which is "either less prevalent or about which less is known." *Id.* at 533; see also Arye Rattner, *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, 12 *Law & Hum. Behav.* 283, 286 (1988). But cf. Ruth Brandon & Christie Davies, *Wrongful Imprisonment: Mistaken Convictions and Their Consequences* 47 (1973) (finding false confessions to be the leading cause of wrongful imprisonment after misidentification in Britain).

[FN553]. For example, even making the dubious assumption that false confessions fell ten-fold after Miranda, that would mean roughly 350 fewer false confessions (35 false confessions x 10 -fold decrease) out of a total number of roughly 100,000 lost cases from Miranda.

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

[FN554]. Stuntz, *supra* note 491, at 1931.

[FN555]. *Id.* It should be noted that Stuntz believes that some of the Miranda rules, such as the waiver rule, also help innocent suspects. See *id.* at 1948.

[FN556]. See Witt, *supra* note 89, at 328 (table 5) (finding no significant change in ability of suspects to clear themselves after Miranda).

[FN557]. See Van Kessel, *supra* note 7, at 129 (advancing similar argument).

[FN558]. See *supra* Table 3 (pre- Miranda confession rates might be around 60%).

[FN559]. See *supra* notes 183 - 85 and accompanying text (reliable studies suggest 16% drop in confession rate).

[FN560]. Cf. Yale Project, *supra* note 8, at 1586 (suggesting that 2 of 90 suspects (2%) were believed by the study's authors to be innocent).

[FN561]. The bigger haystack problem is not refuted by the fact that the hypothetical prosecutor will save time from the 3.8% of all cases that will no longer be prosecutable because of Miranda. To begin, the prosecutor must spend time culling the unprosecutable cases. Moreover, the pool of nonconfessors might shrink from 55 to 51, leaving more cases without

confessions to wade through than before Miranda. Finally, the prosecutor will likely need to spend more time in assembling cases against the nonconfessors. See *supra* note 319 (suspects more likely to go to trial when they have not confessed).

[FN562]. Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671, 680 (1968); see [Akhil R. Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857, 861-62 \(1995\)](#) (advancing this position with respect to current Fifth Amendment interpretations); Dripps, *supra* note 62, at 716 (advancing this position with respect to the Fifth Amendment in general); Erwin N. Griswold, *The Right to be Let Alone*, 55 Nw. U. L. Rev. 216, 223 (1960) (conceding that "[i]t was a mistake" to attempt to defend the Fifth Amendment on the ground that it protects the innocent). But see Schulhofer, *supra* note 535, at 330-33 (arguing that the Fifth Amendment helps innocent persons).

[FN563]. The low percentage is derived by using all cases in the criminal justice system as the denominator. One might reasonably argue that, from the perspective of criminal justice reform, the proper focus is not on all cases in the system, but rather only on those cases that cannot be successfully prosecuted. Because about half of all cases today "fail" for one reason or another, see Forst et al., *supra* note 48, at 167 (figure 1), Miranda is responsible for 7.6% of the failed cases in the system.

[FN564]. See *supra* notes 292-346 and accompanying text.

[FN565]. [United States v. Leon](#), 468 U.S. 897, 908 n.6 (1984) (citing Davies, *supra* note 6, at 621).

[FN566]. *Id.*

[FN567]. Compare 3.8% lost cases from Miranda with 0.6% to 2.35% lost cases from the exclusionary rule.

[FN568]. See generally Cassell, *supra* note 481, at 1376-85 (considering the crime victim's perspective).

[FN569]. See OLP Pre-Trial Interrogation Report, *supra* note 13, at 125-27 (describing the case of Ronnie Gaspard).

[FN570]. See David Clifton, *Unsolved Murders Reach 13 in 1994: Grief Goes On When Killers Go Unpunished*, Salt Lake Trib., Jan. 2, 1995, at D1.

[FN571]. Caplan, *supra* note 383, at 1384-85.

[FN572]. Cf. Supplemental Brief for the United States as Amicus Curiae, Supporting Reversal [on reargument] at 3, [Illinois v. Gates](#), 462 U.S. 213 (1983) (No. 81-430) ("[T]he freeing of even one guilty defendant by virtue of an irrational rule may exact a greater cost than society should be expected to bear.").

[FN573]. Nor does this Article attempt to address broader issues of interpreting Fifth Amendment self-incrimination principles. For thoughtful discussions of these issues, see Amar & Lettow, *supra* note 562; OLP Pre-Trial Interrogation Report, *supra* note 13, at 107-17.

[FN574]. ALI Report, *supra* note 56, at 11-15; American Law Inst., *A Model Code of Pre-Arrest Procedure* s 130.4 (1975); see also Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in *Criminal Justice in Our Times* 85-86 (A.E. Dick Howard ed., 1965).

[FN575]. See, e.g., Craig M. Bradley, *The Failure of the Criminal Procedure Revolution* 85 (1993); OLP Pre-Trial Interrogation Report, *supra* note 13, at 105; Phillip E. Johnson, *A Statutory Replacement for the Miranda Doctrine*, 24 Am.

Crim. L. Rev. 303 (1986); George Dix, Putting Suspects' Confessions on Videotape, *Manhattan Law.*, Apr. 25, 1989, at 12; Leo, *supra* note 145, at 401-14; see also Jonathan I.Z. Agronsky, *Meese v. Miranda: The Final Countdown*, *A.B.A. J.*, Nov. 1, 1987, at 86, 90 (reporting that "[e]xperts on both extremes of the political spectrum were enthusiastic about the idea of videotaping confessions").

[FN576]. See *supra* notes 524 -30 and accompanying text.

[FN577]. William A. Geller, U.S. Dept. of Justice, *Police Videotaping of Suspect Interrogations and Confessions: A Preliminary Examination of Issues and Practices -- A Report to the National Institute of Justice* 115 -19 (1992); Ingrid Kane, Note, [No More Secrets: Proposed Minnesota State Due Process Requirement that Law Enforcement Officers Electronically Record Custodial Interrogation and Confessions](#), *77 Minn. L. Rev.* 983, 1011 (1993) (calling for recording of interrogations because suspects "would be afforded more protection from physical and psychological abuse"); Comment, [Let's Go to the Videotape: A Proposal to Legislate Videotaping of Confessions](#), *3 Alb. L.J. Sci. & Tech.* 165, 175 -76 (1993) (collecting evidence that videotapes help control police brutality); Duncan Campbell, *Videos of Interviews "Would Help Police"*, *Guardian* (London), Dec. 9, 1991, at 8 (reporting that videotaped suspects believed opportunities for abuse were reduced); see also [Frederick C. Foote, Note, Self-Incrimination Issues in the Context of Videotaping Drunk Drivers: Focusing on the Fifth Amendment](#), *10 Harv. J.L. & Pub. Pol'y* 631, 638 (1987) (describing interrogated suspect who looked into the camera and said "I guess I can't accuse you guys of police brutality").

[FN578]. But see J.A. Barnes & N. Webster, *Police Interrogation: Tape Recording* 44 (1980) (reporting that international survey found that "challenges to the authenticity of recordings of police interrogations seldom, if ever, arise" and tamper-proof security devices are available); Geller, *supra* note 577, at 119 ("[W]e found not a single allegation in any jurisdiction we visited that police or prosecutors had intentionally tampered with recorded videotapes"); Grant, *supra* note 207, at 75 (reporting that two-year Canadian study of videotaping found no allegations of tampering with tapes); Comment, *supra* note 577, at 179 ("most recorders are now equipped with an internal time/date stamp" and "noticeable breaks in the continuity of the tape may lead to questions concerning what happened during the gaps").

[FN579]. See Rosenberg & Rosenberg, *supra* note 4, at 102 n.205 (asserting, without empirical or other support, that a "recording requirement is too easily subject to circumvention, permitting officials to coerce the suspect before capturing an ostensibly voluntary account on film or tape"). But see Geller, *supra* note 577, at 117 (only a "few" claims of coercion before or after videotaping in Kansas City); Grant, *supra* note 207, at 42, 77 (two-year Canadian study of videotaping found that allegations of police misconduct about the period before taping have "not turned out to be a major problem in court to date" and in the few allegations of off-camera "rehearsals" the courts did not find a problem with the taped confession; few challenges to statements overall).

[FN580]. See, e.g., Skolnick & Fyfe, *supra* note 368, at 266 ("To the degree possible, we should routinely videotape police conduct during those occasions where propensities to excessive force are most likely to occur: [e.g.,] ... interrogation"); Yale Kamisar, *Foreward: Brewer v. Williams -- A Hard Look at a Discomfiting Record*, *66 Geo. L.J.* 209, 243 (1977) (concluding that without recording the *Miranda* "temple" is "a house built upon sand"); Leo, *supra* note 145, at 410 (concluding after field research on police interrogation and extensive review of the literature on police brutality that "the video-taping of custodial interrogations will reduce police improprieties during interrogation"); see also Brandon & Davies, *supra* note 552, at 64 (recommending recording of confessions to avoid wrongful convictions).

[FN581]. See, e.g., [Miller v. Fenton](#), *796 F.2d 598 (3d Cir. 1986)*; see also Caplan, *supra* note 184, at 1475 (recording "would provide an accurate record by which the judiciary could evaluate the police pressure on the suspect"); cf. G. Daniel Lassiter

& Audrey A. Irving, Videotaped Confessions: The Impact of Camera Point of View on Judgments of Coercion, 16 J. Applied Soc. Psychol. 268 (1986) (finding that camera point of view is important in evaluating coercion).

[FN582]. See, e.g., [Arthur E. Sutherland, Jr., Crime and Confession, 79 Harv. L. Rev. 21, 31-32 n.28 \(1965\)](#) (noting reversal of conviction in case involving confession where "the persistent questioning in the strong voices of the two policemen, the low-pitched responses of the weary prisoner asserting his innocence over and over, his final surrender of will, all emerge convincingly from the sound-record").

[FN583]. See Kamisar, *supra* note 580, at 238 - 40. In Australia, because of allegations of police "verballing" (that is, fabricating verbal confessions), the High Court recently held that police must record all confessions or the jury will receive a cautionary instruction suggesting police testimony may be unreliable. [McKinney v. R., 65 A.L.R. 241 \(Austl. 1991\)](#). See generally Bradley, *supra* note 575, at 111; Royal Comm'n on Criminal Justice, Report 60 - 61 (1993) (discussing the admissibility of interrogations that have not been tape-recorded).

[FN584]. See Lawrence S. Wrightsman & Saul M. Kassin, Confessions in the Courtroom 134 -35 (1993) (describing efforts to use examination of tape of confession to demonstrate that it was false); Gisli Gudjonsson, The Psychology of False Confessions, New L.J., Sept. 18, 1992, at 1277 ("As police behaviour becomes more controlled and better monitored by improved procedures, including tape recording, then more attention is likely to be placed on the identification of individual vulnerabilities when disputing the reliability of confession statements").

[FN585]. See Parloff, *supra* note 542. I will not discuss the false confession of a fourth person, who appeared to be motivated to obtain publicity.

[FN586]. *Id.* at 38. To the same effect is Philip Weiss, Untrue Confessions, Mother Jones, Sept. 1989, at 20, 20 ("The police made just one mistake: they turned on a tape recorder during Sawyer's sixteen-hour interrogation. Were it not for that recording, Sawyer would have stayed a nobody, good-bye kind of guy ... who looked like he sure might have killed somebody and had even said as much.").

[FN587]. Videotaping may also allow more effective presentation of the prosecution's case. See Uviller, *supra* note 14, at 186 - 87; Ronald K.L. Collins & David M. Skover, [Paratexts, 44 Stan. L. Rev. 509, 543 n.181 \(1992\)](#).

[FN588]. Geller, *supra* note 577.

[FN589]. *Id.* at 54 (figure derived from table 1).

[FN590]. *Id.* at 108 (figure 21).

[FN591]. *Id.* at 107 (figure 20).

[FN592]. *Id.* at 109, 110, 119 -23, 125, 148, 149.

[FN593]. *Id.* at 82- 83; see also Barnes & Webster, *supra* note 578, at 45 (finding costs for nationwide police recording in Britain minimal provided that routine transcription of the tapes is avoided); Grant, *supra* note 207, at 76 (finding that cost of less than 1% of police force vehicle budget will finance force-wide videotaping system).

[FN594]. Geller, *supra* note 577, at 152; cf. Barnes & Webster, *supra* note 578, at 42, 47 (describing survey results of American police departments that record police interrogations as conveying the impression that advantages outweighed

disadvantages; some indication that suspects were inhibited from talking by recording).

[FN595]. Geller, *supra* note 577, at 103.

[FN596]. *Id.* at 70; see also *id.* at 99 -103 (discussing police concerns about discretionary videotaping becoming mandatory).

[FN597]. Code of Practice on Tape Recording (1988), in Zander, *supra* note 202, at 429. See generally Zander, *supra* note 202, at 124 -32 (discussing the Code of Practice on Tape Recording).

[FN598]. Royal Comm'n on Criminal Justice, Report 26 (1993).

[FN599]. See generally Carole F. Willis et al., *The Tape-Recording of Police Interviews with Suspects: A Second Interim Report* 34 -35, 73 (1988) (discussing the effects of taping on obtaining confessions).

[FN600]. David Dixon, *Politics, Research and Symbolism in Criminal Justice: The Right of Silence and the Police and Criminal Evidence Act*, 20 *Anglo-Am. L. Rev.* 27, 46 (1991). This confirms the conclusion reached by other observers that the recent decline in the confession rate in Britain is attributable to other aspects of the interrogation regulatory regime. See, e.g., *supra* note 203 and accompanying text.

[FN601]. Grant, *supra* note 207, at 28.

[FN602]. *Id.* at 80. The study reported that "[o]nly a small minority refuse 'on camera' to be videotaped (4.8%)." *Id.* at 73 -74. The "refusal-to-be-taped" figure of 4.8% may be artificially deflated because it is derived by taking suspects who refused to be taped and dividing by all suspects, including suspects who were never asked to give a taped statement. *Id.* at 32. The proper measure for such a figure is the number of suspects who refused to be taped divided by the number of suspects asked to give a taped statement. This calculation generates a more worrisome 12.1% (69/569) refusal-to-be-taped rate. See *id.* at 32 (figure derived from table 1). It is not clear from the report whether suspects were interviewed after they refused to be taped. Also cutting against the study's conclusion is the higher incriminating statement rate in the "control" city of Oakville -- 87.0% -- vs. 71.6% in Burlington with videotaping. *Id.* (figures derived from Table 1). However, an alternative explanation for the higher Oakville rate is that police interviewed far fewer suspects overall -- 59% vs. 71% in Burlington. *Id.* at 31. Perhaps the suspects who were interviewed in Oakville were those against whom the police had stronger cases and who were, therefore, more likely to confess. See *supra* note 214 and accompanying text.

[FN603]. Vera Inst. of Justice, *supra* note 71, at 53.

[FN604]. Cassell & Hayman, *supra* note 47 (finding questioning successful 60% of the time for recorded interrogations, 45% for nonrecorded interrogations).

[FN605]. [Stephan v. State, 711 P.2d 1156, 1158 \(Alaska 1985\)](#); see also [Mallott v. State, 608 P.2d 737, 743 n.5 \(Alaska 1980\)](#). Minnesota recently required taping as well. [State v. Scales, 518 N.W.2d 587, 591- 93 \(Minn. 1994\)](#). Other states have rejected such a state constitutional requirement. See, e.g., [State v. Kekona, 886 P.2d 740, 746 \(Haw. 1994\)](#); [Jimenez v. State, 775 P.2d 694, 695 - 97 \(Nev. 1989\)](#); [State v. Villareal, 889 P.2d 419, 427 \(Utah 1995\)](#).

[FN606]. Parloff, *supra* note 542, at 38 (quoting Chief Judge Alexander Bryner of the Alaska Court of Appeals).

[FN607]. *Id.*

[FN608]. Geller, *supra* note 577, at 107 (figure 20).

[FN609]. Inbau et al., *supra* note 212, at 176 -78 (citing Luppó Prins, Special Study for the Members of the Australasian Forces: Scientific and Technical Aids to Police Interview-Interrogation (1983)). But see Arthur S. Aubry, Jr. & Rudolph R. Caputo, *Criminal Interrogation* (3d ed. 1980) (recommending recording).

[FN610]. Geller, *supra* note 577, at 64 - 65 (finding that 4% of police agencies that videotape confessions do so covertly).

[FN611]. [Moran v. Burbine, 475 U.S. 412, 433 n.4 \(1986\)](#); see also Kamisar, *supra* note 11, at 150 (stating that striking a balance "is the way Miranda's defenders -- not its critics -- have talked about the case for the past twenty years").

[FN612]. See Robinson, *supra* note 351, at 482 (reporting that after Escobedo but before Miranda 90% of police and prosecutors said they advised suspects of their right to silence).

[FN613]. Sidney E. Zion, Prosecutors Say Confession Rule Has Not Harmed Enforcement, *N.Y. Times*, May 18, 1966, at 27.

[FN614]. *Id.* The right to counsel warning presumably involved counsel at arraignment, not appointed counsel during interrogation.

[FN615]. Sidney E. Zion, Advice to Suspect Found Police Aid, *N.Y. Times*, Feb. 28, 1966, at 18.

[FN616]. [Miranda v. Arizona, 384 U.S. 436, 483 \(1966\)](#). The Miranda Court went on to equate the limited FBI practice of warning of rights with the Miranda requirements -- an equation that was clearly wrong. See Graham, *supra* note 511, at 181-82 (noting that "important differences" made Miranda "far more generous"); OLP Pre-Trial Interrogation Report, *supra* note 13, at 39 - 40 (calling FBI practice "basically different"); see also [Miranda, 384 U.S. at 521](#) (Harlan, J., dissenting).

[FN617]. After Escobedo, Detroit police gave the following warning to suspects in custody once the investigation began to focus on them: " I am Detective ..., and I wish to advise you that you have a constitutional right to refuse to make any statement. You do not have to answer any questions which are put to you, and anything you do say may be used against you in a Court of Law in the event of prosecution. You are further advised that you have a right to counsel.' " See Souris, *supra* note 166, at 255 n.15.

[FN618]. *Id.* at 255. The Yale Law Journal recounting of the study, see *supra* notes 238 -41 and accompanying text (noting conflicting versions of study), reports a rise in confessions after Escobedo, noting that "confessions were given in 64.7 percent of the 2,620 completed prosecutions in 1961, and 65.6 percent of the 2,234 prosecutions in 1965 completed at the time of the survey." Yale Project, *supra* note 8, at 1641.

[FN619]. See Seeburger & Wettick, *supra* note 32, at 8; see also [Commonwealth v. Negri, 213 A.2d 670 \(Pa. 1965\)](#) (holding that confession not admissible unless suspect has been warned of the right to remain silent and the right to counsel).

[FN620]. Yale Project, *supra* note 8, at 1569.

[FN621]. See *supra* notes 78 - 85 and accompanying text.

[FN622]. See *supra* notes 191-210 and accompanying text.

[FN623]. See ALI Report, *supra* note 56, at 140 (77% of suspects did not execute waiver of rights form in New Orleans, as

inferred from number of suspects who executed form); Vera Inst. of Justice, *supra* note 71, at 76 (68.3% of suspects in a survey of all 22 different precincts in New York City asserted right to silence or their Miranda right to counsel); James Ridella, *Miranda One Year Later -- The Effects*, Pub. Mgmt., July 1967, at 183, 187 (64% of suspects did not execute waiver of rights form in New Orleans, as inferred from number of suspects who executed form); Vera Inst. of Justice, *supra* note 71, at 40 (58.9% of suspects in a six-month survey of one New York precinct in which all interrogations were recorded asserted right to silence or right to counsel); Seeburger & Wettick, *supra* note 32, at 13 n.37 (42.8% of suspects in Pittsburgh "refused to talk"; study describes these suspects as invoking their "constitutional right to remain silent"; figure includes 26.6% of suspects who "requested counsel"); Controlling Crime Hearings, *supra* note 45, at 201 (40.7% of suspects in Philadelphia "refused to give a statement after the Miranda warnings"); Medalie et al., *supra* note 133, at 1361 n.55, 1367 (three of seven suspects (42.9%) in D.C. refused to sign Miranda waiver forms); *id.* at 1372 (29 of 85 defendants -- 34% -- in D.C. requested counsel after police began partial compliance with Miranda); *id.* at 1366 n.68 (30.6% of suspects in D.C. informed the police at some point in the process that they did not wish to talk or to continue to talk); Leiken, *supra* note 365, at 19 (28% of suspects in Denver did not make a statement to police) (figure derived from table 2); Yale Project, *supra* note 8, at 1571 n.135 (18 of 81 -- 22.2% -- suspects in New Haven asked to see a lawyer or a friend); *id.* at 1566 (23 out of 127 -- 19.5% -- suspects in New Haven who were questioned "refused to talk" (figure derived from table 12 by dividing suspects who refused to talk by suspects questioned, which was obtained by subtracting those "not questioned from total interrogations"); Feeney et al., *supra* note 17, at 143 (17.8% of burglary suspects in San Diego refused to answer questions); Yale Project, *supra* note 8, at 1578 (10 of 81 -- 12% -- suspects in New Haven whose conduct could be analyzed invoked right to silence); Seeburger & Wettick, *supra* note 32, at 14 n.37 (17% of suspects in Chicago claimed either their right to remain silent or their right to counsel) (figure derived by implication from numbers of suspects claiming "neither their right to remain silent nor their right to counsel"); Witt, *supra* note 89, at 325 (8.7% of suspects in Seaside City refused to talk); Neubauer, *supra* note 319, at 104 (4.4% of suspects in Prairie City refused to sign custodial interview form acknowledging only that they understood their rights; in 25.4% of cases, no further information was available); 2 Feeney & Weir, *supra* note 18, at 134 (3 of 71 -- 4.2% -- robbery suspects refused to answer questions); Feeney et al., *supra* note 17, at 143 (4.0% of burglary suspects in Jacksonville, Florida refused to answer questions); see also Grisso, *supra* note 443, at 36 (9.4% of juveniles referred to police for felonies refused to talk; refusal rate increased with age, reaching 12-14% for 15 - and 16 -year-olds); *id.* at 185 (5.6% of parents advised children to assert right to silence during interrogation; 2.3% advised children to assert right to counsel).

[FN624]. The wide variance in the percentages is probably explained, in part, by the fact that some studies report figures on suspects who refused to waive their rights while others report suspects who simply declined to make a statement. Of course, refusing to waive rights and refusing to talk about an offense are separate matters, but the studies often fail to distinguish between the two.

[FN625]. Leo, *supra* note 145, at 262.

[FN626]. Cassell & Hayman, *supra* note 47. If suspects who were never given Miranda warnings and suspects who invoked before police were successful are included, 12.1% of all suspects in the sample invoked their rights.

[FN627]. See, e.g., Seeburger & Wettick, *supra* note 32, at 13 n.37.

[FN628]. See *supra* note 267.

[FN629]. See *supra* notes 300 - 11 and accompanying text.

[FN630]. Indirect support for the conclusion that the right to counsel in particular is responsible for confession rate reductions comes from a post-Miranda survey of police officers in Tennessee and Georgia, which found that 42% identified

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

[FN631]. Cf. OLP Pre-Trial Interrogation Report, *supra* note 13, at 107-10 (suggesting modified warnings); Johnson, *supra* note 575, at 304 (same).

[FN632]. See also Johnson, *supra* note 575, at 308 - 09 (advancing similar recommendation).

[FN633]. See Milner, *supra* note 336, at 228.

[FN634]. Continued persistence to convince a suspect to change his mind will, at some point, render a confession involuntary and thus inadmissible under Fifth Amendment principles. Other approaches to handling the problem of continued police pressure could also be considered. See, e.g., Johnson, *supra* note 575, at 305, 310 (proposing that police be allowed to "make a pitch" for cooperation to a reluctant suspect but not engage in a "prolonged campaign of wheedling, coaxing, and nagging").

[FN635]. Cf. [18 U.S.C. s 3501 \(1988\)](#) (restoring the pre- Miranda voluntariness test for admissibility of confessions in federal cases).

[FN636]. See generally [Gordon Van Kessel, Adversary Excesses in the American Criminal Trial](#), 67 *Notre Dame L. Rev.* 403, 487-501 (1992) (noting creation of "inflexible constitutional boundaries" by the Court).

[FN637]. [Miranda v. Arizona](#), 384 U.S. 436, 467 (1966).

[FN638]. See Bradley, *supra* note 575, at 29; OLP Pre-Trial Interrogation Report, *supra* note 13, at 61. This probably was a result of the fact that Miranda's author, Chief Justice Warren, did not really agree with allowing alternatives and thus hedged the language, which had been suggested by other Justices. See OLP Pre-Trial Interrogation Report, *supra*, at 61 (citing Bernard Schwartz, *Super Chief: Earl Warren and his Supreme Court -- A Judicial Biography* 53 -57, 589 - 93 (1983)).

[FN639]. OLP Pre-Trial Interrogation Report, *supra* note 13, at 99.

[FN640]. See *supra* notes 202- 04 and accompanying text (British reforms); *supra* note 206 and accompanying text (Canadian reforms); Law Reform Comm'n of Canada, Working Paper 32: Questioning Suspects (1984) (same); *supra* note 583 (Australian reforms).

[FN641]. Mark Berger, [Legislating Confession Law in Great Britain: A Statutory Approach to Police Interrogations](#), 24 *U. Mich. J. L. Ref.* 1, 64 (1990).

[FN642]. [Miranda](#), 384 U.S. at 467 ("It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities.").

[FN643]. [Id.](#) at 524 (Harlan, J., dissenting).

[FN644]. [Id.](#) at 542 (White, J., dissenting).

[\[FN645\]](#). Id. at 542- 43 (White, J., dissenting).

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

END OF DOCUMENT