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Stories about *Miranda*

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STORIES ABOUT *MIRANDA*

George C. Thomas III*

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* Professor of Law & Judge Alexander P. Waugh, Sr. Distinguished Scholar, Rutgers University School of Law, Newark. B.S. 1968, University of Tennessee; M.F.A. 1972, J.D. 1975, University of Iowa; LL.M. 1982, J.S.D. 1986, Washington University in St. Louis. — Ed. I wish to acknowledge my debt to Yale Kamisar. About fifteen years ago I sent Yale a manuscript about confessions, figuring that he was too busy to read it. As many others have discovered, he not only read the manuscript with care but also called me up with a series of helpful suggestions. I have repeated the process many times, including this time, and the article was always better after Yale's comments. I haven't always taken his advice, but I have always been glad to get it. Indeed, it is fair to say that courts, scholars, and lawyers have, over the years, greatly benefited from Yale's industry, insights, and skilled arguments.

Many people helped me figure out the best way to present the findings from my study. I thank particularly Joshua Dressler, George Elmasry, and Alfredo Garcia. The greatest help came from my friend and sometimes coauthor, Richard Leo. While I like to think that I have the soul of an empiricist, without much formal training, Richard has both the soul and the training. He helped immensely in forcing me to clarify, and limit, my claims for the study. The work that produced this paper was partially supported by funding provided by the Dean's Research Fund of Rutgers School of Law-Newark.

I. YALE KAMISAR'S CREATION

It is no exaggeration to say that Yale Kamisar was present at the creation of *Miranda v. Arizona*.¹ To be sure, the seeds of *Miranda* had been sown in earlier cases, particularly *Escobedo v. Illinois*,² but *Escobedo* was a Sixth Amendment right to counsel case. Professor Kamisar first saw the potential for extending the theory of *Escobedo* to the Fifth Amendment right against compelled self-incrimination. *Escobedo* theorized that a healthy criminal justice system requires that the accused know their rights and are encouraged to exercise them. The *Escobedo* Court read history to teach

that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.³

Justice White, dissenting in *Escobedo*, read the Court's opinion to demonstrate concern about "the unknowing defendant who responds to police questioning because he mistakenly believes that he must and that his admissions will not be used against him."⁴ The majority's intuition that information about rights is critical to a fair interrogation process is a powerful one. But the Sixth Amendment right to counsel was an odd place to attach that intuition to the Constitution. The right to counsel had never been thought to apply to police interrogation before, and *Escobedo* was but a baby step in that direction. The *Escobedo* Court required counsel when

the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent.⁵

But few suspects would benefit from a right defined that narrowly. Few suspects have lawyers and only some of them request a lawyer in

1. 384 U.S. 436 (1966).

2. 378 U.S. 478 (1964).

3. *Id.* at 490 (footnotes omitted).

4. *Id.* at 499 (White, J., dissenting).

5. *Id.* at 490-91.

the face of police interrogation. If information is power, a broader basis for requiring it had to be found.

As Kamisar recognized in 1965, and the Court the next year, informational concerns in the interrogation context are more appropriately centered on the right not to be compelled to incriminate oneself. The criminal justice system makes much of the privilege not to testify in court and other judicial proceedings, requiring a formal waiver. The courtroom right is not very valuable, of course, if the accused has already confessed in the interrogation room. Kamisar put it this way:

The courtroom is a splendid place where defense attorneys bellow and strut and prosecuting attorneys are hemmed in at many turns. But what happens before an accused reaches the safety and enjoys the comfort of this veritable mansion? Ah, there's the rub. Typically he must first pass through a much less pretentious edifice, a police station with bare back rooms and locked doors.⁶

As everyone knows who has watched television in the last thirty-five years, *Miranda* sought to level the playing field by giving suspects at least formal control over the interrogation. *Miranda* required that all suspects who are subjected to custodial interrogation be given two critical pieces of information — that the suspect has a right to remain silent and a right to have a lawyer present during the interrogation. The Court assumed that suspects who felt incapable of dealing with police would invoke the right to silence or to counsel. And it seems clear that the Court (the majority *and* the dissents) expected lots of suspects to do just that, making interrogation a much smaller part of the American police station procedure than it had become by the mid 1960s.⁷

Now we are closing in on *Miranda's* fortieth birthday. The available, albeit somewhat sketchy, evidence suggests that the police have adapted very well to the *Miranda* regime. Moreover, the Burger and Rehnquist Courts have failed to apply the *Miranda* informational theory with much enthusiasm, creating several avenues for prosecutors to use statements made without warnings or based upon what the Warren Court would have considered questionable waivers.⁸

6. Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, from Escobedo to . . .*, in *CRIMINAL JUSTICE IN OUR TIME*, 1, 19 (A.E. Dick Howard ed., 1965) [hereinafter Kamisar, *Equal Justice*].

7. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (concluding that “[i]n order to combat these [interrogation] pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored”); *id.* at 541 (White, J., dissenting) (charging that the majority’s rule “is a deliberate calculus to prevent interrogations, to reduce the incidence of confessions and pleas of guilty and to increase the number of trials”).

8. See *infra* Part IV.

Together, these cases potentially undermine the *Miranda* protections or at least “lessen the desirable clarity” of the doctrine.⁹

In honor of Yale Kamisar, I seek in this paper to shed light on three sets of questions. The first set concerns police compliance with *Miranda*. Do they give warnings when the rules say they should, do they honor invocations of the right to remain silent or to have counsel present, and do they secure waivers of the *Miranda* rights in ways that courts accept? Judges tell us that, at least as a formal matter, police comply quite routinely with *Miranda*'s warning and waiver requirements. A related set of questions is whether, having secured a waiver, police use coercion and trickery to obtain confessions. The evidence here is murkier though overt coercion and elaborate trickery seem relatively rare. The third set of questions, which has never been the subject of an empirical study, concerns how prosecutors use the various *Miranda* loopholes to get statements admitted that might be inadmissible under a robust interpretation of *Miranda*. The ironic answer here is that the “loopholes” prosecutors use most often to admit statements taken without warnings or waiver are built into the *Miranda* doctrine itself and are not the result of later courts tinkering with the *Miranda* rules.

II. MY STUDY

I sought answers in the stories that prosecutors and defendants tell in court about interrogation. One admittedly imperfect source of those stories are court opinions drawn from one of the web-based legal services (I used Westlaw). To be sure, listening to suspect stories in a sample of (mostly) appellate cases — 198 of the 211 cases, or 94%, arose on appeal or in habeas¹⁰ — has a set of potentially distorting limitations. Police have an incentive to tell a story that emphasizes compliance with *Miranda* and the voluntariness of the defendant's responses, while defendants have an even stronger incentive to emphasize precisely the opposite aspects of the interrogation. Moreover, since very few cases go to trial and fewer still are appealed, the pool of appellate cases is unlikely to be a representative sample. More than 90% of convictions result from guilty pleas,¹¹ and guilty pleas waive any objection to the admission of a confession.¹² The stronger the argument for suppression, all else equal, the less likely a defendant is to plead guilty and waive the argument. Thus, it seems

9. *New York v. Quarles*, 467 U.S. 649, 658 (1984).

10. Ten federal district court cases appeared in my sample along with three Delaware superior (trial) court cases.

11. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 2000, at 426 (2001) (federal data for 1999); *id.* at 457 (state data for 1999).

12. *McMann v. Richardson*, 397 U.S. 759 (1970).

likely that the pool of convictions on appeal will contain stronger arguments for suppression than the 90% of all convictions that result from guilty pleas.¹³

A more troublesome distorting effect in my study is the series of “filters” that distort the reality of what happened in the interrogation room. The suspect’s story is filtered through his lawyer. The police story is filtered through the prosecutor. The lawyers’ arguments presumably appear verbatim in the transcript of the hearing on the motion to suppress but are inevitably filtered as they make their way to the court where the issues are ultimately resolved. My study uncovered one case in which the latter filter seems particularly distorting.¹⁴

But I believe examining a sample of cases from Westlaw is useful. These data suggest several truths about interrogation. On a more rigorous note, the data permit a test of five hypotheses drawn from two studies: one by Richard Leo¹⁵ and one by Paul Cassell and Bret Hayman.¹⁶ First, police almost always give *Miranda* warnings as required by the *Miranda* Court’s own set of rules. Second, suspects overwhelmingly waive their rights. Third, police usually cease questioning when the suspect invokes the right to silence or to counsel. Fourth, police rarely use overtly coercive tactics to get waivers. Fifth, police rarely use overtly coercive tactics to obtain confessions following waiver. If my study, using a different methodology, confirms any of these hypotheses, that would suggest

13. I ignore in the text two categories of cases: acquittals and dismissals. It is of course possible that a successful motion to suppress a confession will lead to an acquittal or dismissal. Presumably these successful motions will contain strong evidence of police coercion and failure to follow *Miranda*. But Peter Nardulli’s study of 7767 cases found a successful motion to suppress a confession in only 0.16% of cases. Peter J. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Reassessment*, 1983 AM. B. FOUND. RES. J. 585, 594-96 (1983) (finding that 2.5% of motions to suppress confessions were successful and motions to suppress were made in only 7.6% of cases). For purposes of describing routine police behavior, we can safely ignore the behavior that might be demonstrated in 0.16% of all cases.

Of course, cases can be dismissed prior to a motion to suppress. These dismissals will not appear in Nardulli’s data. Richard Leo pointed out that cases with blatant *Miranda* violations might be dismissed very early in the process. Email from Richard Leo, Oct. 28, 2003 (on file with *Michigan Law Review*). But my intuition, given the various ways that police and prosecutor can seek to bring the police methods in line with *Miranda*, is that prosecutors seek to use almost all incriminating statements and take their chances at a suppression hearing. If dismissals prior to the suppression stage are as rare as I suspect, very few *Miranda* violations are thus hidden from view).

14. See the case of Juan Carlos Chavez, *infra* notes 167-173 and accompanying text.

15. Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996) [hereinafter Leo, *Inside*].

16. Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839 (1996).

that whatever the limitations of the earlier studies, they are reflecting something close to the reality of police interrogation on these points.¹⁷

To conclude that there is general compliance with *Miranda* and little evidence of overt coercion, even if true, is not to say that police never break the rules about interrogation. Presumably, some police are capable of intentionally violating the rules about interrogation. And one assumes police would be most likely to violate rules about interrogation when they perceive they most need a confession — where the crime is horrendous, the police believe they have the guilty party, and the investigation has turned up little evidence. My random sample contained one case like this.¹⁸ If there is one such case in every 211 cases, that would be cause for concern. These cases are precisely the ones where the system is most at risk of convicting an innocent person.¹⁹ The evidence might be thin because the suspect is innocent, and the police might be wrong in their belief that they have the right person. Given sufficient trickery and coercion, an innocent person could make damaging statements and wind up being convicted on circumstantial evidence. So one troubling question left unanswered by any study to date is whether *Miranda* provides sufficient protection against raw coercion in these hopefully rare cases.²⁰

III. GETTING INFORMATION ABOUT INTERROGATION

What role does *Miranda* play in twenty-first century police interrogation? Perhaps police fail to give the *Miranda* warnings and then later falsely claim that they gave the warnings. Perhaps police give the warnings but lie when they later claim the suspect waived his rights without pressure, trickery, or coercion. Alternatively, perhaps police follow the rules and simply benefit from the apparent urge of many suspects to answer police questions.²¹

One universe of possibilities can be seen in David Simon's book, *Homicide*.²² After spending a year observing one shift of Baltimore homicide detectives, Simon put together a composite interrogation

17. All three studies could suffer similar limitations. But as Parts III and V make plain, the methodologies are radically different.

18. See *infra* notes 167-173 and accompanying text.

19. See Richard A. Leo, *Miranda and the Problem of False Confessions*, in *THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING* 271-82 (Richard A. Leo & George C. Thomas III eds., 1998).

20. One scholar contends that *Miranda* is positively harmful. See Alfredo Garcia, *Is Miranda Dead, Was It Overruled, or Is It Irrelevant?*, 10 *ST. THOMAS L. REV.* 461 (2000).

21. For some thoughts on stories in the interrogation room, see George C. Thomas III, *Miranda's Illusion: Telling Stories in the Police Interrogation Room*, 81 *TEXAS L. REV.* 1091 (2003), reviewing WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS* (2001).

22. DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* (1991).

that sought to reflect reality. In this interrogation, the police are sure they have the right suspect, but their case is thin, and so they engage in a lengthy series of ruses to persuade the suspect to talk to them. The basic thrust of the scheme is to convince the suspect that he is better off talking to the police than facing a “tie-wearing, three-piece bloodsucker — a no-nonsense prosecutor from the Violent Crimes Unit.”²³

To push the suspect toward waiving his *Miranda* rights, the police lie about the strength of their case. The interrogator claims to have three eyewitnesses, blood spatter on the suspect’s shoes, and latent prints on the handle of the murder weapon. To clinch the deal, the detective offers the suspect what appears to be an excuse for the killing: “He came at you, right? You were scared. It was self-defense.”²⁴ The suspect admits that the victim came at him, and the police at this point secure a written waiver of *Miranda* and proceed to get the suspect’s story admitting that he killed the victim. Simon notes that “if that police detective wasn’t so busy committing [the suspect’s] weak bullshit on paper,” he might even tell him

that the other witnesses in the other rooms are too drunk to identify their own reflections, much less the kid who had the knife, or that it’s always a long shot for the lab to pull a latent off a knife hilt, or that [his] \$95 sneakers are as clean as the day [he] bought them.²⁵

An alternate universe imagines that police routinely provide *Miranda* warnings in a straightforward manner and obtain waivers without putting much pressure on suspects. In Richard Leo’s pioneering study, he observed 182 interrogations. His study suggests that the *Miranda* waiver process is routine. Leo found that the detectives provided warnings every time the suspect was in custody and was about to be interrogated. Indeed, Leo noted that, with two exceptions, the detectives read the warnings verbatim from a printed form.²⁶ Leo did not note any trickery or coercion used in obtaining waivers, and he found that 78% of suspects waived their *Miranda* rights.²⁷

On the cognate question of how police proceed following a waiver, Leo’s universe of cases begins to resemble the David Simon universe. Though the interrogations tended to be fairly short — 70% of the interrogations lasted less than an hour and only 8% lasted more than two hours²⁸ — Leo observed a wide variety of techniques designed to

23. *Id.* at 195.

24. *Id.* at 196.

25. *Id.*

26. See Leo, *Inside*, *supra* note 15, at 275-76.

27. *Id.* at 276 tbl. 3.

28. *Id.* at 279.

encourage the suspect to confess. He grouped these techniques into negative and positive incentives. Negative incentives are “tactics that suggest the suspect should confess because of no other plausible course of action,” while positive incentives are “tactics that suggest the suspect will in some way feel better or benefit if he confesses.”²⁹ The most common incentive Leo observed was the one that took center stage in the Simon universe, a mix of positive and negative incentives: “In approximately 90% of the interrogations [Leo] observed, the detective confronted the suspect with evidence (whether true or false) of his guilt and then suggested that the suspect’s self-interest would be advanced if he confessed.”³⁰ As to overt coercion that might rise to the level of a due process violation, however, Leo found it in only 2% of the interrogations he observed.³¹

In a study conducted by Paul Cassell and Bret Hayman, researchers were able to observe screening sessions where prosecutors questioned police officers about the evidence they had obtained. The Cassell-Hayman findings confirmed Leo’s on the issue of *Miranda* compliance. They report no failures to warn suspects who were in custody. Suspects waived *Miranda* in large numbers — 84% in this sample.³² No evidence appears of coercive tactics to obtain a waiver. In the Cassell-Hayman study, police reported that they always stopped questioning when the suspect invoked *Miranda*.³³

As with all efforts to get “inside the interrogation room,” both of these studies have limitations. The Cassell-Hayman study depends on the accuracy with which police reported to the prosecutor about whether they gave warnings and how they obtained waivers. One does not have to be unduly cynical to assume that police put the best light on their interrogation methods when discussing the case with the prosecutor. After all, most of the cases will be plea bargained before any motion to suppress, and any coercion or tricks will never see the light of day. The Leo study suffers from the observational effect. Perhaps police save their “dirty tricks” for times when academics are not in the room! Leo discusses this effect and concludes that it did not “significantly alter[] the behavior of the detectives.”³⁴

29. *Id.*

30. *Id.*

31. *Id.* at 282-83.

32. Cassell & Hayman, *supra* note 16, at 859 tbl. 3.

33. *Id.* at 861. Cassell and Hayman reported on the success or failure of the police interrogations in some detail but made no effort to assess the techniques used to obtain the statements. *Id.*

34. Leo, *Inside*, *supra* note 15, at 270. It seems likely that when police use overt coercion to obtain a confession, they do so only after weighing the pros and cons and making a conscious decision. But that decisionmaking process during the Leo study would include the fact that a Ph.D. student was going to be sitting in the room. Presumably, Leo’s presence

Both studies suffer two other limitations. The obvious one is geographical. Leo's study was limited to the San Francisco Bay Area. The Cassell-Hayman study was limited to Salt Lake County, Utah. We cannot foreclose the possibility that San Francisco or Salt Lake police are more (or less) professional than those in most of the rest of the country. Indeed, the question is more complex than a simple reference to professionalism. It entails the interrogators' attitudes, values, and beliefs about crime, about criminals, and about the importance of following rules, as well as external facts about the police command structure and the particular political context in which police operate.

The second limitation bears on the issue of how often suspects make incriminating statements during interrogation. To get this number, both studies depend on a characterization of the answers given by suspects. Such characterization can be a maddeningly difficult task. Few real suspects confess to police the way fictional suspects confess to Lieutenant Columbo. Most answers to police questions are intended to be exculpatory (as indeed, Columbo's prey intend until the very end). Many answers will ultimately incriminate but that is often not known for sure until one knows how the State uses or intends to use the evidence. Leo controlled for this problem by using the police viewpoint; he counted as "incriminating" those statements that the police considered incriminating.³⁵ Cassell and Hayman created a more complex characterization system, but as they candidly admit, it is difficult to draw a line between an incriminating statement and one that denies the suspect's role in the crime but at the same time connects the suspect to the crime scene or calls into question his truthfulness.³⁶

As noted earlier, my study suffers from the way facts are "filtered" through the process of preserving them in a motion to suppress and then appealing that decision. But whatever limitations these filters create, my study does avoid two of the problems of the Leo and Cassell-Hayman studies. First, my national sample obviously avoids the geographical problem. It also avoids the characterization difficulty. The information about *Miranda* compliance in these cases comes from the hearing on the motion to suppress. Filing a motion to suppress is the clearest indication that the defense views the statements as incriminating. A final benefit of my study is that it permits a rigorous examination of the way prosecutors use the Court's doctrine to seek admission of statements.

would tilt the balance toward not using coercion. Thus, we cannot exclude the possibility that Leo's presence produced the "no coercion" result, a possibility that Leo has never denied. See, e.g., Leo email, *supra* note 13.

35. Leo, *Inside*, *supra* note 15, at 280.

36. Cassell & Hayman, *supra* note 16, at 864-65.

IV. THE PROBLEM WITH THE *MIRANDA* DOCTRINE

Reported cases will contain the stories that prosecutors tell about police compliance with the *Miranda* doctrine. These stories should disclose the extent to which the Court's "easing" of the *Miranda* rules over the past three decades has undermined *Miranda*'s protections and made it easier for prosecutors to "sell" the *Miranda* compliance story to courts. In *New York v. Quarles*,³⁷ the Court created an exception to *Miranda* that permits police to ask questions without giving warnings when the situation poses a threat to public safety. How broadly prosecutors and trial courts understand "public safety" is unknown. But *Quarles* will show up in my study because prosecutors must persuade the suppression judge and the appellate courts that the police were acting to protect public safety. A tabulation of the stories that prosecutors tell provides a window into how *Quarles* has affected the admission of statements.

*Oregon v. Elstad*³⁸ held that a confession is admissible if police give warnings and secure a waiver after the suspect has previously made a statement that is inadmissible under *Miranda*. Police who wish to avoid *Miranda*'s strictures can interrogate without giving warnings and then warn the suspect, who will likely figure the "cat is out of the bag" and confess again.³⁹ Some of the "cat out of the bag" cases might not show up in the cases because the second confession is, on its face, admissible and defense counsel might have chosen not to make an argument that seemed to be foreclosed by *Elstad*.⁴⁰ Some of these cases might surface, however, when courts recount the facts of a case. My study is not limited to issues that defendants press at the motion to suppress. Indeed, the facts in fifteen cases disclosed that the *Miranda* warnings were given even though the suspect remained silent and there was, of course, no *Miranda* suppression hearing.

Even less likely to show up in my study is the full effect of the Court's impeachment doctrine. Only four years after *Miranda*, the Court in *Harris v. New York*⁴¹ held that a statement taken in violation of *Miranda* was admissible to impeach the defendant's testimony at

37. 467 U.S. 649 (1984).

38. 470 U.S. 298 (1985).

39. The officer who follows this strategy must now take account of *Missouri v. Seibert*, — U.S. —, 124 S. Ct. 2601 (2004), where five justices condemned the intentional failure to provide warnings in the hopes that the suspect would repeat the confession after warnings are given later. Though the plurality opinion casts a broader net than the intentional failure to warn, Justice Kennedy, the critical fifth vote, concurred in the judgment only. Kennedy would find this practice unconstitutional only when part of a deliberate strategy to avoid *Miranda*.

40. Given *Seibert*, *supra* note 39, no competent lawyer today would fail to move to suppress in this situation, but *Seibert* was decided after my study ended.

41. 401 U.S. 222 (1970).

trial. It is unlikely that a jury can forget the defendant's confession when considering his guilt, and the effect of *Harris* is almost certainly to deter defendants from taking the witness stand when the prosecutor can offer a statement to impeach his credibility. Thus, it will be impossible to assess the true cost of *Harris* since the cases of deterred defendants will not show up in the database as *Harris* cases, though one might see an occasional case where the defendant decides his trial testimony will be a net benefit.

In addition to these explicit modifications, the Court has reshaped the *Miranda* doctrine in more subtle ways that simply cannot be measured by reading case reports. *Miranda* said that the State bore a "heavy burden" of demonstrating waiver in cases where the suspect answers police questions without a lawyer present.⁴² This could have developed into some sort of presumption against finding waiver, but the Court quickly retreated to the position that waivers need only be voluntary to be valid. Indeed, the Court seems to require only that the suspect indicate knowledge of his rights and then answer questions.⁴³ And it does not matter if the suspect indicates willingness to answer in a way that suggests he doesn't really understand the warnings. For example, the Court has held that waiver can be found even if the suspect refuses to sign a written waiver.⁴⁴

*Davis v. United States*⁴⁵ expanded the notion that police can accept ambiguous waivers. After an interrogation of an hour and a half, Davis said, "Maybe I should talk to a lawyer."⁴⁶ The Court said, by a vote of five to four, that this statement did not require agents to ask clarifying questions about whether Davis was requesting a lawyer. Thus police can continue to question unless the suspect makes an unequivocal and unambiguous request for counsel. In this way, the *Davis* Court dealt a serious blow to *Miranda*'s "knowledge as power" rationale.

The effect of the cases softening the waiver/invocation rules cannot be tested by reading court opinions because courts rarely provide enough detail to decide whether the waiver would have been upheld or the invocation rejected if a different standard had been applied. As we will see, courts found waiver in 68% of the cases.⁴⁷ There is no way to know how many of those waivers were fully informed and robust, and how many were scared, pathetic efforts to try to outsmart the police.

42. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

43. See *North Carolina v. Butler*, 441 U.S. 369 (1979).

44. See *id.*

45. 512 U.S. 452 (1994).

46. *Id.* at 455.

47. See *infra* Part V, paying special attention to Table 2.

Thus, I make no claim to assess the overall effects of thirty-five years of doctrine from Courts less committed to *Miranda*'s ideals than was the Warren Court. I can, however, offer a solid test of the *Quarles* public safety exception and a solid test of how often prosecutors use *Harris* to justify admission of a confession taken in violation of *Miranda*. The evidence on the *Elstad* cat-out-of-the-bag doctrine will be less than solid, but if police manipulate *Elstad* routinely, we should pick up a fair number of cases just from courts reciting the facts.

In addition, my sample will disclose with precision the frequency with which prosecutors use the exceptions created by the *Miranda* opinion itself — that warnings are necessary only when a suspect is in custody and police are engaging in interrogation.

V. THE STUDY EXPLAINED

To get a national sample of stories about *Miranda*, I drew a sample of cases that mentioned “*Miranda*” and made it into the Westlaw database during June 2002.⁴⁸ I chose this broad search because I wanted to find as many cases as possible that discussed whether police gave *Miranda* warnings even if no motion to suppress a statement was made. In some cases where no motion was filed, I hypothesized, a reader could determine whether warnings were given or how the defendant reacted to the warnings. The facts might state, for example, that the police gave *Miranda* warnings and the defendant waived his rights. If the waiver was clear enough, the defendant might not make a motion to suppress on *Miranda* grounds and the case could be appealed on another ground. Some cases presented Fourth Amendment and *Miranda* claims, and while the litigant did not press the *Miranda* claim, the facts showed whether the warnings were given. Similarly, in a few cases, the claim on appeal was ineffective assistance of counsel for not raising a *Miranda* claim and the appellate court provided information about the claim that could have been raised. Of course, searching for “*Miranda*” produced some unusable cases — for example, sometimes a party or a witness was named “*Miranda*.”

A sample of 291 “*Miranda*” cases gave me a usable database of 211 cases. That database produced more than 211 entries in my reported results because some cases fit two, or even three, categories. For example, in *People v. Farnam*,⁴⁹ the court (1) admitted some

48. I was originally going to include all cases decided in June but some cases take weeks and sometimes months to make it into the database so I decided to use the date they appeared in Westlaw to constitute my sample. I stopped taking cases when I had a sufficient number from which I thought I could get at least 200 usable cases. I wound up with 211. A list of the original database and the cases used in the study, arranged by categories, is available from the author.

49. 47 P.3d 988 (Cal. 2002).

statements made before custody, (2) held that the suspect did not invoke his right to remain silent after he was taken into custody, and (3) rejected the claim that his later statements were coerced. This one case thus produced three entries into my database. As long as the claims were factually separate, as they were in *Farnham*, I included each claim. After all, the enterprise was designed to understand how police follow the *Miranda* rules and how prosecutors shape arguments. Different facts from the same case can provide those data.

If the same facts gave rise to alternative explanations, however, I tried to figure out which was the dominant theory for admitting or suppressing the statements and entered the case only in that category. Otherwise, I would be “double-counting” the same compliance or noncompliance. Even when I could not determine which theory was dominant in the court’s mind, I chose the one that made the most sense to me so as to avoid double counting. For example, in *People v. Wenzel*,⁵⁰ the defendant appeared voluntarily at police headquarters and gave the police a letter in which he confessed to killing his wife. The court gave no basis for why the letter was admissible (the defendant did not challenge its admissibility). The letter is admissible because *Miranda* requires warnings only when the police engage in custodial interrogation; both custody and interrogation are missing in *Wenzel*. To keep from double counting these facts, I essentially “flipped a coin” and chose the “no interrogation” category.

The total number of entries in all categories was 246. I began with the “usual suspects” for categories: warnings/no warnings; waiver/no waiver; custody/no custody; interrogation/no interrogation; waiver challenged/waiver not challenged. I found that it was useful to present the data in various combinations. Table 1 summarizes the fifty-nine “no warnings” claims and Table 2 does the same for the 186 claims where warnings were given. Table 3 shows all outcomes by categories. Table 4 focuses just on the cases where defendants claim they have invoked the right to silence or to counsel. Table 5 looks only at the cases where the defendant moved to suppress a statement and breaks down the cases by the claim made and the outcome of the claim. Table 6 looks only at the cases where the defendant challenged either the voluntariness of the waiver or of the statements that followed a voluntary waiver.

50. No. D037914, 2002 WL 1265558 (Cal. Ct. App. June 7, 2002).

TABLE 1. NO WARNINGS (60)

Suppress ⁵¹	10	17%
Use to impeach ⁵²	2	3%
Admit because suspect not in custody	28	47%
Admit because police did not interrogate	14	23% ⁵³
Admit because of public safety exception ⁵⁴	6	10%

TABLE 2. WARNINGS GIVEN (186)

No statement made	15	8%
Suspect claims no warnings. Suspect loses	11	6%
<i>Miranda</i> violation, then warnings and a statement	3	2%
Suspect waives <i>Miranda</i>	126	68%
Challenges waiver & loses	51	
Does not challenge	75	
Suspect does not waive; ⁵⁵		

51. One case affirmed the conviction on a harmless error theory and two others held that the failure to move to suppress was deficient lawyering under the Sixth Amendment. See *People v. Ward*, 2002 WL 1272139 (Cal. App.) (harmless error); *United States ex rel. A.M. v. Butler*, 2002 WL 1348605 (N.D. Ill.) (counsel deficient); *State v. Jorgensen*, 650 N.W.2d 322 (Wis. App. 2002) (same). Because the point was to determine how often police fail to comply with *Miranda*, and the State lost or should have lost a confession it sought to use to prove guilt, I included all three in the “suppress” category. I did not, however, include the four *Elstad* cases (see Table 2). In these cases, an inadmissible statement is followed by warnings and then an admissible statement. Because the State in each case got the defendant’s statement into evidence to prove guilt, it seemed trivial that one version of the statement was inadmissible.

52. In *People v. Lucero*, 2002 WL 1424806 (Mich. App.), the court refused to permit a *Harris* impeachment. I did not include that case in this table, however, because it appears in Table 8, “challenge to waiver or interrogation; defendant wins.”

53. These cases broke into the following subcategories: no questions asked, 7 cases; booking questions, 3 cases; and statement “volunteered” after interrogation ended, 4 cases.

54. One case refused to find the public safety exception met. See *United States v. Lutz*, 207 F. Supp. 2d 1247 (D. Kan. 2002). This case is included in the “suppress” category.

55. This category also includes cases where the suspect waived but his later statements were held to be involuntary. In at least one of the cases, the court was not clear whether it

statement suppressed	5	3%
Suspect claims he invoked right to silence.	6	3%
Suspect claims he invoked right to counsel.	20	11%

TABLE 3. ALL CATEGORIES OF OUTCOMES (246)

No warnings; statement suppressed as proof of guilt	12	5%
Statement used to impeach	2	
No warnings; no custody	28	11%
No warnings; no interrogation	14	6%
No warnings; public safety exception	6	2%
Suspect remains silent	15	6%
Suspect claims no warnings. Suspect loses.	11	4%
<i>Miranda</i> violation, then warnings and a statement that is admitted	3	1%
Suspect waives <i>Miranda</i> and statements ruled voluntary	126	51%
Suspect does not waive; statement suppressed	5	2%
Suspect claims invocation of counsel; questioning continues and he makes statement that is admitted	9	4%
Suspect claims invocation of counsel; questioning continues and he makes statement that is suppressed	6	2%
Suspect invokes counsel; questioning ceases	5	2%
Suspect claims he invoked right to silence; questioning continues and he makes statement	6	2%

was the waiver or the statement that was involuntary. There is of course no practical difference.

TABLE 4. CLAIMS OF INVOCATION OF RIGHT TO COUNSEL AND TO SILENCE (26)

Police ignore invocation of right to counsel; statement is suppressed	6	23%
Suspect invokes counsel; police cease questioning	5	19%
Suspect invokes counsel and reinitiates discussion of case	4	15%
No invocation of counsel found	5	19%
No invocation of silence found	6	23%

TABLE 5. COMPILATION OF DATA BY DEFENDANT SUPPRESSION CLAIMS (153)

Warnings were not given ⁵⁶	71	46%
Successful challenge ⁵⁷	12	
Challenge to waiver or to later confession	56	37%
Successful challenges	5	
Invoked counsel	20	13%
Successful challenge	6	
Invoked silence	6	4%
Successful challenge	0	

TABLE 6. CHALLENGES TO WAIVER OR INTERROGATION BY CATEGORY (56)

General claim without much detail	6 (11%)
Successful	2

56. This combines the cases from Table 1 where the State conceded no warnings (60) with the cases from Table 3 where the defendant claimed no warnings but lost (11).

57. I count as successful the 2 cases in Table 1 where the State used the confession to impeach. At least in theory, these statements are not being used to prove guilt.

Deception, promises		9 (16%)
Successful	0	
Coercion		16 (29%)
Successful	2	
General capacity to understand warnings		11 (20%)
Successful	0 ⁵⁸	
Capacity (drugs or alcohol)		8 (14%)
Successful	1 ⁵⁹	
Capacity (language)		4 (7%)
Credibility		2 (4%)
Successful	0	

VI. THE INTERROGATION HYPOTHESES EXAMINED

A. *Miranda Compliance Hypotheses*

The Leo and Cassell-Hayman studies found that police almost always give the warnings as required by the *Miranda* doctrine.⁶⁰ My study found the compliance rate to be 95%.⁶¹ Of course, my data contain a potential reporting bias. If the defendant and the police tell a different story about whether warnings were given, one would expect judges to believe the police — and this is exactly what I found. Defendants contested the warnings in eleven cases where the State claimed warnings were given, and in each case the court deferred to

58. Some of the involuntary waiver cases could be viewed as turning on lack of capacity to understand the warnings, but I chose to categorize them as coercion cases.

59. In one case, the trial court found no waiver because of intoxication. The appellate court deferred to trial court's suppression because the real issue was whether the statements were involuntary and thus inadmissible under *Harris*. *People v. Lucero*, 2002 WL 1424806 (Mich. App.). The other involved the 11 year old suspect. *See United States ex rel. Butler*, 2002 WL 1348605 (N.D. Ill.).

60. *See Cassell & Hayman*, *supra* note 16, at 889 (reporting at most a noncompliance rate of 2%); Leo, *Inside*, *supra* note 15, at 276 (noting that police read warnings in "virtually every interrogation" that he observed).

61. *See supra* Part V, paying special attention to Table 3 (reporting that statements are suppressed for failure to give warnings in only 5% of the cases).

the trial court's findings in favor of the State.⁶² This might be because the defendants were not particularly credible witnesses, because the police were telling the truth, because suppression judges are more likely to believe police, because police are skillful liars, or, more likely, some combination of these factors.

But one fact is clear from my study: when the State asserts that the suspect was given warnings, defendants challenge that assertion in only 6% of the cases.⁶³ That so few challenges are even made is a confirmation of the compliance findings in the Leo and the Cassell-Hayman studies. This is the least controversial of the hypotheses that I tried to test in my study, but the data clearly support the hypothesis. Given the earlier studies and my confirmation, we can confidently claim that police have adjusted to the rule that they must warn suspects before beginning custodial interrogation.

A second hypothesis is that suspects waive *Miranda* in large numbers. Leo found that 78% of suspects waived *Miranda*.⁶⁴ Cassell and Hayman found an 84% rate.⁶⁵ In my sample, the suspect waived *Miranda* 68% of the time.⁶⁶ That my rate is relatively close to the rates found by Cassell-Hayman and Leo tends to confirm that suspects waive *Miranda* in large numbers. Another way to slice these data is to consider the proportion of waivers found valid by courts — 126 — versus invocations that either resulted in suppression or caused the interrogation to end — 11.⁶⁷ Here I do not count the suspects who remain silent as invoking *Miranda*. More than 10 times as many suspects waived *Miranda* as invoked! Even if one counts all 15 suspects who did not answer questions⁶⁸ as silently invoking, the ratio is still 5 to 1 (126 to 26).

A third way to examine these data is to ask what percentage of suspects who received warnings resisted the police interrogation. To make this calculation, I added to the 11 invocations the 15 suspects who remained silent and removed from the total universe of cases those in which the suspect was not warned (60).⁶⁹ This gives me a

62. See *supra* Part V, paying special attention to Table 2.

63. See *supra* Part V, paying special attention to Table 2.

64. Leo, *Inside*, *supra* note 15, at 276.

65. Cassell & Hayman, *supra* note 16, at 859.

66. See *supra* Part V, paying special attention to Table 2.

67. For purposes of this comparison, I used the waivers as found by courts. See *supra* Part V, paying special attention to Table 2. Invocations of counsel that result in suppression or cause questioning to cease are the first two entries in Table 4. See *supra* Part V, paying special attention to Table 4.

68. See *supra* Part V, paying special attention to Table 2.

69. See Tables 1 & 2.

“resistance” rate of 14% (26/186).⁷⁰ In Leo’s study, 22% of suspects did not cooperate⁷¹ while the Cassell-Hayman number was 16%.⁷² Three studies have thus now concluded that suspects do not often resist police interrogation after receiving *Miranda* warnings. Had we presented these numbers to Yale Kamisar and the members of the *Miranda* Court in 1966, they likely would have been stunned.⁷³

The implication of the huge number of waivers is staggering. In the universe of cases where suspects answer questions without invoking the right to counsel or to silence, the issue is precisely the one that *Miranda* sought to avoid: Did the suspect act voluntarily when waiving or when answering police questions after waiving? In my sample this was the issue 131 times, or in 70% of the cases where statements were given.⁷⁴ The irony here is that more than half of the admissibility issues are thus resolved by the voluntariness test that *Miranda* thought insufficiently protective of free will. Moreover, as Table 2 shows, in 75 of the waiver cases, the answer was so clearly “yes” that the defendant did not even raise the issue!⁷⁵ In the rest of the cases challenging waiver or the voluntariness of the subsequent statements, defendants lost almost all of them (51 of 56 cases).⁷⁶ Thus, when the issue is the voluntariness of the waiver or the answers after waiver, the State wins 96% of the time (126 of 131 cases).⁷⁷

70. My methodology probably depresses the estimate of the suspects who resist police interrogation. Though I found 15 examples of suspects remaining silent, suspects who remain silent are less likely to be prosecuted and thus less likely to appeal.

71. Leo, *Inside*, *supra* note 15, at 275 tbl. 2.

72. Cassell & Hayman, *supra* note 16, at 859 tbl. 3.

73. Yale Kamisar reminded me that Earl Warren worked as a prosecutor and state attorney general for 22 years and thus had an intimate knowledge of police interrogation and suspect behavior. Perhaps Warren would not have been surprised by my data. Perhaps he expected suspects to continue to try to outsmart police and wanted only to give them a fair chance by informing them that they did not have to talk. For a fuller perspective on Warren’s law enforcement experience as it might have molded his views on criminal procedure doctrine, see Yale Kamisar, How Earl Warren’s 22 Years in Law Enforcement Affected His Work As Chief Justice, paper presented at the University of California, Berkeley, Symposium on Earl Warren and the Warren Court: A Fifty Year Retrospect, February 27-28, 2004 (forthcoming OHIO ST. J. CRIM. L.).

74. From Table 2, combine the “suspect waives *Miranda*” figure with the “suspect does not waive; statement suppressed.” See *supra* Part V, paying special attention to Table 2.

75. It is possible, of course, that defendants do not raise a plausible waiver claim because of their view (their lawyers’ view) that the issue is simply not winnable. But my sample is mostly appellate cases. These defendants and lawyers showed themselves willing to go to trial and then appeal the conviction. Assuming competent lawyering, it makes no sense to forfeit an issue that might lead to suppression at trial or to a reversal on appeal.

76. Defendants won 5 cases and lost 51. See *supra* Part V, paying special attention to Table 2.

77. In Table 2, add the 5 cases where the court found no waiver to the 126 cases where the court found that the suspect waived *Miranda*. See *supra* Table 2.

The third hypothesis drawn from the earlier studies is that when a suspect invokes his right to remain silent or to counsel, police generally cease questioning. Though my data point roughly in the opposite direction, the sample is small and here the methodological problems with my survey technique are particularly troublesome. In my study, suspects claimed to have invoked silence in six cases and counsel in twenty cases, a total of twenty-six invocations, and police ceased questioning only five times.⁷⁸ Of course, the relevant benchmark is not twenty-six claims of invocation but the actual number of invocations that police accepted or that judges found to have occurred — fifteen.⁷⁹ In that universe, police complied with *Miranda* nine times (the defendant successfully moved to suppress in six cases). Thus, in this small sample of fifteen, police complied with *Miranda* more than half the time.

But taking a sample of mostly appellate cases is bound to overrepresent the number of times the police ignored invocation of the right to counsel or the right to silence. When police comply with the edict to stop questioning, the case may never go forward. If it does, no *Miranda* issue is likely to surface. Thus, on this issue, my study neither confirms nor rejects the working hypothesis that police generally comply with the requirement that the interrogation must cease following invocation of the right to silence or to counsel.

The fourth working hypothesis is that police do not frequently use elaborate trickery or overtly coercive interrogation methods to get a waiver. The fifth hypothesis is that police do not use trickery or overtly coercive methods to get a confession *following waiver*. Though these are distinct doctrinal issues, I found that I could not test for them separately in my data. Defendants and courts conflated these issues in most cases, probably because the standard for resolving them is the same: Did the defendant act voluntarily when answering police questions? I will thus lump hypotheses four and five together for the rest of the paper. When I describe a claim of coercion or involuntariness, it should be understood as a challenge to the waiver or to the confession itself. The data produced by my study on this hypothesis are open to interpretation, and I will devote a Section to sorting through the cases on coercion and trickery. But first, I will offer some tentative observations from my data that exist outside my five hypotheses.

It comes as no surprise that when courts find that police did give warnings in a particular case, the chance of having the statements admitted is generally better. Table 6 shows that courts found only five waivers or answers to subsequent questions to be involuntary (one of

78. See *supra* Table 4.

79. See *supra* Table 4, combining first three categories.

those cases involved a suspect who was eleven years old and the court made much of his age on the voluntariness issue⁸⁰). The likelihood of having a statement suppressed is greatest when defendants claim they invoked one of the *Miranda* rights, though they lost all six cases in which they claimed to invoke the right to silence. Defendants were much more successful, in a small database, when they invoked counsel.⁸¹ Defendants effectively invoked counsel fifteen times.⁸² Police ceased questioning, as required by *Miranda*, in five cases. In the other ten cases, the suspect wound up making an incriminating statement. In six of those cases, the statement was suppressed. In the other four, the court held that the suspect had re-initiated conversation about the crime and thus the police were permitted to seek a waiver of *Miranda*.⁸³ In sum, statements were suppressed in six cases and questioning ceased in five more (another way a suspect could “win” by invoking counsel) for a favorable outcome from the suspect’s perspective in eleven of fifteen cases where a court found or police accepted an invocation of counsel. Though this is too small a sample to provide a robust finding, the data suggest what our intuition tells us: the way for a suspect to avoid incriminating himself after he is given *Miranda* warnings is to request counsel.

Two other tantalizing inferences can be drawn from my universe of cases. One is that police and prosecutors manage quite nicely to get what they want in a *Miranda* world. When police give warnings, the suspect waives his rights and answers questions in 68% of those cases.⁸⁴ More startling, prosecutors manage to get 80% of statements admitted to prove guilt even when no warnings were given!⁸⁵ To be sure, *Miranda* contemplated the admissibility of statements made while the suspect was not in custody or was not subject to interrogation. Still, that 80% of the no-warnings cases result in

80. *United States ex rel. A.M. v. Butler*, No. 98 C 5625, 2002 WL 1348605 (N.D. Ill. June 19, 2002).

81. While the sample of cases where suspects invoked counsel is too small to claim a robust finding, defendants won more motions to suppress in this sample of fifteen (six cases) than they did in a sample of fifty-six challenges to warnings, waiver, and the mode of interrogation (five cases). See *supra* Part V, paying special attention to Table 5.

82. See *supra* Table 4.

83. See *Edwards v. Arizona*, 451 U.S. 477 (1981) (creating a “re-initiation” exception to the rule that a request for counsel forbids the police from asking further questions). For Kamisar’s persuasive critique of the Court’s subsequent application of the re-initiation doctrine, see Yale Kamisar, *The Edwards and Bradshaw Cases: The Court Giveth and the Court Taketh Away*, in 5 *THE SUPREME COURT: TRENDS AND DEVELOPMENTS* 153 (J. Choper et al. eds., 1984).

84. See *supra* Part V, paying special attention to Table 2.

85. See *supra* Table 1. Of statements taken without warnings, 17% were suppressed and 3% were used only for impeachment, meaning that 80% were admitted to prove guilt. See *supra* Part V, paying special attention to Table 1.

admission of the statement to prove guilt would likely have stunned the 1965 Yale Kamisar and the *Miranda* Court. I doubt that it stuns the 2004 Kamisar.

The third inference, a corollary really of the principle that police can usually get what they want by operating close to the *Miranda* line, is that police do not need to use coercion or elaborate trickery to get a confession. This brings us to the fourth and fifth hypotheses, and because my finding here involves more of a judgment call than the first three hypotheses, I devote the next Section to it.

B. *Claims of Coercion, Trickery, and Involuntariness*

The Supreme Court has never provided a comprehensive framework within which to think about how coercion might be different from a general claim of involuntariness or how trickery might affect a court's decision about voluntariness. But a rough distinction can be teased from the Court's many confession cases. An involuntary statement is one that results from the suspect's overborne will.⁸⁶ One's will can be overborne by factors that have nothing to do with the police, such as intoxication or lack of capacity to make a rational choice.⁸⁷ Trickery is simply a way that humans induce a lack of capacity to make a rational choice. Coercion is more narrowly focused on overt pressures brought to bear on the suspect by other human agents — police in this context. One does not feel pressure when tricked or when one acts involuntarily because of some incapacity. On the other hand, one feels the pressure of coercion. If you sell me a rare coin that you know to be a fake, you have tricked me out of my money. If you put a gun to my head and say, "your money or your life," you have coerced me out of my money. If I give you my money because my mental defect causes me to mistake you for my lover, my act is involuntary. We will see all three categories of claims in this section.

Scholars have found cases in which the police use pretty flagrant coercion or massive trickery to get a confession.⁸⁸ I wondered what kind of stories of coercion and trickery I would find in a sample of 211 cases. Table 6 presents these claims by category.⁸⁹ So what do these cases show? It is useful to divide these claims into ones where police are engaged in some kind of misconduct and cases where they are

86. See, e.g., *Culombe v. Connecticut*, 367 U.S. 568 (1961).

87. See, e.g., *Townsend v. Sain*, 372 U.S. 293 (1963) (holding that a confession can be involuntary when induced by a drug that functioned as a "truth serum" even if police did not know drug had that property).

88. See *infra* notes 167-173 and accompanying text, for an example.

89. See *supra* Table 6.

taking advantage of a preexisting lack of capacity. Coercion, deception, or trickery constituted 45% of the claims that the waiver or statement was involuntary. Lack of capacity, of one kind or another, explained 41% of the claims.⁹⁰ But what interests us is how frequently these claims occur in the universe of all cases where suspects make statements. That number in my study was 226.⁹¹ Defendants made a total of 56 challenges to waiver or to the interrogation.⁹² Thus, 25% of the statements were challenged. It is difficult to say, in the abstract, whether that is a high enough percentage to call into question the Leo data finding only a 2% coercion rate.⁹³ For one thing, almost all of the claims in my study were rejected by courts; Leo might have failed to find coercion in most of these cases. For another, my methodological assumption has been that appellate cases will contain stronger cases for suppression than the vast majority of cases that never make it to trial. But it is nonetheless useful to investigate the claims in my database to get a flavor of how courts describe the claims that defendants present and argue at the motion to suppress.

What struck me most about the cases seeking suppression of statements was the lack of detail in the claims, at least as they were described by the courts. The typical claim was that the waiver or confession was involuntary or that the police used trickery or deception, with few underlying details as to what constituted the coercion or the trickery. In *State v. Aponte*,⁹⁴ for example, the court describes the challenge to the confession as simply that it was coerced, without pointing to *any* underlying facts.⁹⁵ If the descriptions in the court opinions are an accurate rendition of the way the lawyers presented the claims, it appears that some of these claims are either boilerplate or simply unsupported by the record.

90. The balance of the claims in Table 6 could not be classified because of insufficient detail in the reported case — general claims and cases that turned exclusively on credibility. *See supra* Table 6.

91. In Table 3, subtract from 246 the suspects who remain silent (15) and the suspects who invoke counsel and police cease questioning (5).

92. *See supra* Table 6.

93. Leo, *Inside*, *supra* note 15, at 282-83.

94. 800 A.2d 420 (R.I. 2002).

95. *Id.* at 424 (noting that the “defendant maintains that the police used coercive tactics to obtain his involuntary confession”). The court ignored the coercion claim when deciding whether the confession was admissible, instead focusing only on the issue of whether defendant was in custody when he was interrogated. *Id.* at 424-26. The court held that he was not in custody and seemed to think that this holding resolved the claim that the police coerced the confession. A coercion claim is of course theoretically independent of a *Miranda* claim. *See Arizona v. Fulminante*, 499 U.S. 279 (1999) (holding inadmissible because involuntary a statement that would have been admissible under *Miranda*).

1. *General Claim (6 claims; 11% of total challenges)*

Sometimes the lawyer failed even to articulate a plausible basis for a claim of involuntariness. A good example in this category is *United States v. Williams*.⁹⁶ The defendant signed a written acknowledgment and waiver of *Miranda* and then, after an interrogation that lasted less than an hour, gave a statement to an interrogator who the defendant later said was “a gentleman to the fullest.”⁹⁷ On this record, the defendant’s claim that his statements were involuntary was simply not plausible. But two defendants prevailed on involuntariness claims without much detail as to why the waiver was no good. In one, the Ninth Circuit, with almost no discussion, deferred to the district court’s findings that “the government had not carried its burden of proving that [defendant] had knowingly and voluntarily waived his *Miranda* rights.”⁹⁸ The only description of the claim was that the suppression hearing featured “sharply conflicting testimony as to whether [defendant’s] *Miranda* rights had been fully respected.”⁹⁹ It’s not clear to me what it means to “fully respect[]” a suspect’s *Miranda* rights.¹⁰⁰ In a similar case, a state court held that “the state presented very little evidence that showed defendant made a knowing and voluntary waiver” of his *Miranda* rights.¹⁰¹ Both of these cases seem to take seriously the notion from *Miranda* that the State has the burden of proving waiver.

2. *Credibility (2 claims; 4% of total challenges)*

Several of the rejected claims entail at least an implicit judgment that the defendant lacked credibility. But when the court rejected the substantive basis of the claim — rejected, for example, that the police had promised a short sentence in exchange for a confession — I counted those in the substantive category rather than as a bare credibility issue. But two cases turned exclusively on credibility. In *United States v. Ragbir*,¹⁰² the defendant argued that the trial judge should have believed his coconspirator rather than the detective on the facts surrounding the putative waiver. The Third Circuit remarked, “We will not review the District Court’s credibility determination.”¹⁰³

96. 291 F.3d 1180 (9th Cir. 2002).

97. *Id.* at 1190.

98. *United States v. Ramirez-Arce*, 37 Fed. App. 862, 863 (9th Cir. 2002).

99. *Id.*

100. *See id.*

101. *State v. Vigne*, 820 So. 2d 533, 539 (La. 2002).

102. 38 Fed. App. 788 (3d Cir. 2002).

103. *Id.* at 790.

In the other pure credibility case lost by a defendant, it was the jury who rejected defendant's claim that the police were lying and that issue was not raised directly on appeal.¹⁰⁴

A defendant won one, and only one, case where credibility was apparently the key issue.¹⁰⁵ The opinion offers no facts but does comment on the "sharply conflicting testimony as to whether [defendant's] *Miranda* rights had been fully respected."¹⁰⁶ I note the case here because of its credibility dimension but I include the case in the involuntary-waiver category because the court characterized it that way.

3. *Deception/Promises (9 claims; 16% of total challenges)*

Most of these cases were pretty short on detail and credibility played a part here too. In one, the court described two claims: one was "a promise by the officer that [the suspect] would not be prosecuted"; the other was simply that the officer had "tricked him" into making an admission.¹⁰⁷ The district court concluded that the defendant "lied when he said an officer tricked him into confessing and that he lied when he said the officer promised that he would not be prosecuted if he made the taped confession,"¹⁰⁸ and the Fourth Circuit affirmed.

In *State v. Crute*,¹⁰⁹ the defendant said he asked how much time he faced, and the officer said, "[W]hen they get a confession you'll get like 3 to 6 months."¹¹⁰ The officer denied saying that, the trial court resolved the credibility issue against the defendant, and the appellate court affirmed. In *Williams v. State*,¹¹¹ the defendant contended that the officer "suggested to [him] that he be truthful or [his girlfriend and child] could be in trouble."¹¹² The trial and appellate courts accepted the police officer's contrary version of the facts: "Perry testified that he made no such threat to Williams. Indeed, there is no evidence supporting Williams' [sic] version of events."¹¹³

104. *People v. Poquette*, No. 225291, 2002 WL 1275495 (Mich. Ct. App. June 7, 2002). The issue on appeal was whether the prosecutor's attempt to bolster the police credibility was proper.

105. *United States v. Ramirez-Arce*, 37 Fed. App. 862, 863 (9th Cir. 2002).

106. *Id.*

107. *United States v. Hayton*, 38 Fed. App. 871, 872-73 (4th Cir. 2002).

108. *Id.* at 874.

109. No. 26144-8-II, 2002 WL 1281943 (Wash. Ct. App. June 7, 2002).

110. *Crute*, 2002 WL 1281943, at *1 (alteration in original).

111. 565 S.E.2d 917 (Ga. Ct. App. 2002).

112. *Id.* at 918 (alterations in original).

113. *Id.*

In *People v. Beal*,¹¹⁴ the defendant testified:

[F]rom the evening of his arrest until he was interviewed the next day, he was provided with no food or drink, that he felt intimidated when he initially signed a waiver of his *Miranda* rights, and that before he provided statements at a second interview the police had beaten him and threatened him with a gun.¹¹⁵

Plenty of detail, to be sure, but the trial judge called the story a “complete fabrication.”¹¹⁶ The trial judge concluded:

[Defendant’s] demeanor while he was testifying was of somebody looking for ways he could avoid telling the truth. I do not believe [defendant’s] story of a beating, I do not believe his story of a gun being held to his head, and I do not believe that he was deprived of food or water or sleep.¹¹⁷

Noting that credibility determinations are for the trier of fact and that the defendant did not explain on appeal why the trial judge was wrong, the Michigan Court of Appeals held that he had “forfeited appellate consideration of [this] argument.”¹¹⁸ That the defendant did not press his coercion claim on appeal suggests that he recognized the futility of getting the appellate court to overturn the trial court’s judgment about credibility.

An alternative way to resolve these claims against defendants is to concede the promise or deception but hold that it does not render the statement involuntary. This occurred in *State v. Long*,¹¹⁹ where the defendant argued that the deceptive characterization of the lie-detector results rendered his waiver involuntary. The court agreed that there was “an element of deception” in the officer’s conduct but given the totality of the circumstances found the waiver was not involuntary.¹²⁰ This approach accords with general due process coercion doctrine.¹²¹

4. Capacity (23 cases; 41% of total challenges)

I divided capacity claims into three subcategories in Table 6 but will discuss them together here.¹²² Capacity claims involve the same

114. No. 230862, 2002 WL 1340894 (Mich. Ct. App. June 18, 2002).

115. *Beal*, 2002 WL 1340894, at *2.

116. *Id.* (quoting trial judge).

117. *Id.* at *2-*3 (quoting trial judge).

118. *Id.* at *5.

119. No. 00-2087, 2002 WL 1071917 (Iowa Ct. App. May 31, 2002).

120. *Long*, 2002 WL 1071917, at *3.

121. See, e.g., *Frazier v. Cupp*, 394 U.S. 731 (1969).

122. See *supra* Table 6.

underlying question as the coercion and deception claims. If the suspect had sufficient capacity to make a voluntary decision, then the waiver is good or the statement voluntary, and thus admissible. One defendant who used insanity as a defense claimed that he lacked the capacity to understand the warnings. The appellate court affirmed the trial court's reliance on police testimony that the defendant "appeared to understand what was being discussed, including his *Miranda* rights."¹²³ One defendant claimed that her statements were involuntary because of her "emotional state at the time of her arrest" and her belief that if she gave the statement she could "avoid being prosecuted for the marijuana found in her car."¹²⁴ The state court did not agree. One defendant claimed that the waiver was invalid because the Spanish language form did not use the word "waiver"; the Ninth Circuit held that waiver was present where warnings were given orally, defendant indicated understanding, and answered "yes" to the question "Are you willing to answer some questions?"¹²⁵

The Fourth Circuit rejected a claim that being under the influence of morphine rendered the waiver involuntary when the facts showed the suspect was alert and cooperated with the agent in giving a very detailed statement.¹²⁶ The Tenth Circuit rejected a claim that a suspect was too drunk to remember being given the warnings or signing the form because the defendant admitted at trial that he had been given his rights.¹²⁷ A state court rejected a claim that the suspect's capacity was overcome by a gunshot wound and pain medication because the officer testified that the suspect "did not appear to be in any sort of pain at the time of [the] interview, nor did he have any mental or intellectual deficiency."¹²⁸

5. *Coercion (16 claims; 29% of total challenges)*

Most of these claims were pretty thin. Two cases featured a remarkable argument: that the urging of the police officer to tell the truth made the statements involuntary.¹²⁹ Imagine suggesting to Oliver

123. *Mitten v. State*, 79 S.W.3d 751, 760 (Tex. Ct. App. 2002).

124. *State v. Washburn*, No. W2001-01847-CCA-R3-CD, 2002 WL 1284324, at *4 (Tenn. Crim. App. June 11, 2002).

125. *United States v. Castro-Cardenas*, 40 Fed. App. 488, 489 (9th Cir. 2002).

126. *United States v. Cristobal*, 293 F.3d 134 (4th Cir. 2002); *see also* *United States v. Zepeda-Armenta*, 36 Fed. App. 315 (9th Cir. 2002); *Commonwealth v. Kenney*, 769 N.E.2d 1231 (Mass. App. Ct. 2002).

127. *United States v. Alexander*, 292 F.3d 1226 (10th Cir. 2002).

128. *State v. Johnson*, 821 So. 2d 652, 661 (La. Ct. App. 2002).

129. *People v. Ortiz*, No. F036564, 2002 WL 1814130 (Cal. Ct. App. Aug. 8, 2002); *People v. Rivera*, 743 N.Y.S.2d 306 (N.Y. App. Div. 2002).

Wendell Holmes or Felix Frankfurter, let alone Immanuel Kant, that the exhortation to tell the truth coerced a statement from a suspect!

One defendant admitted that he received the warnings and told the detective he understood them.¹³⁰ But he claimed coercion based on the following exchange. The detective said, “Well would you like to kind of start at the beginning and, and tell us what’s going on?”¹³¹ The defendant responded, “Which part or what[?],” and the detective replied, “Well why don’t we start uh [on the day of the killing?]”¹³² As to a claim that this exchange was coercive, the state court of appeals sniffed, “[n]ot so. The detective’s words were in interrogatory form and were not leading. At most it suggested where [the defendant] might start if he chose to talk.”¹³³

In *State v. Cordova*,¹³⁴ the defendant alleged that the police “badgered him, used extremely leading questions, and placed undue pressure on him.”¹³⁵ The only specific example mentioned in the opinion was that one of the officers claimed to be an expert in detecting deception and knew that the suspect was lying.¹³⁶ An Idaho appellate court found, without much discussion, that his will was not overborne. Again, this is standard coercion doctrine. One of the factors the court explicitly considered in reaching its judgment was that the police gave him *Miranda* warnings and he signed a written waiver acknowledging that he understood them. In effect, the *Miranda* warnings were used to make it easier to find a lack of coercion. Perhaps the theory is that the warnings nullify the effect of most police pressure that follows the waiver.¹³⁷

I found no cases in the capacity categories that gave me reason to disagree with the court’s holdings. But I did uncover three coercion/trickery cases where the defendant lost the motion to suppress but, in my view, should have won.

130. *People v. Mata*, No. G027682, 2002 WL 1272173 (Cal. Ct. App. June 10, 2002).

131. *Id.* at *4.

132. *Id.*

133. *Id.* The defense might plausibly claim that indicating knowledge of the rights is not sufficient to show waiver. The Supreme Court has never ruled directly on this claim. But to argue that the question was coercive was, well, nutty.

134. 51 P.3d 449 (Idaho Ct. App. 2002).

135. *Cordova*, 51 P.3d at 452.

136. *Id.*

137. Perhaps the assumption is that suspects will remember the warnings and shut down the interrogation if the pressure becomes coercive. William Stuntz has argued that the Warren Court sought to create suspect “safety valves” — “conditional talkers” who would invoke the *Miranda* rights when the interrogation got too “hot.” See William J. Stuntz, *Miranda’s Mistake*, 99 MICH. L. REV. 975 (2001).

a. *Questionable applications of voluntariness doctrine.*

In *State v. Bunting*,¹³⁸ the suspect waived his *Miranda* rights,¹³⁹ and the issue was whether his subsequent responses were voluntary. The police suspected Bunting of killing his four-year-old son while helping him take a bath. In preparation for the interview, police contacted an expert in interrogation techniques for advice about how to question Bunting. The expert “recommended using a confrontational interview approach involving misrepresentations of the evidence the detectives had implicating Defendant and the ‘false friend’ technique.”¹⁴⁰ The police took this advice. The defendant argued that his confession was involuntary because it was caused by “misrepresentations about the evidence, threats, promises of leniency, and the false friend technique.”¹⁴¹ The State did not deny the underlying facts. The court treated each claim of coercion independently, concluding in each case that the technique did not overcome the suspect’s will or was insufficiently coercive to render the confession inadmissible.

Because these cases are extremely fact dependent, I will quote the key part of the interrogation. All deletions and emphases are the court’s work. The State’s suspicion was based on the medical examiner’s conclusion that the child had not drowned. No one at this point knew the cause of death.

Detective Mitchell: . . . [T]he hammer is ready to fall, and that’s why we wanted to talk with you, okay? [Defendant]: Okay. Detective Mitchell: . . . The ME [medical examiner] has wrapped up his investigation, okay. He has forensic evidence — or, excuse me — Sgt. Vaughn: Scientific evidence. . . . Detective Mitchell: Okay. [Son] did not drown. [Defendant]: Uh-huh. Detective Mitchell: [Son] was murdered, is what he’s saying, okay. There’s evidence of proof we can show that the scene was altered. . . . Do you understand what I am saying there? [Defendant]: Uh-huh. . . . Sgt. Vaughn: . . . The medical examiner is saying [Son] was murdered. That leaves you to be the murderer. If you want to go in front of the judge and a jury, and be seen as a premeditated murderer, and there are no other facts that we need to know about it, I don’t think you want that, do you? [Defendant]: Huh-uh. . . . Sgt. Vaughn: . . . [W]e’re going to the district attorney. . . . Now, he can either charge you with first degree homicide, or we can find out from you exactly everything that happened that night. . . . I think it’s more like a manslaughter . . . it’s something reckless . . . it’s something stupid, or maybe something negligent that happened that caused that death. You’re the one with the answers. You’re the one [who] can bail your ass out.

138. 51 P.3d 37 (Utah Ct. App. 2002).

139. *Id.* at 40.

140. *Id.*

141. *Id.* at 41.

Like I said, *the medical examiners want to hang you out to dry right now. . . . This is your chance. . . .* [Defendant]: *The only other thing that was there that night was I had (inaudible) some bubbles in the tub with a jug of Freon . . .*¹⁴²

Freon was later determined to be the cause of death. The court's opinion did not state why the defendant put Freon in the tub, but the State charged only child abuse homicide rather than murder so one assumes Bunting thought the Freon bubbles would make the child enjoy the bath. As an air conditioner repairman, however, "he knew the dangers of inhaling Freon in a closed environment, including that it robs lungs of oxygen."¹⁴³

In addition to the claims of coercion, promises, and misrepresentation, Bunting also argued that "the detectives intentionally played upon his vulnerable mental and psychological conditions to induce incriminating statements."¹⁴⁴ The appellate court rejected that argument as well. "[W]e conclude the detectives' tactics did not exploit any known mental or psychological condition of Defendant."¹⁴⁵ But the court studiously avoided looking at how the police coercion, promises, and misrepresentation might combine to overbear the suspect's will. The Supreme Court, in the "bad old days" before *Miranda* was much more willing to see the whole picture.

In *Miller v. State*,¹⁴⁶ the defendant claimed "that his statement to the police should have been suppressed because it was the result of coercion, manipulation, and fabricated evidence, in combination with his vulnerable mental state."¹⁴⁷ He argued that the "totality of the circumstances creates a full picture of the unwitting mentally retarded defendant being led down the path to his own detriment, the path being paved by lies and coercion."¹⁴⁸ The trial court found, and the appellate court did not disagree, that the defendant was mentally retarded,¹⁴⁹ though the opinion provides no details about how profoundly he was retarded. The appellate court commented that there was "no allegation or indication that police knew that he was mentally retarded," that "he did not appear to be incoherent or under the influence of alcohol or drugs."¹⁵⁰

142. *Id.* at 42.

143. *Id.* at 40.

144. *Id.* at 44.

145. *Id.* at 45.

146. 770 N.E.2d 763 (Ind. 2002).

147. *Id.* at 766.

148. *Id.*

149. *Id.*

150. *Id.* at 769.

Miller is an example of a fundamental problem with the due process voluntariness doctrine as applied by lower courts. If a defendant is mentally retarded, and thus less capable of acting on his own will, what possible difference could it make that the police did not know of his retardation? Either his will was overborne or it was not. But courts are always balancing two different goals when applying the voluntariness test: protecting the suspect's free will and preventing police misconduct. When the focus is on controlling police conduct, which Kamisar has long seen as the transcendent goal,¹⁵¹ the suspect's will tends to get lost. The converse is also true: when the police engage in misconduct, the courts emphasize the sturdiness of the defendant's will. To take a cynical view, perhaps when courts want to affirm a conviction, they will focus on the police conduct if it looks like the suspect's will was overborne, and if the police have admittedly engaged in misconduct, courts will claim that the suspect's will was sturdy enough to withstand that misconduct.

In addition to the retardation issue in *Miller*, the State admitted that the detective told three lies to the suspect: (1) he told Miller that witnesses had seen him "in the hallway outside the victim's first floor office" when in fact the witness saw the suspect only in the upstairs hallway; (2) the detective "presented the defendant with a fabricated fingerprint card and computer printout and represented that the defendant's fingerprints had been found in the victim's office"; and (3) the detective "showed the defendant the police report that stated that the victim died of natural causes" when the detective knew that the report was erroneous.¹⁵² The detective used lie number three to "suggest[] to the defendant that the death could have been an accident."¹⁵³

Relying on an earlier case that held voluntary a confession made after police lied about witnesses and fingerprints — *Henry v. State*¹⁵⁴ — the Indiana Supreme Court noted the "totality of the substantial probative evidence of voluntariness shown by the record" and found "beyond a reasonable doubt that the defendant voluntarily waived his rights, and that his incriminatory statements admitted in evidence were voluntarily given."¹⁵⁵ The court failed to note that *Henry* did not involve a mentally retarded suspect, indeed the court in that case

151. Yale Kamisar argued in 1963 that whatever courts *said* about voluntariness and free will, most of what they *did* was explained best as preventing police misconduct in the interrogation room. Yale Kamisar, *What Is An "Involuntary" Confession*, 17 RUTGERS L. REV. 728 (1963).

152. *Miller*, 770 N.E.2d at 768.

153. *Id.*

154. 738 N.E.2d 663 (Ind. 2000).

155. *Miller*, 770 N.E.2d at 770.

found Henry to be of “average intelligence.”¹⁵⁶ This is a good example of a court dismissing mental retardation as a potential problem along the police misconduct axis and then appearing to forget about the retardation when assessing whether the suspect’s will was overborne.¹⁵⁷

But in recognition of the suspect’s retardation, the court held that the trial court erred in refusing to permit the jury to hear the testimony of one defense witness, Dr. Richard Ofshe, an expert in the “social psychology of police interrogation and false confessions.”¹⁵⁸ On retrial, therefore, the defendant’s confession will be admissible as voluntary but so will Ofshe’s testimony “regarding the psychology of relevant aspects of police interrogation and the interrogation of mentally retarded persons, topics outside common knowledge and experience.”¹⁵⁹ The point here, at least according to the defendant’s argument on appeal, is that without Ofshe’s testimony, “there was nothing to explain to the jury why someone, confronted with lies, would then falsely admit to a crime.”¹⁶⁰ Thus, the real basis for the court’s recognition of the suspect’s retardation seems to be the fear of a false confession rather than an involuntary one.

Oddly, three of the five cases where a court found in favor of the defendant did not contain the level of overreaching and police misconduct that occurred in *Bunting* and *Miller*. I discussed two of these cases earlier.¹⁶¹ In a third case won by the defendant, the appellate court deferred to the trial court’s finding that the defendant was too intoxicated to make voluntary statements.¹⁶² The real issue in this case was whether the statements could be used to impeach the defendant’s testimony. The appellate court ruled that if the defendant lacked the capacity to make voluntary statements, they could not be used to impeach. As the real issue was impeachment, rather than voluntariness, no facts appear about the extent of the suspect’s drunkenness.

156. *Henry*, 738 N.E.2d at 665.

157. For a more fundamental critique of how judges apply *Miranda* to retarded suspects, see Morgan Cloud, George B. Shepherd, Alison Nodvin Barkoff & Justin V. Shur, *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495 (2002). The researchers conducted an empirical study to determine whether retarded people can understand the warnings and whether they are capable of voluntary, knowing, and intelligent waivers of those rights. The researchers concluded that the concept of a retarded person making a valid waiver of *Miranda* was possible only if one is “willing to manipulate and distort the very meaning” of voluntary, knowing, and intelligent. *Id.* at 591.

158. *Miller*, 770 N.E.2d at 770 (quoting Appellant’s Brief at 17 (49500-9908-CR-445)).

159. *Id.* at 774.

160. *Id.* at 772 (quoting Appellant’s Brief at 10 (49500-9908-CR-445)).

161. See *supra* notes 98-100 and accompanying text.

162. *People v. Lucero*, No. 231977, 2002 WL 1424806 (Mich. Ct. App. June 28, 2002).

The fourth case finding an involuntary confession, *People v. Traylor*,¹⁶³ is also short on facts, as the court used a presumption to rule in the defendant's favor. The defendant presented evidence that, after interrogation, he had a bruise on his nose that was not present before the interrogation began. Because he "proved that he had been injured 'while in police custody,' the State was required to prove by clear and convincing evidence that [the defendant's] injuries were not inflicted as a means of producing a confession."¹⁶⁴ The defendant won when the State did not discharge that burden of proof. This is certainly a common sense presumption, given the difficulty of proving coercion, but because of the presumption, the underlying facts of the interrogation nowhere appear in the opinion.

The fifth case is hard to categorize because the suspect was eleven years old and the issue on habeas was whether the lawyer was ineffective when he failed to move to suppress the confession.¹⁶⁵ The facts are complicated, and the court relies in part on the failure of the police to have a Youth Officer present for the first interrogation. Moreover, the court does not actually reach the issue of voluntariness. But the court does conclude that had defendant's lawyer made a motion to suppress the confession, it "would have enjoyed a very high probability of success."¹⁶⁶ Thus I chose to include it as a successful challenge based on coercion.

b. Questionable reading of the record and application of the doctrine: the strange case of Juan Carlos Chavez.

In a remarkable coincidence that I did not notice until near the end of this project, my Westlaw sample picked up *Chavez v. State*,¹⁶⁷ the case that Alfredo Garcia used in 2000 to illustrate how *Miranda* makes it easier for police to disguise coercion.¹⁶⁸ Garcia drew on trial court records from 1995. It took seven years for the case to wind its way to the Florida Supreme Court and, by pure chance, it showed up in my sample. I selected the Chavez case from my sample as the one with the most detailed and credible claim of coercion and, in an early draft of this paper, had included Garcia's discussion of what I thought was a different Chavez case as an example of a case with much more coercive facts. It finally dawned on me that, though seven years apart and with quite different factual accounts, they were the same case!

163. 771 N.E.2d 629 (Ill. Ct. App.2002).

164. *Traylor*, 771 N.E.2d at 633.

165. United States ex rel. A.M. v. Butler, 2002 WL 1348605 (N.D. Ill.)

166. *Id.* at *21.

167. 832 So. 2d 730 (Fla. 2002).

168. Garcia, *supra* note 20.

The facts of the case are gruesome. Chavez not only admitted kidnapping, raping, and murdering a nine-year-old boy, but also that three days later he dismembered the body into three parts to get it to fit in three planters in a barn. The Florida Supreme Court affirmed Juan Carlos Chavez's conviction and death sentence, describing the facts of the interrogation very differently from the account in Garcia's article. As to which description is closer to the truth, my money is on Garcia. Here is his description drawn from the trial records:

Police detectives interrogated the suspect for a total of thirty hours before he was allowed to sleep. During that period of time, the suspect was interrogated by three different teams of detectives, not counting the polygraph examiner who administered two polygraph examinations. Detectives secured *Miranda* waivers from the suspect a short period of time after the interrogation began at headquarters and approximately ten-and-one-half hours after the first waiver, after which they confronted Chavez with the negative results of both polygraph examinations. At that time, they let the suspect get some sleep within the cramped confines of the interrogation room. The defendant slept on the "carpeted floor of the interrogation room." . . .

The interrogation resumed the next morning, after the suspect slept for six hours. . . . After the interrogation continued, a member of the public defender's office contacted the homicide office and attempted unsuccessfully to gain access to the suspect. At the forty-four hour mark of the interrogation, Chavez finally broke down and acknowledged participation, though accidental, in the victim's death and acknowledged that he had disposed of the victim's body¹⁶⁹

Here is how the Florida Supreme Court described, and resolved, the coercion claim in the same case:

Although Chavez was questioned over the course of several days, he was provided with food, drink, and cigarettes (as requested) at appropriate times, and permitted to have frequent breaks. His interrogation was also interspersed with time away from the police facilities for visits to various properties, a six-hour rest period (where Chavez was offered a blanket and a pillow), and times when he was left alone for quiet reflection. He was repeatedly given *Miranda* warnings, in Spanish, and indicated each time that he fully understood them. Consequently, the trial court did not err in denying Chavez's motion to suppress on this ground.¹⁷⁰

While Garcia gives the source of his facts as the "Response to Defendant's Amended Motion to Suppress Evidence,"¹⁷¹ the Florida

169. Garcia, *supra* note 20, at 500-01 (drawing facts from Response to Defendant's Amended Motion to Suppress Evidence at 1, State v. Chavez (Fla. Cir. Ct. 1995) (No. 95-037867)).

170. *Chavez*, 832 So.2d at 749.

171. Garcia, *supra* note 20, at 499 n.406.

Supreme Court makes only a single indirect reference to the “record” as the source of its facts: “The trial court’s denial of Chavez’s motion to suppress is presumed to be correct and must be upheld where, as here, that decision is supported by the record.”¹⁷² Perhaps the motion to suppress produced evidence more favorable to the State than it claimed in its response to the motion to suppress, though that does not seem likely. This might be an example of a court “smoothing out” the facts to support a decision that it wishes to reach. To affirm a death sentence by “smoothing out” the facts to the detriment of the defendant is a pretty sorry business.

But, on either reading of the facts, *Chavez* shows how police use *Miranda* to ward off a claim of coercion. By breaking up the interrogation and repeatedly giving *Miranda* warnings, the police managed to insulate their high-pressure interrogation from scrutiny. I doubt the Warren Court imagined this use of *Miranda*. In the “bad old days” of the voluntariness test, Chavez would have had a better chance to suppress his confession because the State would not have had *Miranda* warnings to inoculate the marathon questioning.¹⁷³

I have explicitly assumed throughout this paper that the court opinions accurately recount the facts. The comparison of the Florida Supreme Court opinion in *Chavez* with the account Garcia draws from the State’s own court documents calls into question the validity of my operating assumption. If the appellate courts are “smoothing out” the facts to permit them to affirm convictions, the incidence of police coercion and trickery may be substantially more than I found. The degree of police compliance with *Miranda* may be substantially lower than I found. More troubling, if appellate courts are assisting the State in hiding problems with police interrogation, courts are failing to provide justice.

6. *Findings on Coercion, Trickery, and Involuntariness*

So what is the verdict? Did I uncover sufficient evidence to reject the earlier findings of little police coercion and trickery in obtaining waivers or statements? I tentatively conclude that I did not find enough evidence to reject those findings. But the *Chavez* case remains troubling. My finding of little coercion and trickery assumes that appellate courts in run of the mill cases accurately present facts and claims relative to suppression. I also assume that when courts resolve credibility disputes, they resolve them accurately most of the time.

172. *Chavez*, 832 So. 2d at 748.

173. Professor Garcia agrees, concluding that the police in *Chavez* used “the great *Miranda* warnings to sanitize a clearly involuntary confession.” See Garcia, *supra* note 20, at 502.

These are powerful assumptions and I recognize that a reader could reject them as putting too much faith in appellate court opinions.¹⁷⁴

Chavez may be an outlier. Hopefully, cases as gruesome as *Chavez* are extremely unusual in the first place. The police did not have much evidence against Chavez and thus had a powerful incentive to obtain a statement. Perhaps lack of evidence in murder cases will be unusual in a world where DNA testing can conclusively prove guilt in many rape cases. Thus, my assumption that appellate court opinions paint a more or less accurate picture of the interrogation are, I think, plausible, at least when limited to the run of the mill case. If these assumptions hold, my study supports the findings of Leo and of Cassell and Hayman that there is little police coercion or trickery in typical police interrogations. Of the twenty-five claims of coercion or trickery,¹⁷⁵ I thought only five presented sufficient credible evidence to qualify as a violation of the due process voluntariness doctrine: [1] *Chavez*, of course; [2] *Miller*, where I think the court was wrong to deny the claim of the mentally retarded suspect; [3] *Bunting*, where the father killed his son with Freon bubbles; [4] *Traylor*, where the court applied a presumption of coercion because of evidence of injury while in police custody and [5] the case of the eleven-year-old suspect. None of the other descriptions in the appellate opinions came close to documenting a due process violation. The reader may quite justifiably think that the due process voluntariness test is an insufficient protection of suspects' free will. Indeed, the *Miranda* Court reached the same conclusion. But of the suspects who receive warnings, 68% waive *Miranda*,¹⁷⁶ and the Court has adopted voluntariness as the test of waiver and of subsequent confessions. Defendants made only five credible showings of a coerced confession, which is only 2% of all the claims where a statement is made (226 cases).

In the actual cases, of course, only Traylor and the juvenile persuaded a court that the police used coercive tactics. Miller, Bunting, and Chavez lost. Three other defendants won their claims, not on the basis of a coerced confession but, rather, on the basis of what could be termed "technical" violations of *Miranda* — the failure to demonstrate that the waiver was voluntary. If we add the technical *Miranda* violations to the coerced confession cases, as another way of showing involuntariness, we have eight credible showings of involuntariness, broadly conceived, or 3.5% of all the statements.

174. Richard Leo raised this point forcefully. See Leo email, *supra* note 13. In the context of *Miranda*, Richard is both a loyal supporter and a fierce critic of some of my assumptions about how courts and police approach compliance.

175. See *supra* Table 6.

176. See *supra* Table 2.

Assuming competent lawyering and accurate reporting in court opinions, and given the tendency of suspect stories to exaggerate police misconduct, I do not think this frequency is sufficient to cause us to suspect widespread police misconduct during interrogation. Richard Leo found a 2% coercion rate in his observational study.¹⁷⁷

However accurate my study is in assessing police misconduct, my account of prosecution stories is a valuable addition to the *Miranda* literature. My study provides the first picture of how often prosecutors rely on various *Miranda* doctrines as they offer into evidence suspect statements. I describe these findings in the next Part.

VII. HOW PROSECUTORS USE THE *MIRANDA* DOCTRINES

The classification of claims into doctrinal categories in Table 3 shows how prosecutors use the Court's various exceptions to *Miranda*.¹⁷⁸ When decided, *Harris* seemed to have blown a gaping hole in *Miranda* by permitting use of statements taken in violation of *Miranda* to impeach the defendant's credibility, thus indirectly putting tainted evidence of guilt before the jury. Doctrinally, *Harris* might be a disaster. But Table 3 suggests that prosecutors rarely make use of this way of avoiding *Miranda*'s exclusionary rule — only 1% of cases involved an overt use of *Harris*. Even if we limit the universe to statements made without warnings,¹⁷⁹ *Harris* accounts for only 3% of the uses of suspect statements.

To be sure, *Harris* is useful only when the police have violated *Miranda*, and I found only eighteen violations — twelve failures to warn¹⁸⁰ and six refusals to honor an invocation of counsel.¹⁸¹ Perhaps *Harris* was not helpful to the State in sixteen of those eighteen cases because these sixteen defendants chose not to testify, at least in part because of the *Harris* threat. It is fair to conclude that *Harris* is a minor doctrinal wrinkle. I cannot also conclude that *Harris* has a minor real world effect on the decision of whether to testify.

In *Oregon v. Elstad*,¹⁸² the Court held that warnings and a waiver will, in effect, remedy the harm of a *Miranda* violation that preceded the warnings. That exception is of no use to prosecutors seeking to introduce a statement¹⁸³ unless the police actually give the warnings

177. Leo, *Inside*, *supra* note 15, at 282.

178. *See supra* Table 3.

179. *See supra* Table 1.

180. *See supra* Table 1.

181. *See supra* Table 4.

182. 470 U.S. 298 (1985).

183. Prosecutors do not have to show that warnings were given to get physical evidence admitted under the *Elstad* exception. When tangible evidence is found as a result of a *Miranda* violation, that evidence is admissible even if the statement that led the police to

after there has been a *Miranda* violation. Police might do this because they were unaware that the earlier conversation qualified as custodial interrogation and thus required warnings — indeed, *Elstad*'s facts suggest this kind of inadvertent *Miranda* violation. Or police might manipulate the *Elstad* doctrine by intentionally violating *Miranda* and then giving the warnings as triage.¹⁸⁴ At least in my study, *Elstad* was not very significant, providing a remedy for a *Miranda* violation in only three cases.¹⁸⁵ If the sum total of inadvertent “uses” and intentional manipulation of *Elstad* is 3 of 211 cases,¹⁸⁶ the hole in *Miranda*'s protection is insignificant.

New York v. Quarles,¹⁸⁷ the public safety case, also precipitated a good deal of criticism and hand-wringing when it was decided. Even Justice O'Connor, hardly an ardent supporter of *Miranda*, dissented on the ground that the Court was blurring *Miranda*'s relatively clear strictures without sufficient justification. Whatever blur may have occurred doctrinally does not seem to have translated into a police appetite for avoiding *Miranda* by creative use of the public safety exception — Table 3 shows that only 2% of the claims were resolved on this ground.¹⁸⁸

But once the police fail to give warnings as required by *Miranda*, and prosecutors seek to “save” the confession, *Quarles* is somewhat useful. A prosecutor who wants to prove guilt with a statement taken in violation of *Miranda* has essentially three arguments from which to choose: the suspect was not in custody, the police did not interrogate, or public safety concerns made the warnings unnecessary. In my study,

that evidence is not admissible. The Court suggested as much in *Elstad* and held that to be the rule in *United States v. Patane*, 124 S.Ct. 2620 (2004). (Though *Patane* has no majority opinion, five justices agreed that physical evidence is admissible despite being the fruit of a *Miranda* violation.)

All the *Miranda* violations in my sample involved statements. If the prosecutor seeks to use *Elstad* to have a statement admitted, the police must give warnings prior to taking the statement, as I indicate in the text.

Yale Kamisar refuses to let *Miranda* die (perhaps because of his view of assisted suicide). He already has a paper forthcoming on the Court's two “fruits” cases decided in 2004 — *Patane*, *supra* this note, and *Missouri v. Seibert*, *supra* note 39. See Yale Kamisar, Postscript: Another Look at *Patane* and *Seibert*, The 2004 *Miranda* “Poisoned Fruit” Cases, 2 OHIO ST. J. CRIM. L. ____ (2004) (forthcoming). The paper is vintage Kamisar, filled with penetrating analysis, choice quotes from the oral arguments, and provocative hypotheticals that test the limits of the new doctrine. Kamisar concludes that the new *Miranda* poisoned fruit doctrine fails as a reasonable application of *Miranda*'s principles.

184. The Court just held this strategy unconstitutional. See *Missouri v. Seibert*, 124 S.Ct. 2601 (2004), discussed *supra* note 39.

185. See *supra* Table 3.

186. The proper universe is all cases because police could seek to manipulate *Elstad* in every case.

187. 467 U.S. 649 (1984).

188. See *supra* Table 3.

police did not give warnings in 60 cases.¹⁸⁹ The State obtained admission of the statement in the case-in-chief in 48 of those cases,¹⁹⁰ 6 of which were based on the public safety exception. Thus, the public safety exception explained 13% of the success in having confessions admitted despite the lack of warnings. The custody and interrogation grounds explained the rest — 87%. It's clear which argument prosecutors favor, almost surely because most of the failures to warn simply cannot be described plausibly as an attempt to protect the public safety.

Has *Miranda* had much effect on prosecutors? Table 3 shows that in 5% of the cases statements are suppressed for lack of warning; 2% of the time when the suspect invoked counsel and the police continued questioning; and 2% of the time when the defendant successfully challenges the waiver or subsequent interrogation.¹⁹¹ In seeking *Miranda*'s real effect, though, we should include the five cases from Table 3 where the suspect invoked the *Miranda* right to counsel and the police ceased questioning.¹⁹² If the interrogation had continued, at least some of those suspects would probably have made a statement. If we include all, to be conservative, the total negative outcomes, from the perspective of the State, increases to 11%. Moreover, we should include some of the suspects who did not answer questions. Presumably, not all of these suspects were assisted by the warnings — we know for a fact that some suspects refused to answer police questions in the pre-*Miranda* era — but even if we include all fifteen of the silent types, we are only up to a negative outcome total of 17%.

Like much else in my study, this finding likely overstates, by a substantial amount, the loss of statements in the average case that ends either in a plea bargain or a trial and no appeal. So we can confidently claim that the effect of *Miranda* is a lot lower than 17%. Indeed, we can speculate that even in the cases that go to trial and are appealed, the true rate of bad outcomes for the State is considerably less than 17% because not all of the silent types would have answered questions even if no warnings were given.

CONCLUSION

The gaping holes in *Miranda*'s protection that show up in my study are the ones inherent in *Miranda* itself. The Court explicitly provided that the rights could be waived and explicitly limited its warnings

189. See *supra* Table 1.

190. Subtract the first two categories from the total of 60 cases where warnings were not given. See *supra* Table 1.

191. See *supra* Table 3.

192. Paul Cassell would approve. See Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 Nw. U. L. REV. 387 (1996).

requirement to interrogations that take place when the suspect is in custody.¹⁹³ Justice Marshall argued in a dissent a few years after *Miranda* that custodial interrogation was merely a starting place, and that the principles underlying *Miranda* justified the extension of the doctrine in a more protective direction.¹⁹⁴ But the Court never took that bait. Thus, many police-suspect encounters fall outside *Miranda*'s ambit. Table 3 shows that 17% of all claims were resolved by holding that the suspect was either not in custody or not subject to interrogation.¹⁹⁵ Once we account for suppression, waiver, and various forms of invocation or silence as shown in Table 3, 235 claims, or 96%, of the total were resolved within the framework explicitly created by *Miranda*. This means only 4%, or a total of 11 claims, resulted from the Burger and Rehnquist Court "wrinkles" in the *Miranda* doctrine that I was able to test.¹⁹⁶

I reiterate that my methodology cannot test the subtle and perhaps far more pernicious softening of the waiver and invocation rules that occurred on the watch of the Burger and Rehnquist Courts. Nor can I measure the effect of *Harris* on the defendant's decision to testify when she faces impeachment by use of a statement taken in violation of *Miranda*.

But the main body of my study confirms much of the newly emerging view of how *Miranda* operates "on the ground." The original aspects of my study include trying to uncover the stories defendants and prosecutors tell when arguing over whether to suppress statements. Whatever the extent of the methodological flaws in using a database drawn from Westlaw, the results are in line with Richard Leo's study and with the Cassell-Hayman study. Police usually give warnings, they usually do not engage in lengthy or high-pressure coercion to get waivers, and while they occasionally resort to trickery, it is rarely of the degree and scope of that suggested in Simon's book.¹⁹⁷ Police do not seem to commit perjury in any kind of obvious or large-scale way. And even with warnings given properly and police more or less observant of the rules about waiver, police are hugely successful in getting suspects to say incriminating things.

Suspects usually waive their rights and talk to the police, and defendants almost always lose their motions to suppress statements.

193. Once again, Yale Kamisar has written early and with great insight on these issues. See, e.g., Yale Kamisar, *Brewer v. Williams, Massiah, and Miranda: What Is "Interrogation"? When Does It Matter?*, 67 GEO. L.J. 1 (1978).

194. See *Oregon v. Mathiason*, 429 U.S. 492, 497-99 (1977) (Marshall, J., dissenting).

195. See *supra* Table 3.

196. Six cases admitted statements because of *Quarles*, three because of *Elstad*, and two because of *Harris*. See *supra* Table 3.

197. See SIMON, *supra* note 22, at 197-203.

Many suspects talk, not because police are skilled or calculating, but because at some level they *want* to talk to police. They *want* to tell their story because they think they can skillfully navigate the shoals of police interrogation and arrive safely on the other shore. If this is the right way to view most (not all) suspects, then the Court has for many decades had the wrong “picture” of police interrogation. In the 1940s, the Court seemed to view suspects as coolly calculating actors who confessed to gain some tactical advantage.¹⁹⁸ *Miranda*, on the other hand, viewed suspects as either helpless or confused, incapable of making a rational choice about answering police questions.¹⁹⁹ My data, and the emerging idea of a guilty suspect who talks in the hope that he can persuade the police to release him, paint a different picture. The guilty suspects who waive *Miranda* and answer police questions look neither calculating, nor helpless. Instead they appear to be willing but overmatched participants in the game of interrogation.

My study is the latest piece of evidence that *Miranda* has not changed very much about police interrogation. Perhaps history will record the *Miranda* revolution as a mere blip on the screen in the centuries of evolving law that regulates police questioning of suspects.²⁰⁰ But there is no denying the enduring power of the insight Yale Kamisar had almost forty years ago.²⁰¹ American society values informed citizens and equal treatment. Our Constitution gives suspects the right not to answer police questions. To inform all suspects who face police interrogators of this right is simply part and parcel of what America means. That the Supreme Court in 2000 reaffirmed *Miranda*, in an opinion written by Chief Justice Rehnquist,²⁰² is a fitting tribute to Yale Kamisar’s vision and skill.

The larger implication of my study is a cautionary note for law reformers who think that law can change behavior in ways that suit the

198. See, e.g., *Lisenba v. California*, 314 U.S. 219, 241 (1941). The Court noted that the suspect, who likely murdered two wives,

exhibited a self-possession, a coolness, and an acumen throughout his questioning, and at his trial, which negatives the view that he had so lost his freedom of action that the statements were not his but were the result of the deprivation of his free choice to admit, to deny, or to refuse to answer.

Id.

199. Many examples can be given. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 458 (1966) (noting that “[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice”).

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200. For a doctrinal argument along these lines, see George C. Thomas III, *The End of the Road for Miranda v. Arizona?: On the History and Future of Rules for Police Interrogation*, 37 AM. CRIM. L. REV. 1 (2000).

201. See Kamisar, *Equal Justice*, *supra* note 6, at 19.

202. *Dickerson v. United States*, 530 U.S. 428 (2000).

reformers. Law can change behavior, to be sure, but only when it changes the balance of incentives and thus makes the actor choose a different course because she perceives it to be better than any other course. As long as suspects think they are better off trying to persuade police that they are not guilty, they will continue to talk to police. *Miranda* provides knowledge that it *might* not be in a suspect's best interests to talk to police. But this knowledge is meaningless as long as suspects are willing to take the chance that it *is* in their best interests to talk. As that calculation is based on a suspect's entire life telling stories, the *Miranda* Court was naïve if it thought that a set of formal warnings could change story-telling behavior. My study suggests that the warnings do not change suspect behavior in any significant way.