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ARTICLE: MIRANDA'S SOCIAL COSTS: AN EMPIRICAL REASSESSMENT

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SUMMARY:
... Justice White argued in his dissenting opinion in *Miranda* that "in 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." ... 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. ... 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. ... 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). ... 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. ... 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. ... The data reviewed in the preceding sections should allow us to make a general estimate of *Miranda's* costs in terms of lost cases. ...

TEXT:
[*389] [EDITOR'S NOTE: PART 1 OF 2. THIS DOCUMENT HAS BEEN SPLIT INTO MULTIPLE PARTS ON LEXIS TO ACCOMMODATE ITS LARGE SIZE.]

INTRODUCTION

Justice White argued in his dissenting opinion in *Miranda* that "in 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." n1 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. n2 For example, the nation's leading criminal procedure hornbook concludes that "little has changed since *Miranda* was decided." n3 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. n4 Many of the most widely used criminal procedure textbooks contain the same definitive pronouncement. n5

[*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. n6 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. n7 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. n8 However, "from a policy perspective, what is needed is not precise numbers so much as a sound estimate of the general level of [*Miranda's*] effects." n9

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." n10 Even *Miranda's* most ardent defenders choose to view the decision in terms of costs and benefits. n11 But any supposed "balancing" of interests requires some attempt to measure the weight on the cost side of the [*391] scales. n12 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. n13 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 lost faith in the system. n14

While these cases are dramatic, defenders of *Miranda* respond -- quitecorrectly, 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. n15 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. n16 Similar conclusions came from a study conducted by Floyd Feeney, Forrest Dill, and Adrianne 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. n17 Other studies suggest a similarly minimal impact of suppression motions on convictions. n18 To complete the picture, [*393] studies find that convictions are rarely reversed on appeal because of a motion to suppress under *Miranda*. n19

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 "the *Miranda* exclusionary rule has had a negligible impact on the ability of the police to obtain confessions." n20 Similarly, Professor Paul Marcus has argued that evidence that suppression motions are rarely granted "mutes the concern" about *Miranda's* harm. n21 Nardulli himself has read his data as supporting the proposition that the "exclusionary rule[] -- as applied to . . . confessions -- has a truly marginal effect on the criminal court system." n22

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." n23 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. n24 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. n25

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. n26 This approach is similar to that used in studies assessing the cost of the Fourth Amendment exclusionary rule. n27

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, n28 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 n29 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*. n30 Studies in a single jurisdiction automatically hold constant a variety of factors that might otherwise confound comparative analysis. n31 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 confessionrates 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. n32 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. n33

The Pittsburgh study concluded that *Miranda* did reduce the confession rate. n34 Before *Miranda* the detectives obtained confessions from 48.5% of suspects; after *Miranda* the rate was 32.3% -- a 16.2% drop n35 in the confession rate. n36 The same findings continued in a second sample drawn in the summer of 1967. The confession rate was an even lower 27.1% n37 -- a drop of 21.4% from the pre-Miranda rate. n38 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. n39 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.

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. n40 More important, conviction rates do not capture all of the "lost cases" from *Miranda*. n41 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. n42 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. n43 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 "offer some support to this explanation." n44 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. n45 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. n46 In addition to grand jury presentment, there are other points at which cases weakened by *Miranda* [*398] were screened out. n47 The criminal justice literature recognizes that prosecutorial screening plays an important role in the process n48 and thus that studies that fail to account for prosecutorial screening are less useful. n49 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, n50 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. n51 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 n52 -- 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. n53 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. n54

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*." n55 Why a sample drawn from a jurisdiction that followed *Miranda* is "biased" when considering the effects of *Miranda* is unclear. n56 In any event, the prevailing view now is that law enforcement generally complies with *Miranda*. n57 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. n58

(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). n59 Cases that went to the grand jury in New York County were the more solid and serious criminal cases. n60 From December 1965 through May 1966, 49.0% of the felony defendants made incriminating statements. n61 After *Miranda* (from July 1966 to December 1966), the number of incriminating statements dropped to 14.5% of [*400] the cases. n62 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. n63 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." n64 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. n65 More importantly, Hogan reported that "only 15% confessed in the six months after the *Miranda* ruling and 49% confessed before." n66 Thus, as then-Assistant Attorney General Stephen Markman has concluded, "barring 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." n67 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." n68 It is also supported by Hogan's separately tabulated data on homicides, which plainly involved post-Miranda questioning of suspects. n69 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. n70

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. n71 From April to October 1967, the Institute collected 806 tape recordings of interrogations in the 20th Precinct in New York City. n72 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%. n73 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%. n74 The 20th Precinct survey found an incriminating statement rateof 23.7%. n75 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. n76 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. n77 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. n78 Following the Supreme Court's June 1964 decision in *Escobedo v. Illinois*, n79 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. n80 Specter estimated that the number of suspects giving statements fell to 80%. n81 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. n82 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. n83 In June 1966, *Miranda* was announced. From that time until February 1967, only 40.7% of individuals arrested gave statements. n84

The Philadelphia study examined "statements" to the police, not "incriminating statements." n85 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, "frequently the statements did not constitute admissions or confessions, but they were very helpful in later investigation." n86 More concrete evidence comes from the Pittsburgh study, which reported that of suspects who talked, roughly half confessed, n87 and from the Vera Institute survey, which found that of suspects who talked, roughly 60% confessed or made incriminating admissions. n88 Other studies suggest similar results. n89 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 n90 produces the following numbers in Philadelphia: An estimated 45% of suspects confessed before *Escobedo*, n91 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*." n92 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 botheredto initiate an interrogation." n93 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. n94

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." n95 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. n96 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. n97 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. n98 Witt reviewed files from 1964 to 1968 for cases dealing with murder, forcible rape, robbery, and burglary. n99 He found only a 2.0% percent drop in the confession rate after *Miranda*, from 68.9% to 66.9%. n100 One possible explanation for the low figure is that Witt examined "onlythose 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." n101 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." n102 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. n103 Finally, even before *Miranda*, the Seaside police were already giving warnings to suspects, as required by a 1965 California Supreme Court decision. n104 Thus, Witt's "before-and-after" *Miranda* figures do not capture any effect on suspects' willingness to confess caused by warnings. n105 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. n106 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. n107 They observed all 127 interrogations at the station. n108 To obtain pre-Miranda data for comparison, the editors also reviewed approximately 200 cases from 1960 to 1965 to compare with their 1966 sample. n109 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." n110 Given that during the summer of 1966 New Haven police were "successful" in questioning 48.2% of the time, n111 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, 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. n112 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." n113 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. n114 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." n115

At the same time, the editors ventured their conclusion that "not much has changed after *Miranda*." n116 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. n117 Beyond that, it appears that the police did not comply with the most harmful *Miranda* rules. n118 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 "near the end of the observation period." n119 Even this card, however, likely would not satisfy *Miranda* because it did not contain any language in which a suspect waived his rights. n120 Moreover, it appears that the typical format for questioning did not include obtaining a waiver. n121 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, n122 perhaps because the editors designed their study *before Miranda* was announced. n123 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. n124 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*. n125 The study's authors admitted as much in noting that "our 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." n126

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," n127 and only three of those eight suspects refused to give a confession. n128 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." n129 Because such statements are suppressible or would never have been obtained if police [*409] complied with *Miranda* (as police now appear generally to do n130), 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. n131 The Yale Study, then, is fully consistent with the studies discussed earlier finding a confession rate decline after *Miranda*. n132

(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. n133 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" n134 -- 175 before

Miranda and 85 after *Miranda*. n135 The data came from the defendants' reporting about what had happened to them. n136 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. n137 If half of the statements were confessions, as suggested previously, n138 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, n139 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. n140 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." n141 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. n142 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. n143 When suspects requested counsel, the officers did not stop questioning, but instead often continued pending the attorney's arrival. n144

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. n145 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." n146 The study suffers from other similar problems of slanted presentation of the data. n147

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, n148 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 n149 -- a 15% change in the rate. Similarly, 46% gave statements after receiving the warning about the right to counsel n150 -- 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. n151 While there may be some difficulties with using the data to establish this kind of [*412] precise confession rate change, n152 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 about the right to nonstationhouse 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. n153 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. n154

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." n155 For the two-year period before [*413] *Miranda*, the Department estimated that about 40% of arrested suspects made incriminating statements, n156 an estimate that appears to be reasonable. n157 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." n158 Assuming conservatively that Kelley was referring to all statements rather than incriminating statements, n159 and applying the 50% relation of statements to confessions discussed earlier, n160 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. n161 Following the decision (between June and September 1966), 59% gave statements. n162 Relying on the previously [*414] discussed estimate that 50% of statements are confessions, n163 this would mean that the confession rate went from 45% n164 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. n165 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 n166). 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. n167

(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. n168 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. n169

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*, n170 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. n171 The Los Angeles District Attorney's Office sampled cases during the week of December 13-17, 1965, approximately eleven months after *Dorado*. n172 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. n173 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. n174 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. n175 Accordingly, it apparently redesigned the study questionnaire. n176 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*." n177 Because many suspects make "other statements," n178 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. n179 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 "we cannot tell from this present survey how many cases we are not even seeing from the police agencies." n180 Finally, it appears that the District Attorney's Office viewed the *Miranda* requirements and the *Dorado* requirements as essentially indistinguishable. n181 Thus, the study is not really a before-and-after study, but rather an "after-and-after" study. n182 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. n183 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. n184 The change in rate ranges from 34.5% for New York County to 2.0% for Seaside City. The "reliable" studies n185 -- 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. [*418]

TABLE 1 -- ESTIMATES OF CHANGES IN THE CONFESSION RATE DUE TO MIRANDA

City	Confession Rate Before	Confession Rate After	Change	Major 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 Without			-16.1% *	

Major Problems

est. = estimated
der. = derived

* Excluding Chicago homicide study for reasons given in note 185, *supra*.

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. n186 Chief Justice Warren's decision in *Miranda* made something of an anticipatory comparison, arguing that "the experience in some other countries also suggests that the danger to law enforcement in curbs on interrogation is overplayed." n187 He then examined the practices in England, Scotland, and other countries, described the restrictive features of the interrogation regimes there, and concluded that "there appears to have been no marked detrimental effect on criminal law enforcement in these jurisdictions as a result of these rules." n188 While the accuracy of the Chief Justice's description of the practices in these countries has been powerfully challenged, n189 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%. n190 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. n191 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. n192 A study of cases at the Old Bailey found an incriminating statement rate of 76%. n193 An observational study in Brighton found that 65% of observed interrogations produced incriminating statements. n194 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. n195 A study of cases heard in the seven Crown Court centers in London found that a total 71.2% of defendants gave incriminating information. n196 Finally, interviews with a sample of defendants drawn [*420] randomly from Sheffield court records found that 94% admitted their guilt to police. n197 While recent (and highly publicized) examples of coerced confessions have been responsible for several miscarriages of justice in Britain, n198 it seems unlikely that the high overall British confession rate is attributable to such tactics. n199

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 Kessell 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." n200 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% n201) 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. n202 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 "the 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." n203 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. n204

(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. n205 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. n206

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. n207 The confession rate is even higher if one excludes the 4.8% of suspects who refused to be videotaped; of those agreeing to be videotaped, 71.6% made inculpatory statements. n208 In the "control" city of Oakville, police obtained incriminating information in 87.0% of the interviews. n209 These Canadian confession rates are substantially higher than any recently reported rate here, which suggests that *Miranda* may be inhibiting American suspects. n210

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." n211

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. n212 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. n213

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. n214 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. n215 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. n216 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." n217 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." n218

Seeburger and Wettick found that a confession was needed to convict in roughly 20% of all cases. n219 They also found that a confession [*425] was necessary in roughly 25% of cases involving confessions (both pre- and post-Miranda). n220

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." n221 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, n222 one might reasonably assume a certain degree of thoroughness in investigating homicide cases. n223

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. n224

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. n225 Of these cases, in 67 (roughly 10%) the prosecutor believed that an incriminating statement [*426] or admission was needed for conviction. n226 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. n227 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. n228 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. n229

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. n230 Based on these two factors, the editors developed a matrix to categorize the need for interrogation as either "essential," "important," "not important," or "unnecessary." n231

[*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%. n232 The editors combined the "essential" and "important" categories into an "interrogation necessary" category, which was therefore estimated to be 13.3% of total cases. n233 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. n234

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! n235 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%. n236 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. n237

[*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. n238 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. n239 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. n240 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. n241

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. n242 In view of the significance of prosecutorial screening, this renders his ultimate figures suspect. It is also unclear what definition of "essential" Piersante used. n243

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. n244 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. n245 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. n246 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. n247

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%). n248 Apart from the small sample size, about which Sobel himself cautioned, n249 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. n250 Thus, the study is not particularly useful.

[*430] *9. The Jacksonville and San Diego Study*. -- Floyd Feeney, Forrest Dill, and Adrianne 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. n251 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). n252 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. n253 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. n254

10. The Oakland Robbery Study. -- Floyd Feeney and Adrianne Weir performed an earlier study of robbery investigations in Oakland. They concluded that, at least for the crime of robbery, "confessions are relatively unimportant, being judged as essential for only five-to-ten percent of the charged suspects." n255 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. n256

[*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" n257 -- 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. n258 The authors explained that they were substituting a "single, uniform standard," but they did not explain what that standard was. n259 Their uniform standard probably related to the ability of the police to arrest or detain, not to the ability of

the prosecution to convict. n260 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. n261 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. n262

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. n263 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. n264 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. n265 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. n266 From this data, one might infer a necessity rate by taking the difference between the conviction rates -- in this case, 26%. n267 However, one must be cautious about such a conclusion for the reasons explained above. n268

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. n269 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. n270 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%. n271

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 n272) and between 8.2% to 61.0% of cases involving confessions. Excluding my own recently completed study n273 and examining the "reliable" estimates n274 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. [*434]

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-		26.2%	

post-Dorado			
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 Major Problems	23.8%	26.1%	

est. = estimated
der. = derived

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

Two cross-checks can be made to these estimates, which suggest that they are, if anything, conservative assessments of the need for confessions. n275 First, recent studies in Britain have reached similar [*435] 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. n276 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. n277 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, n278 for a necessity estimate of 31.8%. n279 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%. n280 In the 500 guilty pleas, the first assessorthought that the statements made all the difference in 32.4%; the second assessor estimated the figure to be 27.5%. n281 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. n282 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. n283 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. n284 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. n285 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. n286 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. n287 This prosecutorial screening accounts for three-fourths of the adult felony cases that fail to end in conviction. n288 Forst notes that "the vast majority of all felony cases dropped by the prosecutor are rejected due to insufficiency of the evidence." n289 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. n290

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. n291

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*. n292 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). n293

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. n294 Combining these figures produces the following result:

16% x 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. n295 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. n296 A confession shores upa weak case unlike any other single piece of evidence, n297 and prosecutors are probably particularly disinclined to plead down cases with confessions. n298

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*"). n299

Persons arrested seems to be an appropriate figure for extrapolation. n300 Although "arrest" can be defined differently by various police agencies, n301 the operational definitions for reporting purposes seem to coalesce around events such as "brought to the station" n302 or "booking." n303 These appear to be definitions that would correspond with police opportunities for custodial interrogation. n304 Indeed, the definition of arrest might understate the number of custodial situations, not only because some arrests are not reported, n305 but also because some police agencies commonly interrogate a suspect at the stationhouse without considering this to be an arrest. n306

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. n307 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." n308 The Philadelphia study used "individuals arrested" as the base measure. n309 The Seaside City study involved cases in which "suspects were actually arrested and incarcerated by the Seaside City Police Department." n310 [*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. n311 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. n312 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.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsSearch & SeizureExclusionary RuleCriminal Law & ProcedureInterrogationMiranda RightsCustodial InterrogationCriminal Law & ProcedureInterrogationVoluntariness

FOOTNOTES:

n1 Miranda v. Arizona, 384 U.S. 436, 542 (1966) (White, J., dissenting).

n2 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").

n3 1 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 484 (1984 & Supp. 1991) (citation omitted).

n4 *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) ("Most 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) ("It 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.").

n5 *See, e.g.*, FRANK W. MILLER ET AL., CASES AND MATERIALS ON CRIMINAL JUSTICE

ADMINISTRATION 519 (4th ed. 1991) ("The 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.").

n6 *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.

n7 *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").

n8 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*].

n9 Davies, *supra* note 6, at 622 (discussing Fourth Amendment exclusionary rule).

n10 Moran v. Burbine, 475 U.S. 412, 433 n.4 (1986).

n11 *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").

n12 *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).

n13 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).

n14 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).

n15 Nardulli, *supra* note 6, at 601 (table 12).

n16 Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, 1987 U. ILL. L. REV. 223, 233 (table 8).

n17 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).

n18 *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 & ADRIANNE 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).

n19 *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).

n20 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.*

n21 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).

n22 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.

n23 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)).

n24 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").

n25 *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).

n26 *See, e.g.*, CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 382 (3d ed. 1993).

n27 *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.").

n28 *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).

n29 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.

n30 *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).

n31 *See, e.g.*, *infra* note 412 (noting difference that arrest practices can make in confession rates).

n32 Richard H. Seeburger & R. Stanton Wettick, Jr., Miranda *in Pittsburgh -- A Statistical Study*, 29 U. PITT. L. REV. 1, 6-7, 11, 13 (1967).

n33 *Id.* at 8.

n34 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.

n35 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.

n36 Seeburger & Wettick, *supra* note 32, at 12 (table 2).

n37 *Id.* at 13 (table 3).

n38 The reasons for the even larger drop in 1967 are discussed *infra* notes 389-93 and accompanying text.

n39 *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.

n40 *See, e.g.*, KATHLEEN B. BROSI, A CROSS-CITY COMPARISON OF FELONY CASE PROCESSING 52 (1979) (finding conviction 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).

n41 *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).

n42 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).

n43 *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").

n44 *Id.* at 24.

n45 *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.).

n46 *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.

n47 *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).

n48 *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).

n49 *See* FEENEY ET AL., *supra* note 17, at 21-22.

n50 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 ofthe 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.

n51 *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).

n52 *See* Dunaway v. New York, 442 U.S. 200 (1979).

n53 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.

n54 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*.

n55 White, *supra* note 2, at 19.

n56 *See* AMERICAN LAW INST., A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE: STUDY DRAFT NO. 1 134 (1968) [hereinafter ALI REPORT] (attributing confession rate drop to "full compliance" with *Miranda*).

n57 *See, e.g.*, Schulhofer, *supra* note 39, at 456 & n.56 (1987) ("Many studies have shown that the degree of compliance with *Miranda's* requirements . . . has been high.").

n58 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.

n59 *Controlling Crime Hearings*, *supra* note 45, at 1120 (statement of District Attorney Frank S. Hogan).

n60 *Id.*

n61 *Id.* (1280 out of 2610 defendants).

n62 *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.

n63 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).

n64 Stephen J. Schulhofer, *The Fifth Amendment at Justice: A Reply*, 54 U. CHI. L. REV. 950, 955 (1987).

n65 *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).

n66 *Controlling Crime Hearings*, *supra* note 45, at 1120.

n67 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 "the grand jury can receive none but legal evidence." N.Y. CRIM. PROC. LAW § 249 (1958) (superseded by N.Y. CRIM. PROC. LAW § 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, "there is no other evidence").

n68 *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.

n69 *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).

n70 *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.").

n71 *See* VERA INST. OF JUSTICE, MONITORED INTERROGATIONS PROJECT FINAL REPORT: STATISTICAL ANALYSIS 2, 7 (1967); *see also* VERA INST. OF JUSTICE, *supra* note 24.

n72 VERA INST. OF JUSTICE, *supra* note 71, at 2, 39.

n73 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").

n74 VERA INST. OF JUSTICE, *supra* note 71, at 11. The study showed that 68.3% of suspects refused to make any statement. *Id.*

n75 *Id.* at 40. The study showed that 58.9% of suspects refused to make any statement. *Id.*

n76 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.

n77 *Controlling Crime Hearings*, *supra* note 45, at 200-01.

n78 *Id.* at 200.

n79 378 U.S. 478 (1964).

n80 *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.*

n81 *Controlling Crime Hearings, supra* note 45, at 200.

n82 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.

n83 *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.

n84 *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.

n85 *See* Dripps, *supra* note 62, at 722-23 n.91.

n86 *Controlling Crime Hearings, supra* note 45, at 200.

n87 *See* Seeburger & Wettick, *supra* note 32, at 13 (table 3) (indicating that out of 99 suspects willing to talk, 46 confessed).

n88 VERA INST. OF JUSTICE, *supra* note 71, at 40.

n89 *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 (notingthat 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).

n90 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.

n91 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].

n92 Harold E. Pepinsky, *A Theory of Police Reaction to* Miranda v. Arizona, 16 CRIME & DELINO., 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.

n93 Pepinsky, *supra* note 92, at 382; *see also* Schulhofer, *supra* note 64, at 955 & n.23 (making same argument).

n94 *See Controlling Crime Hearings*, *supra* note 45, at 201 (sample size involving more than 5000 arrests).

n95 Pepinsky, *supra* note 92, at 382-83; *see also* Schulhofer, *supra* note 64, at 955 (adopting this argument).

n96 Pepinsky, *supra* note 92, at 383.

n97 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.

n98 Witt, *supra* note 89, at 322.

n99 *Id.* at 323.

n100 *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.

n101 *Id.* at 323.

n102 *Id.* at 325.

n103 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.

n104 *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*).

n105 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).

n106 *Yale Project*, *supra* note 8, at 1613.

n107 *Id.* at 1527.

n108 *Id.* at 1532.

n109 *Id.* at 1573.

n110 *Id.*

n111 *Id.* at 1644 (53/110) (derived from data in table A).

n112 *Id.* at 1574.

n113 *Id.*

n114 *Id.*

n115 *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.

n116 *Yale Project, supra* note 8, at 1613.

n117 *Id.* at 1550 (25 suspects of 118 questioned received full *Miranda* warnings).

n118 *See infra* notes 612-30 and accompanying text (finding *Miranda's* costs mostly attributable to waiver and questioning cutoff rules).

n119 *Yale Project, supra* note 8, at 1551.

n120 *See id.* at 1551 n.84 (providing text of "waiver of rights" card).

n121 *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?'").

n122 *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).

n123 *See id.* at 1527 (admitting that "since 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 "the 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").

n124 *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").

n125 *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").

n126 *Yale Project, supra* note 8, at 1533.

n127 *Id.* at 1571.

n128 *Id.* One of the eight other suspects confessed to police after receiving advice from a lawyer. *Id.*

n129 *Id.* at 1578.

n130 *See supra* note 57 and accompanying text.

n131 (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.

n132 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").

n133 Richard J. Medalie et al., *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement* Miranda, 66 MICH. L. REV. 1347 (1968).

n134 *Id.* at 1351.

n135 *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.

n136 *Id.* at 1359.

n137 *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 atwhich D.C. police interrogated suspects dropped after *Miranda* as well. *Id.* at 1364-65 (interrogation rate 55% before *Miranda*, 48% after).

n138 *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).

n139 *See, e.g.*, White, *supra* note 2, at 19 n.99 (concluding that study shows that *Miranda* has no harmful effects).

n140 Medalie et al., *supra* note 133, at 1364.

n141 ROYAL COMM'N ON CRIMINAL PROCEDURE, REPORT 98 (1981).

n142 Medalie et al., *supra* note 133, at 1351 (table 1), 1361 n.55.

n143 *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).

n144 *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").

n145 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).

n146 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.

n147 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 "again, one must question the integrity of" the analysis. *Id.*

n148 Medalie et al., *supra* note 133, at 1347, 1394-96.

n149 *Id.* at 1373 (table 9) (total post-Miranda defendants).

n150 *Id.*

n151 *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).

n152 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).

n153 *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.

n154 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).

n155 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).

n156 Seeburger & Wettick, *supra* note 32, at 26 n.51.

n157 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%).

n158 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).

n159 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.

n160 *See supra* notes 86-89 and accompanying text.

n161 *Controlling Crime Hearings, supra* note 45, at 223 (statement of District Attorney Aaron Koota).

n162 *Id.* at 223.

n163 *See supra* notes 86-89 and accompanying text.

n164 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.

n165 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).

n166 *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).

n167 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).

n168 *Controlling Crime Hearings, supra* note 45, at 344.

n169 *Id.* at 344 (721/1437).

n170 398 P.2d 361 (Cal.) (en banc), *cert. denied*, 381 U.S. 937 (1965).

n171 *Id.* at 366-72.

n172 *Controlling Crime Hearings*, *supra* note 45, at 349.

n173 *Id.* (figure rounded to 40% in original).

n174 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" FifthAmendment 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.

n175 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 ("There 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.").

n176 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.

n177 *Compare Controlling Crime Hearings*, *supra* note 45, at 350 (post-Dorado worksheets) *with id.* at 347 (post-Miranda worksheets) (emphasis added).

n178 *See supra* notes 86-89 and accompanying text (approximately half of all statements are not confessions).

n179 *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.").

n180 *Controlling Crime Hearings*, *supra* note 45, at 345.

n181 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.

n182 *See* Seeburger & Wettick, *supra* note 32, at 25 (observing that the "pre-Miranda cases are post-Dorado cases").

n183 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 instation 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).

n184 *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) ("Many of the studies concluded shortly after the decision concluded that there was no 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).

n185 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.

n186 *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).

n187 Miranda v. Arizona, 384 U.S. 436, 486 (1966).

n188 *Id.* at 489.

n189 *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.").

n190 *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).

n191 *See generally* Van Kessel, *supra* note 7, at 35-72; *see also* OLP PRE-TRIAL INTERROGATION REPORT, *supra* note 13, at 88-89.

n192 *See* Barry Mitchell, *Confessions and Police Interrogation of Suspects*, 1983 CRIM. L. REV. 596, 598.

n193 *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).

n194 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).

n195 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).

n196 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 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.

n197 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.

n198 *See* ROYAL COMM'N ON CRIMINAL JUSTICE, REPORT 6 (1993) (remarking on "widely publicised miscarriages of justice which have occurred in recent years").

n199 *See infra* note 531 (reporting high confession rates observed even where outside observers present or videocameras running).

n200 *See* Van Kessell, *supra* note 7, at 128; *see also* BALDWIN & McCONVILLE, *supra* note 196, at 3

(suggesting that more British suspects make admissions than American suspects).

n201 *See infra* notes 396-411 and accompanying text.

n202 *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).

n203 GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY 324 (1992).

n204 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, § 34 (Eng.).

n205 *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).

n206 *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).

n207 *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*).

n208 GRANT, *supra* note 207, at 28.

n209 *See id.* at 32 (figure derived from table 1).

n210 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).

n211 UVILLER, *supra* note 14, at 181.

n212 *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 ("Confessions rarely have anything to do with convictions because all the evidence needed to convict is usually in long before anybody confesses.").

n213 *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.").

n214 *See* NATHAN R. SOBEL, THE NEW CONFESSION STANDARDS: MIRANDA V. ARIZONA 137 (1966) ("*Most* 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 ("People 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).

n215 *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).

n216 *But cf.* Cassell & Hayman, *supra* note 47 (finding police "rarely" obtained incriminating fruits through questioning in Salt Lake County in 1994).

n217 Seeburger & Wettick, *supra* note 32, at 14.

n218 *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).

n219 Seeburger & Wettick, *supra* note 32, at 15 (table 4) (total confessions necessary = 156/771 or 20.2%).

n220 *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.

n221 *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.

n222 *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).

n223 *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).

n224 *Controlling Crime Hearings, supra* note 45, at 349, 350 (table).

n225 Most of these data involve interrogations conducted before *Miranda. See supra* note 179.

n226 *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.*

n227 *See Yale Project, supra* note 8, at 1643.

n228 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).

n229 *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.

n230 *Id.* at 1582-83.

n231 The matrix was as follows:

		Amount of Evidence			
		None	Some	Trial	Conviction
Investigative Alternatives	None	Essential			
	Available but probably inadequate	Important			
	Available and probably adequate	Not Important			
	Further investigation unnecessary				Unnecessary

Id. at 1583 (table 19).

n232 *Id.* at 1585 (table 20) (essential = 3/90; important = 9/90).

n233 *Id.*

n234 *Id.* at 1590 (table 21).

n235 *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.

n236 Witt, *supra* note 89, at 324 (table 2) (75+38/478).

n237 *Id.* at 324 n.39.

n238 *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)).

n239 *Id.* at 255, 264 (grand total table).

n240 *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)).

n241 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).

n242 *See Yale Project, supra* note 8, at 1643 n.16; *see also* ALI REPORT, *supra* note 56, at 142.

n243 *Yale Project, supra* note 8, at 1642.

n244 *Controlling Crime Hearings, supra* note 45, at 223.

n245 *Id.*

n246 *Id.* at 223 ("I *estimate* that in these instances of refusal . . . .") (emphasis added).

n247 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.

n248 SOBEL, *supra* note 214, at 146.

n249 *Id.; see also* Roberts, *supra* note 221, at 1 (calling Sobel data a "small sampling").

n250 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, § 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.

n251 FEENEY ET AL., *supra* note 17.

n252 *Id.* at 142 (table 15-1).

n253 *See id.* at 88 (table 10-2) (listing reasons for disposition of various charges).

n254 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.

n255 5 FLOYD FEENEY & ADRIANNE WEIR, THE PREVENTION AND CONTROL OF ROBBERY 7 (1973).

n256 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.

n257 5 *id.* at 43 (table 19).

n258 2 *id.* at 38.

n259 2 *id.* at 42.

n260 *See* 2 *id.* at 42 (referring to substituting a "single, uniform standard" for assessments of "the decision for charging the suspect").

N261 *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").

n262 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.

n263 Nardulli, *supra* note 6, at 601 (table 12).

n264 Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, 1987 U. ILL. L. REV. 223, 233 (table 8).

n265 Leo, *supra* note 145.

n266 *Id.* at 294 (table 16) (statistically significant at the .001 level).

n267 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.

n268 *See supra* notes 253-54 and accompanying text.

n269 *See* Cassell & Hayman, *supra* note 47.

n270 *Id.*

n271 *Id.* One must be cautious about using the necessity figure, for the reasons given in *supra* notes 253-54 and accompanying text.

n272 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.

n273 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.

n274 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.

n275 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).

n276 *See* BALDWIN & McCONVILLE, *supra* note 196, at 8.

n277 *Id.* at 31 (figure 4.1).

n278 *Id.* (figure 4.1).

n279 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, § 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%.

n280 BALDWIN & McCONVILLE, *supra* note 196, at 28 (table 4:1(a)).

n281 *Id.* (table 4:1(b)).

n282 JULIE VENNARD, ROYAL COMM'N ON CRIMINAL PROCEDURE, CONTESTED TRIALS IN MAGISTRATES' COURTS: THE CASE FOR THE PROSECUTION 3 (1980).

n283 *See id.* at 13 (table 3:1).

n284 *Id.* (table 3:1).

n285 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.

n286 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).

n287 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).

n288 Forst, *supra* note 287, at 168.

n289 *Id.*

n290 *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").

n291 *Cf. id.* at 654 (making same argument in favor of rough estimate of search and seizure exclusionary rule costs).

n292 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 Kessell, *supra* note 7, at 129.

n293 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.

n294 *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.

n295 *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").

n296 *See supra* notes 285-90 and accompanying text.

n297 *See infra* notes 317-18 and accompanying text.

n298 *See infra* notes 321-36 and accompanying text.

n299 *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).

n300 *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).

n301 "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).

n302 *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.

n303 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.").

n304 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).

n305 FEENEY ET AL., *supra* note 17, at 40.

n306 *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.

n307 Seeburger & Wettick, *supra* note 32, at 6.

n308 *Controlling Crime Hearings*, *supra* note 45, at 1120.

n309 *Id.* at 200-01.

n310 Witt, *supra* note 89, at 323.

n311 *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.

n312 *See id.* at 217 (table 29).