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# QUESTIONING THE RELEVANCE OF *MIRANDA* IN THE TWENTY-FIRST CENTURY

Richard A. Leo\*

## INTRODUCTION<sup>1</sup>

*Miranda v. Arizona*<sup>2</sup> is the most well-known criminal justice decision — arguably the most well-known legal decision — in American history. Since it was decided in 1966, the *Miranda* decision has spawned voluminous newspaper coverage, political and legal debate, and academic commentary. The *Miranda* warnings themselves have become so well-known through the media of television that most people recognize them immediately.<sup>3</sup> As Patrick Malone has pointed out, the *Miranda* decision has added its own lexicon of words and phrases to the American language.<sup>4</sup> Perhaps with this understanding in mind, George Thomas recently suggested that the *Miranda* warnings are more well-known to school children than the Gettysburg address,<sup>5</sup> foreshadowing the Supreme Court's statement in *Dickerson v. United States* that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."<sup>6</sup> But even this may be an understatement: beyond the borders of the United States, the *Miranda* warnings may be more well known than virtually any other feature of the American criminal justice system.

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1. I thank George Thomas, Charles Weisselberg, and Welsh White for their helpful comments.

2. 384 U.S. 436 (1966).

3. SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950-1990*, at 51-52 (1993).

4. Patrick Malone, *You Have the Right to Remain Silent: Miranda After Twenty Years*, 55 AM. SCHOLAR 367 (1986).

5. THE *MIRANDA* DEBATE: LAW, JUSTICE AND POLICING xv (Richard A. Leo & George C. Thomas III, eds., 1998). As George Thomas points out elsewhere, "the typical TV viewer has heard *Miranda* warnings given hundreds of times, with no discernible effect on the 'good guys' getting the confession from the guilty suspects." George Thomas, *The End of the Road for Miranda v. Arizona*, 37 AM. CRIM. L. REV. 1, 12 (2000).

6. 120 S. Ct. 2326, 2336 (2000).

From all this attention, one might reasonably infer that the impact of the *Miranda* decision — on police, on criminal suspects, on confession and conviction rates, on the American public — continues to be enormous. The purpose of this Essay is to question assumptions about the effects of *Miranda* and to suggest that legal scholars devote more energy to the empirical study of other, more significant, aspects of police interrogation and confessions. While it may have initially exerted a substantial impact on police interrogation practices and the criminal justice system, *Miranda* may no longer be as relevant as it once was to understanding how police interrogate, why suspects do or do not confess, and which legal reforms best serve the imperatives of crime control, due process and justice. In Part I, I review two generations of studies assessing *Miranda*'s impact to set forth what we know and do not know about the ongoing macro-level impact of *Miranda*. In Part II, I take a more micro-level view to analyze the probable impact of *Miranda* on the central actors in the criminal justice system in the twenty-first century. Both Parts I and II conclude that *Miranda* has had a very limited impact (positive or negative) on the criminal justice system in the last two decades. Finally, in Part III, I conclude with some observations about the importance of mandatory video-taping of police interrogations and the future of legal scholarship on police interrogation practices and confession law. It is not the purpose of this Essay to provide any hard and fast answers to enduring and difficult questions, but rather to question our assumptions about *Miranda*'s real world relevance in the twenty-first century and to suggest less popular, but arguably far more important, directions for policy innovation and future scholarship in this area.

## I. THE *MIRANDA* IMPACT STUDIES

### A. *First Generation Studies (1966-1973)*

In the three decades prior to *Miranda*, there had been relatively little field research on police interrogation practices in America.<sup>7</sup> It was thus hardly surprising that the Warren Court in 1966 relied on police training manuals — rather than empirical studies — to describe the techniques and methods of police interrogation in America. Emphasizing the absence of first-hand knowledge of actual police interrogation practices at the time, the Warren Court in *Miranda* noted that: “Interrogation still takes place in privacy. Privacy results in secrecy

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7. For some pre-*Miranda* studies that included an analysis or discussion of observations of actual interrogations, see WILLIAM A. WESTLEY, *VIOLENCE AND THE POLICE: A SOCIOLOGICAL STUDY OF LAW, CUSTOM, AND MORALITY* (1970); AMERICAN BAR FOUNDATION, *THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE UNITED STATES: PILOT PROJECT REPORT* (1957); Edward Barrett, Jr., *Police Practices and the Law — from Arrest to Release or Charge*, 50 CAL. L. REV. 11 (1962).

and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation room.”<sup>8</sup>

In the years immediately following the *Miranda* decision, scholars published approximately a dozen empirical studies that sought to fill in this gap.<sup>9</sup> These studies relied on a variety of methodologies (e.g., participant observation, survey research, interviews, analysis of case files) and were undertaken in a variety of locations (e.g., Pittsburgh, New Haven, Washington, D.C., Los Angeles, Denver, Madison, and elsewhere). In the main, these studies sought to identify and analyze police implementation of, and compliance with, the new *Miranda* requirements; police attitudes toward *Miranda*; the effect of the *Miranda* warning and waiver regime on police and suspect behavior during interrogation; and the impact of *Miranda* on confession, clearance, and conviction rates.

Several scholars have catalogued and analyzed the findings of the first generation *Miranda* studies.<sup>10</sup> Although an in-depth discussion of these studies is beyond the scope of this Essay, several general patterns are worth briefly noting. First, in the initial aftermath of *Miranda*, some police began immediately complying with *Miranda*,<sup>11</sup>

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8. 384 U.S. 436, 448, 466 (1965).

9. See NEIL A. MILNER, *THE COURT AND LOCAL LAW ENFORCEMENT: THE IMPACT OF MIRANDA* (1971); John Griffiths & Richard Ayres, *Faculty Note, A Postscript to the Miranda Project, Interrogation of Draft Protesters*, 77 YALE L. J. 300 (1967); Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DENV. L.J. 1 (1970); Richard J. Medalie et al., *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968); David W. Neubauer, *Confessions in Prairie City: Some Causes and Effects*, 65 J. CRIM. L. & CRIMINOLOGY 103 (1974); Cyril D. Robinson, *Police and Prosecutor Practices and Attitudes Relating to Interrogation as Revealed by Pre- and Post-Miranda Questionnaires: A Construct of Police Capacity to Comply*, 3 DUKE L. J. 425 (1968); Roger C. Schaefer, *Patrolman Perspectives on Miranda*, 1971 LAW & THE SOC. ORD. 81 (1971); Richard Seeburger & R. Stanton Wettick, Jr., *Miranda in Pittsburgh — A Statistical Study*, 29 PITT. L. REV. 1 (1967); Otis Stephens et al., *Law Enforcement and the Supreme Court: Police Perceptions of the Miranda Requirements*, 39 TENN. L. REV. 407 (1972); Michael Wald et al., *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967); James W. Witt, *Non-Coercive Interrogation and the Administration of Criminal Justice: The Impact of Miranda on Police Effectuality*, 64 J. CRIM. L. & CRIMINOLOGY 320 (1973); Evelle J. Younger, *Interrogation of Criminal Defendants — Some Views on Miranda v. Arizona*, 35 FORDHAM L. REV. 255 (1966) [hereinafter Younger, *Interrogation*]; Evelle J. Younger, *Results of a Survey Conducted in the District Attorney's Office of Los Angeles County Regarding the Effect of the Miranda Decision Upon the Prosecution of Felony Cases*, 5 AM. CRIM. L. Q. 32 (1966) [hereinafter Younger, *Results*]. In addition to these published studies, prosecutors' offices in several other cities conducted surveys and ventured speculations of the confession rates in the period immediately prior and subsequent to the *Miranda* decision. For a catalogue of these unpublished speculations, see Paul Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV., 387, 397-418 (1996).

10. Younger, *Interrogation*, *supra* note 9 at 33. See Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 632-645 (1996); Cassell, *supra* note 9, at 394-433; Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 516-538 (1996).

11. Younger, *Interrogation*, *supra* note 9, at 32.

while others ignored the decision or failed to recite part or all of the required warnings to suspects in custody.<sup>12</sup> After a brief adjustment period, however, virtually all police began to regularly comply with the letter, though not always the spirit, of the fourfold warning and waiver requirements.<sup>13</sup> Despite their compliance, however, many detectives resented the new *Miranda* requirements.<sup>14</sup>

Second, despite the fourfold warnings, suspects frequently waived their *Miranda* rights and chose, instead, to speak to their interrogators. Some researchers attributed this largely unexpected finding to the manner in which detectives delivered the *Miranda* warnings,<sup>15</sup> while others attributed it to the failure of suspects to understand the meaning or significance of their *Miranda* rights.<sup>16</sup>

Third, once a waiver of rights had been obtained, the tactics and techniques of police interrogation did not appear to change as a result of *Miranda*. For example, Wald et al. observed in New Haven that *Miranda* appeared to have little impact on police behavior during interrogation, since detectives continued to employ many of the psychological tactics of persuasion and manipulation that the Warren Court had deplored in *Miranda*.<sup>17</sup> Stephens reported that while most detectives in Knoxville, Tennessee, and Macon, Georgia, issued formalized warnings, *Miranda* did not change the nature and role of the interrogation process.<sup>18</sup>

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12. Wald et al., *supra* note 9, at 1550.

13. *Id.* at 1550-51; Leiken, *supra* note 9, at 9-10, 14, 47 (finding "strict compliance with [*Miranda*'s] formal requirements."). Leiken's study also suggested that police sometimes ignored suspects' refusals to waive rights. *Id.* at 30.

14. For example, police interrogators in New Haven viewed the requirements as artificial, unnecessary and generally impugning of police integrity, while police detectives in Macon, Georgia, and Knoxville, Tennessee, almost uniformly felt that *Miranda* had hampered their ability to investigate and solve crime effectively by undermining the authoritativeness of their relations with criminal suspects. Wald et al., *supra* note 9, at 1610-11; Stephens et al., *supra* note 9, at 423. Wisconsin police also viewed *Miranda* as harmful and drastic. MILNER, *supra* note 9, at 219.

15. For example, Wald et al. believed that New Haven detectives often intoned the warnings in a mechanical, bureaucratic manner so as to trivialize their potential significance and minimize their effectiveness, sometimes coaxing ambivalent suspects into waiving their rights. Wald et al., *supra* note 9, at 1552. Leiken argued that police used the very psychological pressures deplored by the *Miranda* court, including promises and threats to induce suspects to sign waiver forms and subsequently to elicit statements and confessions. Leiken, *supra* note 9, at 37-41.

16. For example, Medalie argued that a significant number of suspects in the District of Columbia did not understand the right to silence or the right to appointed counsel. Medalie, *supra* note 9, at 1374-75. Wald et al. and Leiken argued that many suspects in New Haven and Denver, respectively, were unable to grasp the meaning of their *Miranda* rights. Wald et al., *supra* note 9, at 1554-55, 1614; Leiken, *supra* note 9, at 14-15.

17. Wald et al., *supra* note 9, at 1542-43.

18. Stephens et al., *supra* note 9, at 430.

Fourth, suspects continued to provide detectives with confessions and incriminating statements. In some studies, however, researchers reported a lower rate of confession following the *Miranda* decision than prior to *Miranda*. For example, Seeburger and Wettick reported that in Pittsburgh, the confession rate dropped from 54.4% prior to *Miranda* to 37.5% after *Miranda*, though the specific amount varied by the type of crime reported.<sup>19</sup> Yet other researchers reported only a marginal decrease in the confession rate. For example, Witt reported that in "Seaside City" (a pseudonym for a beach city in Los Angeles) the confession rate dropped only two percent (from 69% before the *Miranda* decision to 67% after the *Miranda* decision).<sup>20</sup> And one researcher even reported an increase in the confession rate of approximately 10% after *Miranda*.<sup>21</sup>

Fifth, researchers reported that clearance and conviction rates had not been adversely affected by the new *Miranda* requirements. For example, even though Seeburger and Wettick found a 17% decline in the confession rate of suspects in Pittsburgh, they did not find a corresponding decline in the conviction rate.<sup>22</sup> Other researchers reported significant, if temporary, declines in clearance rates, but also noted that conviction rates remained relatively constant.<sup>23</sup> Moreover, even where conviction rates dropped along with clearance rates, the drop was not significant. For example, in his study of "Seaside City," Witt reported a 3% decline in the clearance rate and a 9% decline in the conviction rate (from 92% to 84%) after *Miranda* became law.<sup>24</sup> If there was a significant cost to *Miranda* according to first generation impact researchers, it appeared to be that *Miranda* may have caused the interrogation rate to drop and may also have been responsible for lessening the effectiveness of the collateral functions of interrogation such as identifying accomplices, clearing crimes and recovering stolen property.<sup>25</sup>

Regardless, the consensus that emerged from the first generation of *Miranda* impact studies was that the *Miranda* rules have had only a marginal effect on the ability of the police to successfully elicit confes-

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19. Seeburger & Wettick, *supra* note 9, at 11.

20. Witt, *supra* note 9, at 325.

21. Younger, *Interrogation*, *supra* note 9, at 260.

22. Seeburger & Wettick, *supra* note 9, at 20. A confession is not always necessary for conviction, and thus a decline in the confession rate will not inevitably produce a decline in the conviction rate.

23. For example, Milner notes in his study of four Wisconsin police departments that, in the year following *Miranda*, the clearance rate went down significantly (13-51%), but that the conviction rate remained relatively constant for the two departments that provided Milner with statistics. MILNER, *supra* note 9, at 218-19.

24. Witt, *supra* note 9, at 328-29.

25. *Id.* at 332.

sions and on the ability of prosecutors to win convictions, despite the fact that some detectives continued to perceive that *Miranda's* impact was substantial.<sup>26</sup> The general view of these studies is not merely that *Miranda* has failed to adversely affect the ability of police to control crime, but also that, in practice, the requirement of standard *Miranda* warnings failed to achieve the goal or impact originally envisioned by the Warren Court.

The first-generation *Miranda* impact researchers are to be commended for the efforts they expended in gathering data on *Miranda's* real world impact in the immediate years after the case was decided. However, as I have argued elsewhere, the generalizability and contemporary relevance of these findings are undermined by two key factors. First, these studies are largely outdated. The data in each of the first-generation *Miranda* impact studies was gathered during the first three years following the *Miranda* decision in the mid-to-late 1960s. Therefore, these studies arguably captured only the initial effects of *Miranda* before police officers and detectives had fully adjusted to the new procedures.<sup>27</sup> Second, many of these studies are methodologically weak, perhaps because they were virtually all conducted by lawyers or law professors without any training in the research methods of social science.<sup>28</sup>

#### B. Second Generation Studies (1996-Present)

The first generation of *Miranda* impact studies had run their course by 1973. For the next two decades, the social science and legal community, with few exceptions,<sup>29</sup> appeared to lose interest in the empirical study of *Miranda's* impact on criminal justice processes and outcomes. Since the mid-1990s, however, there has been a second flurry or generation of empirical *Miranda* impact studies. These stud-

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26. *Id.* at 322-25.

27. Schulhofer, *supra* note 10, at 506 (“[E]ven if we can assume that the studies give a reliable picture of *Miranda's* costs thirty years ago, there is strong reason to believe that such costs were transitory and that confession rates have since rebounded from any temporary decline.”).

28. As I have pointed out elsewhere:

[S]ome of the studies did not disaggregate the data they collected and thus lack any systematic analysis between independent and dependent variables in their sample. Three of the studies that did disaggregate their quantitative data failed to employ even the most elementary statistical techniques to evaluate whether any of the pre-*Miranda* and post-*Miranda* differences observed were statistically significant. More fundamentally, several of the studies suffer from selection and respondent biases that undermine the validity and generalizability of their findings.

Leo, *supra* note 10, at 647 (citations omitted).

29. John Gruhl & Cassia Spohn, *The Supreme Court's Post-Miranda Rulings: Impact on Local Prosecutors*, 3 LAW & POL'Y Q. 29 (1981); Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980).

ies might loosely be divided into two types: those that seek to assess the quantitative impact of *Miranda* on confession, clearance, and conviction rates; and those that qualitatively seek to assess *Miranda*'s real world impact on how police issue warnings and elicit waivers, whether and how they comply with or circumvent *Miranda*'s requirements, and *Miranda*'s effects on police interrogation methods and confessions. Unlike their first generation counterparts, however, the second generation impact studies have generated considerable interpretive disagreement, debate, and commentary.

The most well-known "debate" in the second-generation studies has been between Paul Cassell and Stephen Schulhofer. Selectively re-analyzing the first generation impact studies, as well as several unpublished surveys conducted by prosecutors' offices in several cities immediately prior to and after *Miranda*, Cassell speculated in 1996 both that *Miranda* has caused a 16% reduction in the confession rate and that it is responsible for lost convictions in 3.8% of all serious criminal cases.<sup>30</sup> Utilizing such figures, Cassell concluded that, as a result of *Miranda*, the government fails to obtain convictions in approximately 28,000 violent crime and 79,000 property crime cases each year and is forced to settle for plea bargains on terms more favorable to criminal defendants in a similar number of cases.<sup>31</sup> Shortly after publishing these figures, Cassell substantially revised them and argued that each year 100,000 violent criminals (who would otherwise be convicted and incarcerated) go free as a direct result of the *Miranda* requirements.<sup>32</sup> Re-analyzing the same data,<sup>33</sup> Stephen Schulhofer has speculated that *Miranda* may have initially caused a 4.1% drop in the confession rate in the immediate post-*Miranda* period and a 0.78% drop in the conviction rate.<sup>34</sup> Based on his analysis, Schulhofer has argued that "for all practical purposes, *Miranda*'s empirically detectable net damage to law enforcement is zero."<sup>35</sup>

In a number of subsequent law review and newspaper articles, Cassell has continued to argue that *Miranda* has substantially depressed the confession rate and imposed significant costs on society by allowing tens of thousands of guilty suspects to escape conviction. In a study of prosecutorial screening sessions involving a sample of 219 suspects, Cassell found that 42.2% of the suspects who were ques-

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30. Cassell, *supra* note 9, at 437-438.

31. *Id.* at 440.

32. Paul Cassell, *True Confessions About Miranda Legacy*, LEGAL TIMES, July 22, 1996, at 22.

33. Schulhofer properly excludes the unpublished studies that Cassell had included in his analysis of *Miranda*'s quantitative effect. Schulhofer, *supra* note 10, at 516-38.

34. *Id.* at 541-42.

35. *Id.* at 547.



tioned gave incriminating statements, a confession rate that he argued is far lower than pre-*Miranda* confession rates.<sup>36</sup> Analyzing national aggregate clearance data, Cassell has asserted that about one out of every four violent crimes that was “cleared” before *Miranda* was not cleared “after” *Miranda*, and has attributed the decline in clearance rates to the *Miranda* decision.<sup>37</sup> In a subsequent law review article based on a multiple regression analysis of the time series of Federal Bureau of Investigation reported national clearance rates,<sup>38</sup> Cassell and his co-author Richard Fowles claimed that *Miranda* caused clearance rates to drop sharply for certain crimes during the years 1966-1968, and argued that “[a]s many as 36,000 robberies, 82,000 burglaries, 163,000 larcenies, and 78,000 vehicle thefts remain uncleared each year as a result of *Miranda*.”<sup>39</sup> Based on all of these studies, Cassell argues not only that “*Miranda* has seriously harmed society by hampering the ability of the police [to elicit the confessions necessary] to solve crimes,” but also that “*Miranda* may be the single most damaging blow inflicted on the nation’s ability to fight crime in the last half century.”<sup>40</sup>

Though he has garnered considerable attention from some of the nation’s top law reviews, as well as the media, Cassell’s quantitative claims have not been generally accepted in either the legal or social science community. Instead, numerous scholars, including myself, have disputed Cassell’s findings and/or inferences and have criticized his objectivity,<sup>41</sup> methodology,<sup>42</sup> and conclusions.<sup>43</sup> For example,

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36. Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 869 (1996).

37. Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda’s Defenders*, 90 NW. L. REV. 1084, 1090 (1996).

38. Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda’s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998).

39. *Id.* at 1126.

40. *Id.* at 1132. In an interview with *60 Minutes*, Cassell was less ambiguous, asserting unequivocally that *Miranda* is “the most damaging blow inflicted on law enforcement in the last half-century.” *60 Minutes* (CBS television broadcast, Dec. 5, 1999). Elsewhere, Cassell has stated that “there are literally hundreds of thousands of criminal cases that have not been solved because of *Miranda*.” Roger Parloff, *Miranda on the Hot Seat*, THE NEW YORK TIMES MAGAZINE, Sept. 26, 1999, at 84-86.

41. See, e.g., Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557, 557 (“Paul Cassell advances several logically flawed and empirically erroneous propositions. These propositions appear to stem from Cassell’s ideological commitments.”); Stephen J. Schulhofer, *Miranda and Clearance Rates*, 91 NW. U. L. REV. 278, 278 (1996) (“Yet once again, [Cassell’s] arguments rest on selective descriptions of the data and — I am sorry to say — indefensibly partisan characterizations of the underlying material.”); George C. Thomas III, *Telling Half-Truths*, LEGAL TIMES, Aug. 12, 1996, at 20 (“While *Miranda* is not immune from questioning, advocacy cannot replace careful scholarship.”); *id.* at 24 (“[S]cholars have a duty to describe all the evidence and to acknowledge contrary interpretations if they are widely held. Professor Cassell draws a one-sided picture of the evidence against *Miranda*.”); Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 176 & n.332 (1998)

Schulhofer has repeatedly criticized Cassell for selectively citing data, presenting sources and quotes out of context, and advancing indefensibly partisan analyses.<sup>44</sup> Schulhofer has also disputed some of Cassell's factual assertions,<sup>45</sup> provided alternative explanations for patterns in Cassell's data,<sup>46</sup> and continued to argue that there is no empirical support for Cassell's claim that *Miranda* has measurably reduced confession rates.<sup>47</sup> Other scholars have criticized Cassell for oversimplifying complicated issues,<sup>48</sup> presenting speculation as fact,<sup>49</sup>

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(suggesting that "one may question Cassell's motives" and pointing out that "Cassell has presented his views as an advocate in litigation" and does not acknowledge "critiques of his work or otherwise acknowledge that his empirical analyses are much disputed").

42. See, e.g., Weisselberg, *supra* note 41, at 176 (noting Cassell's "flawed methodologies"); *id.* at 177 ("Cassell's work, with its dubious methods, sets a poor benchmark from which to base a revision of *Miranda*'s settled rules."); Thomas, *supra* note 41, at 21 ("Cassell relies on flawed studies, while rejecting other studies that show little or no effect from *Miranda*. His empirical theories and underlying methodologies have been strongly criticized."); Schulhofer, *supra* note 10, at 502 ("[A]t critical points in [Cassell's] analysis, data are cited selectively, sources are quoted out of context, weak studies showing negative impacts are uncritically accepted, and small methodological problems are invoked to discredit a no-harm conclusion when the same difficulties are present — to an even greater extent — in the negative-impact studies that Cassell chooses to feature.").

43. Schulhofer, *supra* note 41, at 280 ("Like the statistics and quotations Cassell featured in his original article, his national clearance-rate data have been isolated from their context in order to support a dramatic but misleading claim."); Welsh S. White, *What Is An Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2031 n.189 (1998) (stating that "even if Cassell's calculations deserved to be taken seriously, his conclusions would be subject to the criticism: garbage in, garbage out"); Peter Arenella, *Miranda Stories*, 20 HARV. J.L. & PUB. POL'Y 375, 380 (1997) ("Cassell has clearly exaggerated the extent to which the *Miranda* regime has hampered law enforcement.").

44. Schulhofer, *supra* note 10, at 502 ("[A]t critical points in [Cassell's] analysis, data are cited selectively, sources are quoted out of context, weak studies showing negative impacts are uncritically accepted, and small methodological problems are invoked to discredit a no-harm conclusion when the same difficulties are present — to an even greater extent — in the negative-impact studies that Cassell chooses to feature."); Stephen J. Schulhofer, *Pointing in the Wrong Direction*, LEGAL TIMES, Aug. 12, 1996, at 21 ("Readers should understand that these are simply advocacy numbers, derived from indefensibly selective accounts of the available data."); Schulhofer, *supra* note 41, at 280 ("Like the statistics and quotations Cassell featured in his original article, his national clearance-rate data have been isolated from their context in order to support a dramatic but misleading claim."). Elsewhere, Schulhofer has described some of Cassell's empirical assertions about *Miranda* as "junk science of the silliest sort." Alexander Nguyen, *The Assault on Miranda*, AM. PROSPECT, Mar. 27-Apr. 10, 2000, at 59.

45. Stephen J. Schulhofer, *Bashing Miranda is Unjustified — And Harmful*, 20 HARV. J.L. & PUB. POL'Y 347, 358 (1997) (arguing that, while Professor Cassell claimed that clearance rates fell dramatically following *Miranda*, in fact, the number of violent crimes cleared after *Miranda* did not decline at all).

46. For example, Schulhofer has argued that the cause of the declining clearance rate was a decline in police resources relative to an increase in crime, not *Miranda*. Schulhofer, *supra* note 41, at 281-85; Schulhofer, *supra* note 45, at 358-60.

47. Schulhofer, *supra* note 10, at 505-06; Schulhofer, *supra* note 45, at 353-55.

48. Leo & Ofshe, *supra* note 41, at 563 ("The problem with Cassell's impulse to quantification . . . is that it oversimplifies complicated issues and inevitably presents speculation as fact.").

failing to address contrary evidence and widely held interpretations,<sup>50</sup> and ultimately, for failing to demonstrate that *Miranda* has caused a decline in confession, clearance or conviction rates.<sup>51</sup>

Despite the disagreements between Cassell and his many critics, there appears to be relatively little dispute among second generation researchers on several aspects of *Miranda*'s real world effects. First, police appear to issue and document *Miranda* warnings in virtually all cases.<sup>52</sup> Second, police appear to have successfully "adapted" to the *Miranda* requirements. Thus, in practice, police have developed strategies that are intended to induce *Miranda* waivers.<sup>53</sup> Third, police appear to elicit waivers from suspects in roughly 80% of their interrogations,<sup>54</sup> though suspects with criminal records appear disproportion-

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49. Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397, 404 n.30 (1999) ("Cassell's attempt at informed quantification amounts to no more than elaborate speculation. . .").

50. Weisselberg, *supra* note 41, at 176 n.332 ("Cassell does not cite to Schulhofer's or Donohue's critiques of his work or otherwise acknowledge that his empirical analyses are much disputed.").

51. E.g., George C. Thomas III, *Plain Talk About the Miranda Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. REV. 933, 957 (1996) ("[N]othing in the old studies or the new ones provides sufficient evidence to accept the hypothesis that *Miranda* has depressed the rate of confessions."); Arenella, *supra* note 43, at 380 ("Cassell has clearly exaggerated the extent to which the *Miranda* regime has hampered law enforcement."); John J. Donohue III, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998) (questioning Cassell's assertion that *Miranda* caused a statistically significant drop in actual clearance rates). Weisselberg summarizes the heart of this critique:

John Donohue has analyzed the Cassell and Fowles study closely. As an initial matter, Donohue notes that FBI clearance data have proven unreliable because, in addition to the manipulation of clearance rates by local authorities, a perceived decline in clearance rates may reflect nothing more than the improved reporting of crime. . . . Donohue also doubts Cassell's and Fowles's conclusion that *Miranda* alone lies at the root of any perceived drop in clearance rates in the late 1960s. . . . [Donohue concludes that *Miranda*] should not have a substantial impact upon clearance rates because solving a crime clears it whether or not an arrest or prosecution occurs, and *Miranda* only operates after a suspect is in custody. . . . In the end, however, Cassell provides the wrong answers to the wrong questions.

Weisselberg, *supra* note 41, at 175-76.

52. Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276 (1996).

53. As Welsh White and I have written elsewhere:

Empirical data indicates that the police deliver the *Miranda* warnings in at least three ways. First, the police may deliver the warnings in a neutral manner; second, they may de-emphasize the warnings' significance by delivering them in a manner that is designed to obscure the adversarial relationship between the interrogator and the suspect; and, third, they may deliver the warnings in a way that communicates to the suspect that waiving his rights will result in some immediate or future benefit for him.

Leo & White, *supra* note 49, at 432. See also Leo, *supra* note 10, at 658-65; DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* 204-20 (1991) (describing an interrogation of a suspect after he waived his *Miranda* rights).

54. Leo, *supra* note 52, at 276; Cassell & Hayman, *supra* note 36, at 860.

ately likely to invoke their rights and terminate interrogation.<sup>55</sup> Fourth, in some jurisdictions police are systematically trained to violate *Miranda* by questioning “outside *Miranda*” (i.e., by continuing to question suspects who have invoked the right to counsel or the right to remain silent).<sup>56</sup> Finally, some researchers have argued that *Miranda* eradicated the last vestiges of third degree interrogation present in the mid-1960s, increased the level of professionalism among interrogators, and raised public awareness of constitutional rights.<sup>57</sup>

The second generation of *Miranda* impact research has been far more spirited and engaging than the first round of studies. Yet despite the new energy that empirically-oriented scholars have breathed into the *Miranda* debate and despite the renewed calls for more empirical research on *Miranda*'s real world effects,<sup>58</sup> the second generation of *Miranda* impact scholarship may be at a close. Now that the Supreme Court has resolved any questions about *Miranda*'s constitutional underpinnings, it is highly unlikely that the Court will reconsider any constitutional challenges to *Miranda* for many years, if not decades, to come. As a result, there may be little incentive for either *Miranda*'s supporters or *Miranda*'s critics to continue the difficult task of gathering and interpreting data on *Miranda*'s measurable effects. The Supreme Court in *Dickerson* made its own empirical assessments of *Miranda*'s impact when it stated that, “*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture,”<sup>59</sup> yet it did so without considering any of the first or second generation research of *Miranda*'s real

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55. Leo, *supra* note 10, at 654-55; SIMON, *supra* note 53, at 210-11; see also Cassell & Hayman, *supra* note 36, at 895-96. British research also demonstrates that suspects with prior records are significantly more likely to remain silent or seek counsel. E.g., PAULA SOFTLEY, HOME OFFICE RESEARCH UNIT, ROYAL COMM'N ON CRIMINAL PROCEDURE RESEARCH STUDY NO. 4 POLICE INTERROGATION: AN OBSERVATIONAL STUDY IN FOUR STATIONS (1980).

56. The interrogator's objective is to convince the suspect that he can talk to the interrogator without any fear that his words will be used against him. To achieve this goal, the interrogator either may tell the suspect explicitly that nothing he says can be used against him, implicitly communicate the same message through statements to the effect that the suspect's answers will be off the record, or tell the suspect that his statement will be used only to help the interrogator understand what happened. The purpose of questioning outside *Miranda* is to obtain a confession that may be used to impeach a suspect should he take the stand at trial and may also be used to discover non-testimonial evidence against the suspect, which also can be used at trial. Weisselberg, *supra* note 41, at 189-92; Leo & White, *supra* note 49, at 447-50; Charles Weisselberg, *In the Stationhouse After Dickerson*, 99 MICH. L. REV. 1121 (2001).

57. Leo, *supra* note 10, at 668-74; SIMON, *supra* note 53, at 211.

58. E.g., George C. Thomas III, *Is Miranda A Real World Failure? A Plea for More (and Better) Empirical Evidence*, 43 UCLA L. REV. 821 (1996); Tracey L. Meares & Bernard E. Harcourt, *Foreword, Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733 (2000).

59. 120 S. Ct. 2326, 2336 (2000).

world effects. This result is particularly surprising in light of the fact that Paul Cassell litigated the challenge to *Miranda* before the Supreme Court in *Dickerson*. That the Court ignored even the *Miranda* impact research of one of the primary litigants might, understandably, dissuade advocates on both sides of the *Miranda* debate from pursuing another round of empirical research on *Miranda*'s real world effects on the interrogation process, public attitudes, or confession and conviction rates. After all, for the foreseeable future, *Miranda* is here to stay.

## II. MIRANDA'S IMPACT ON INSTITUTIONAL ACTORS

### A. Introduction

The purpose of the preceding section was to describe the main findings from two generations of *Miranda* impact studies in the last thirty-five years. The purpose of this section is to qualitatively evaluate *Miranda*'s seeming real world effects on the various actors, agencies, and institutions that comprise the criminal justice system. A narrow focus on *Miranda*'s quantitative impact on such macro-level statistics as confession, clearance, and conviction rates may cause us to lose sight of the more mundane impact of *Miranda* on everyday criminal justice actors and processes.<sup>60</sup> Unlike most *Miranda* impact studies, this Essay seeks to break down *Miranda*'s impact (or lack of impact) on sub-parts of the criminal justice system in order to arrive at a better understanding of *Miranda*'s impact (or lack of impact) on the whole.

I argue that an examination of *Miranda*'s effect on various institutional actors supports the conclusion that *Miranda*'s impact may be relatively inconsequential in practice and may have been overstated in much second-generation scholarship. However, I do not profess to provide hard and fast answers in this short Essay. I therefore offer this argument more as a critique and a hypothesis than as a firm assertion. For despite two dozen or so original studies on various aspects of *Miranda*'s impact in thirty-five years, in many ways we still lack fundamentally good data in this area.<sup>61</sup> Nevertheless, what the first generation researchers suggested of their era may be true of ours: that *Miranda*'s impact in practice is negligible. While *Miranda* may have initially exerted a substantial effect on police practices and public atti-

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60. *Miranda*'s statistical impact on conviction rates in a sample of cases could be studied using multiple regression analysis (to hold constant confounding variables) and statistical significance (to infer likely causation). See *Leo, supra* note 10, at 676 & n.244. The impact of *Miranda* on the "lost" confession rate is, however, unknowable since it presumes a counterfactual world which does not exist and therefore cannot be measured. See *Thomas, supra* note 58, at 825-26, 834-37; *Weisselberg, supra* note 41, at 173-75; *Alfredo Garcia, Is Miranda Dead, Was it Overruled, or is it Irrelevant?*, 10 ST. THOMAS L. REV. 461 (1998).

61. Cassell & Hayman, *supra* note 36, at 840 ("Even the most informed observers can offer little beyond speculation on these fundamental subjects.").

tudes, this impact may have diminished as the criminal justice system adjusted to its dictates, and *Miranda* became normalized among the police, prosecutors, and the public. If I am right, this phenomenon may explain both why police and prosecutors, for the most part, no longer complain about *Miranda*, as well as why *Miranda* is perceived by many as no longer imposing serious costs on the criminal justice system. My intent here is not to defend *Miranda* (or, for that matter, to attack it), but, rather, simply to question what *Miranda* really delivers in practice. I will suggest not only that *Miranda*'s costs may be negligible, but that its practical benefits may also be negligible. It may be time, as Alfredo Garcia has suggested, to reconsider whether *Miranda* is even relevant to the type of criminal justice system we wish to have.

### B. Suspects

As many writers have pointed out, the daily stream of detective shows seems to have educated everyone (in America and abroad) about the fact and content of the *Miranda* warning and waiver requirements. There has been a widespread diffusion of the *Miranda* litany in American culture not only through television programs, but also through movies, detective fiction, and the popular press. It is therefore unlikely that many criminal suspects today hear the *Miranda* rights for the first time prior to police questioning; in fact, suspects are likely to have heard *Miranda* so many times on television that the *Miranda* warnings may have a familiar, numbing ring. A national poll in 1984 revealed that 93% of those surveyed knew they had a right to an attorney if arrested,<sup>62</sup> and a national poll in 1991 revealed that 80% knew they had a right to remain silent if arrested.<sup>63</sup> With the infusion and popularity of even more detective shows in the last decade (such as *Homicide*, *N.Y.P.D. Blue*, and *Law and Order*), it is likely that these figures have only gone up. And it is because of these shows and the mass media more generally — not the police, the legal system or Supreme Court doctrine — that *Miranda* has become so much a part of our national culture.

Despite this knowledge, however, the overwhelming majority of suspects (some 78% to 96%) waive their rights,<sup>64</sup> and thus appear to consent to interrogation, whether implicitly or explicitly. This fact, which is enormously significant in evaluating *Miranda*'s impact, has not been disputed by scholars on any side of the *Miranda* debate. As

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62. Jeffrey Toobin, *Viva Miranda*, NEW REPUBLIC, Feb. 1987, at 11-12.

63. WALKER, *supra* note 3, at 51. According to one source, 91% of all thirteen-year-olds can already recite the famous *Miranda* warnings. Nguyen, *supra* note 44, at 61.

64. Richard A. Leo, *Miranda and the Problem of False Confessions*, in THE MIRANDA DEBATE, *supra* note 5, at 275.

Patrick Malone pointed out fifteen years ago, “*Miranda* warnings have little or no effect on a suspect’s propensity to talk. . . . Next to the warning label on cigarette packs, *Miranda* is the most widely ignored piece of official advice in our society.”<sup>65</sup> The same appears to be true today. This simple fact — which likely explains *Miranda*’s survival better than the doctrinal underpinnings of the Supreme Court’s contorted post-*Miranda* jurisprudence — has, for years, baffled social scientists and legal scholars alike.

There are a number of simple theories (some suspect-centered, some police-centered) to account for why so high a percentage of suspects waive their rights and submit to police questioning. Perhaps the most obvious explanation is that suspects may not know they can invoke their rights and terminate interrogation once it has begun. Some suspects — particularly juveniles, individuals of low intelligence, and the mentally handicapped or disordered — may not understand the content or the significance of the warnings. This misunderstanding may be due to a lack of cognitive capacity to understand, appreciate or act based on the abstract *Miranda* warnings. Moreover, even adult suspects of normal or above average intelligence may not fully comprehend their *Miranda* rights because the “inherently compelling” stresses of police custody and/or impending interrogation cause them to fail to listen to, register or process the literal meaning of the *Miranda* warnings. Other suspects may not understand the full extent of their rights, such as the right to force the police to stop asking questions, thereby “implicitly” waiving their *Miranda* rights (perhaps without even realizing they are doing so).<sup>66</sup> Finally, some suspects may understand the import of the *Miranda* rights and may desire to invoke them but fail to make a legally cognizable assertion of those rights (e.g., by using indirect and equivocal modes of expression).<sup>67</sup>

Even if they have the cognitive capacity to understand the *Miranda* rights and register their significance, some suspects may feel that they have no choice but to comply with their interrogators. In other words, some suspects simply doubt that the *Miranda* warnings should be taken at face value. As Janet Ainsworth has pointed out:

[The suspect is situationally powerless inside the interrogation room because the interrogator controls] the subject matter, tempo, and progress of the questioning, and [whether the suspect is permitted] to interrupt responses to questions, and to judge whether the responses are satisfactory. The person questioned, on the other hand, has no right to question the

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65. Malone, *supra* note 4, at 368.

66. See *infra* Section III.C.2-4.

67. Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L. J. 259, 298-315 (1993).

interrogator, or even to question the propriety of the questions the interrogator has posed.<sup>68</sup>

Some suspects may feel as if they are under the control of their interrogator, who is trained to dominate the police-suspect encounter. Others may fear that by failing to cooperate they will anger their interrogators, who may thereby retaliate against them.<sup>69</sup> Innocent suspects who lack knowledge about how the system works may perceive that they will be arrested, incarcerated and/or prosecuted if they do not cooperate with authorities; guilty suspects may perceive imminent arrest and prosecution if they do not successfully divert suspicion and talk their way out of trouble. Silence implies consciousness of guilt, and thus naturally evokes suspicion.<sup>70</sup> Whether innocent or guilty, suspects may reasonably perceive that submitting to police questioning is the only way to exculpate themselves.

Indeed, several scholars have argued, somewhat counter-intuitively, that despite its enunciation of rights and cutoff rules, *Miranda* affirmatively encourages suspects to cooperate with their interrogators. Patrick Malone has suggested that “[s]killfully presented, the *Miranda* warnings themselves sound chords of fairness and sympathy at the outset of the interrogation. The interrogator who advises, who cautions, who offers the suspect the gift of a free lawyer, becomes all the more persuasive by dint of his apparent candor and reasonableness.”<sup>71</sup> David Simon has argued that *Miranda* — particularly the *Miranda* form — lulls suspects into compliance by co-opting them and making them part of the interrogation process, thereby diffusing the impact of the *Miranda* warning.<sup>72</sup> I have argued that the ritualistic *Miranda* warnings create a felt sense of obligation among suspects to

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68. *Id.* at 287.

69. Nguyen, *supra* note 44, at 61 (“‘[If you don’t talk], they’ll just make stuff up’, says one criminal defendant interviewed for this story, who asked to remain anonymous. ‘They’ll lie on your report, so it’s on your behalf to just talk to them. Then they’ll say you cooperated.’”).

70. As one observer as pointed out:

[T]he inmates I interviewed all believed that silence during an interrogation was interpreted as guilt. They also believed that if the evidence was against them anyway, keeping silence could get them a stiffer sentence than if they talked as they might be considered uncooperative, a hardened criminal, or something of that sort by the court.

MALIN AKERSTRÖM, BETRAYAL AND BETRAYERS: THE SOCIOLOGY OF TREACHERY 71 (1991).

71. Malone, *supra* note 4, at 371.

72. SIMON, *supra* note 53, at 214 (“[T]he forms have proven essential. Moreover, the detectives have found that rather than drawing attention to the *Miranda* warnings, the written form diffuses the impact of the warning. Even as it alerts a suspect to the dangers of interrogation, the form co-opts the suspect, making him part of the process. It is the suspect who wields the pen, initialing each component of the warning and then signing the form; it is the suspect who is being asked to help with the paperwork.”).



show respect to the police who question them.<sup>73</sup> Perhaps most interestingly, George Thomas has argued that *Miranda* warnings simultaneously encourage suspects to answer police questions while discouraging admissions.<sup>74</sup> All of these arguments suggest that there may be multiple and overlapping reasons why so many custodial suspects waive their rights and so often submit to police questioning.<sup>75</sup> It is important to appreciate that each of these explanations is not mutually exclusive, and thus that many of these factors or pressures to comply with questioning may be simultaneously present in any given interrogation.

Regardless of why suspects submit to interrogation, however, *Miranda* offers very little, if any, meaningful protection, once a suspect has waived his rights. While it may prevent some suspects from speaking to police, *Miranda* does not restrict deceptive or suggestive police tactics, manipulative interrogation strategies, hostile or overbearing questioning styles, lengthy confinement, or any of the inherently stressful conditions of modern accusatorial interrogation that may lead the suspect to confess.<sup>76</sup> Once the interrogator recites the fourfold warnings and obtains a waiver (and very few suspects subsequently invoke their *Miranda* rights after they have been waived), *Miranda* is irrelevant to both the process and the outcome of the subsequent interrogation. Any protection that *Miranda* might have offered a suspect typically evaporates as soon as an accusatory interrogation begins — which is exactly when a suspect is most likely to feel the inherently compelling pressures of police-dominated custodial questioning.

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73. Richard A. Leo, *Police Interrogation and Social Control*, 3 SOC. & LEG. ST. 93, 116-17 (1994).

74. Thomas, *supra* note 58, at 831 (“This double effect could result from a complex interaction between cognition and behavior. Understanding that they do not *have* to talk might sometimes make suspects more likely to talk because they feel more at ease or feel they are equal to the interrogators. They might also think that their willingness to talk in the face of the warnings demonstrates their innocence.”).

75. Another possibility, explored in the subsequent section, is that police actively persuade suspects — either through manipulation, trickery, and/or psychological coercion — to submit to interrogation, despite the *Miranda* rights. See *infra* Section III.C.

76. As Welsh White has pointed out in this issue, “[i]n the context of twenty-first century interrogation practices, however, the claim that a suspect’s awareness of her rights provides an antidote to the coercive effect of custodial interrogation is either naive or disingenuous.” Welsh S. White, *Miranda’s Failure To Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1215 (2001); see also Leo, *supra* note 64, at 275-76.

### C. Police

#### 1. Introduction

In 1966 law enforcement in America reacted to *Miranda* with anger.<sup>77</sup> Along with Justice White<sup>78</sup> and many others,<sup>79</sup> police initially feared that *Miranda* would handcuff their investigative abilities, not only causing them to lose numerous essential confessions and convictions, but also returning rapists and killers to the streets only to prey again. Police chiefs predicted chaos, believing that the new *Miranda* requirements were the equivalent of a virtual ban on interrogation.<sup>80</sup> Contrary to these dire predictions, however, police have successfully adapted to *Miranda* in the last four decades. Following an initial adjustment period, police have learned how to comply with *Miranda*, or at least how to create the appearance of compliance with *Miranda*, and still successfully elicit a high percentage of incriminating statements, admissions, and confessions from criminal suspects. In this section, I will illustrate how police have devised multiple strategies to avoid, circumvent, nullify or simply violate *Miranda* and its invocation rules in their pursuit of confession evidence. Because American police have learned how to “work *Miranda*” to their advantage — i.e., to issue *Miranda* (or avoid having to issue) warnings in strategic ways that will result in legally accepted waivers — *Miranda* operates as a weak or minimal restraint on police interrogation, contrary to the intentions and beliefs of the Warren Court as well as its many contemporary liberal and progressive supporters. As one commentator has pointed out, *Miranda* has become a “manageable annoyance”<sup>81</sup> — the anti-climax

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77. When *Miranda* was decided, Philadelphia Police Commissioner Edward J. Bell decried the decision stating, “I do not believe the Constitution was designed as a shield for criminals.” LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* 176 (1983). Similarly, Boston Police Commissioner Edmund L. McNamara complained, “Criminal trials no longer will be a search for truth, but a search for technical error.” *Id.*

78. In his dissent, Justice White stated that:

There is . . . every reason to believe that a good many criminal defendants who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence will now, under this new version of the Fifth Amendment, either not be tried at all or will be acquitted if the State’s evidence, minus the confession, is put to the test of litigation.

*Miranda v. Arizona*, 384 U.S. 436, 542 (1966).

79. See, e.g., Yale Kamisar, *Can (Did) Congress “Overrule” Miranda?*, 85 CORNELL L. REV. 883, 900 (2000) (quoting position paper critical of *Miranda* issued by candidate Richard M. Nixon during the 1968 presidential campaign).

80. Malone, *supra* note 4, at 367, 376-77. Ironically, some in law enforcement now predict “it would be chaos to go back” to a world without *Miranda*. Brooke A. Masters & Tom Jackman, *Justice System Worries About Miranda: Some Prosecutors, Judges Fear VA Ruling May Try to Fix Something That Isn’t Broken*, WASH. POST, Feb. 16, 1999, at B1.

81. Jan Hoffman, *Some Officers are Skirting Miranda Restraints to Get Confessions*, N.Y. TIMES, Mar. 29, 1998, at A1. See also Peter Carlson, *You Have the Right to Remain Silent . . . ; But in the Post-Miranda Age, the Police Have Found New and Creative Ways to*

of virtually all custodial police questioning — to American police in the twenty-first century that does little, if anything, to protect suspects against abusive interrogation tactics.

## 2. Avoiding Miranda

*a. Recasting Interrogation as a Non-Custodial Interview.* Perhaps the most fundamental police strategy to successfully negotiate *Miranda* is to do an end run around *Miranda*'s requirements by taking advantage of the definitions, exceptions, and ambiguities in *Miranda* doctrine. Since *Miranda* warnings are only required when a suspect is legally in custody (i.e., either under arrest or not free to leave),<sup>82</sup> police often redefine the circumstances of questioning so that the suspect technically is not in custody and therefore *Miranda* warnings are no longer required. Police recast what would otherwise be a custodial interrogation as a non-custodial interview by telling the suspect that he is not under arrest and that he is free to leave — sometimes even after detectives have transported the suspect to the stationhouse with the express purpose of questioning him inside the interrogation room and eliciting incriminating information. In this way, police circumvent the legal necessity of having to issue *Miranda* warnings or invocation rules — and thus avoid the risk that the suspect will terminate the interrogation by exercising his right to silence or counsel. The shift from custodial interrogations to non-custodial interviews following *Miranda* is, as several observers have noted, supported by legal doctrine<sup>83</sup> as well as empirical evidence.<sup>84</sup>

*b. Implicit Waivers.* Another way in which police use the definitions, ambiguities and exceptions of law to minimize the risk that a suspect will terminate interrogation is by obtaining a so-called “implicit” waiver from suspects. To elicit an “implicit” waiver, an interrogator must simply read to the suspect the fourfold *Miranda* warnings,<sup>85</sup>

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*Make You Talk*, WASH. POST, Sept. 13, 1998, at 10 (“There’s a lot of ways to get around *Miranda* . . . Most guys know how to get somebody to waive their rights.”) (quoting former head of Washington, D.C. police homicide unit).

82. See *Rhode Island v. Innis*, 446 U.S. 291 (1980).

83. In *Berkemer v. McCarty*, the Court narrowed the definition of custody, holding that a suspect is in custody when his “freedom of action is curtailed to a ‘degree associated with formal arrest.’” 468 U.S. 420, 440 (1984) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam)). *Berkemer*'s holding, of course, opens up the possibility that, so long as they do not effect an arrest, the police may conduct lengthy “interviews” with suspects without giving suspects *Miranda* warnings. See generally Kate Greenwood & Jeffrey A. Brown, *Investigation and Police Practices: Custodial Interrogations*, 86 GEO. L.J. 1318 (1998).

84. See, e.g., Cassell & Hayman, *supra* note 36, at 874; Jerome H. Skolnick & Richard A. Leo, *The Ethics of Deceptive Interrogation*, 11 CRIM. JUST. ETHICS 3, 5 (1992).

85. You have the right to remain silent; anything you say can and will be used against you in a court of law; you have the right to an attorney; if you cannot afford one, one will be provided to you free of charge.

but need not ask him whether he understands his rights or wishes to act on them (what might be called the twofold invocation rules).<sup>86</sup> Instead, after reading the warnings, the interrogator simply launches into the interrogation. If, after hearing the warnings (but not the invocation rules), the suspect responds to interrogation without invoking his rights (that is, by saying nothing or answering the interrogator's queries), he is said to have implicitly waived his rights, and thereby consented to interrogation according to *North Carolina v. Butler*.<sup>87</sup> For suspects who would otherwise not know that they can ask an interrogator to re-explain the *Miranda* rights if they do not understand them and do not know that they need to answer any questions, the remarkable legal fiction of a so-called "implicit waiver" obviously obviates the import of the *Miranda* warnings.

### 3. *Negotiating Miranda*

*a. Introduction.* Even when they issue the *Miranda* warnings and ask suspects whether they wish to respond to questions, police are enormously successful in moving past the *Miranda* moment, eliciting signed waivers, and controlling when interrogation begins and ends. In the last thirty-five years, police have learned to skillfully employ a range of sophisticated strategies to induce *Miranda* waivers and thus to deliver the warnings and invocation rules in a manner that will not lead the suspect to invoke his rights or terminate questioning.

*b. De-Emphasizing the Significance of the Miranda Warnings.* As Welsh White and I have written about in greater depth elsewhere, interrogators often seek to elicit waivers by minimizing, downplaying or de-emphasizing the potential import or significance of the *Miranda* warnings.<sup>88</sup> One way interrogators accomplish this goal is by ingratiating themselves with suspects prior to the reading of the *Miranda* rights, engaging in extensive rapport-building small talk, and personalizing the police-suspect interaction in order to establish a norm of friendly reciprocation and the expectation that the suspect will comply. Another way interrogators de-emphasize the potential import of *Miranda* is by strategically delivering the warnings quickly, in a perfunctory tone of voice, and/or in a bureaucratic manner — communicating that the warnings are a necessary, but insignificant, technicality. A third way in which detectives de-emphasize the significance of the *Miranda* warnings is by explicitly telling the suspect that the warnings are unimportant, a mere formality to dispense with prior to question-

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86. Do you understand these warnings? Having these rights in mind, do you wish to speak to me?

87. 441 U.S. 369 (1979).

88. Leo & White, *supra* note 49, at 433; *see also* Leo, *supra* note 10, at 662-63.

ing, or a simple matter of routine. The purpose of all three strategies is to trivialize the legal significance of *Miranda*, create the appearance of a non-adversarial relationship between the interrogators and the suspect, and communicate that the interrogator expects the suspect to passively execute the waiver and respond to subsequent questioning. As Welsh White and I have written, the interrogator's "hope is that the suspect will not come to see the *Miranda* warning and waiver requirements as a crucial transition point in the questioning or as an opportunity to terminate the interrogation, but as equivalent to other standard bureaucratic forms that one signs without reading or giving much thought."<sup>89</sup>

c. *Persuading Suspects to Waive Miranda*. Another strategy that interrogators sometimes use is to persuade, manipulate and/or deceive a suspect into waiving *Miranda*, typically by suggesting (implicitly or explicitly) that he will receive a tangible benefit in exchange for talking to police. For example, detectives sometimes tell a suspect that he will only be able to tell his side of the story if he waives *Miranda*, implying that the suspect will not be able to clear things up unless he first answers their questions.<sup>90</sup> Detectives sometimes tell a suspect that they can only inform the suspect of the charges against him, or the likely outcome of his case, if he waives *Miranda*.<sup>91</sup> Detectives sometimes accuse a suspect of committing a crime, confront him with real or alleged evidence, and then suggest that the range of possible sentences and punishments depends upon how favorably the suspect's actions are portrayed.<sup>92</sup> As Peter Arenella has noted, the implication is clear: if the suspect waives his *Miranda* rights, the police can help him (such as by talking to the prosecutor or testifying on the defendant's behalf); if the suspect invokes his right to silence or counsel, the police communicate the message that they cannot help him.<sup>93</sup> Sometimes detectives explicitly tell the suspect that the criminal justice system will treat him more leniently if he first waives his rights; otherwise he runs the risk of being treated more punitively.<sup>94</sup> As Yale Kamisar has pointed out, all of these persuasive strategies amount to interrogation before *Miranda* — clearly a violation of both the letter and the spirit of *Miranda*.<sup>95</sup>

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89. Leo & White, *supra* note 49, at 435.

90. See Leo, *supra* note 10, at 663-66; Leo & White, *supra* note 49, at 435-36.

91. Leo & White, *supra* note 49, at 440.

92. SIMON, *supra* note 53, at 193-207; Leo & White, *supra* note 49, at 441.

93. Arenella, *supra* note 43, at 382.

94. SIMON, *supra* note 53, at 193-207; Leiken, *supra* note 9, at 22-23; Leo & White, *supra* note 49, at 445.

95. Yale Kamisar, *Reflections, Special: Retrospective on David Simon's Homicide*, 2 JURIST 1, Feb., 1999. Kamisar writes:

Unfortunately the very police conduct that *Miranda* tried to forbid seems to be occurring in Baltimore police stations. The police are threatening the suspect. They are telling him that

#### 4. Questioning “Outside Miranda”: Interrogation After Invocation

If the interrogator fails to elicit an implicit or explicit waiver, he may seek to change the suspect’s mind by persuading him to reconsider his decision or he may simply continue to question the suspect in direct violation of *Miranda*.<sup>96</sup> In the last decade, particularly in California, numerous police have been trained to question suspects “outside *Miranda*” — to continue questioning a suspect who has invoked one of his *Miranda* rights by convincing him that his words will not be used against him. Police typically persuade a suspect who has invoked his right to silence or counsel to continue answering their questions by falsely telling him that anything he says is now off the record, that nothing he says can be used against him since he has invoked his constitutional rights, and/or that his answers will only be used to help the interrogator understand what happened.<sup>97</sup> The purpose of questioning outside *Miranda* is to capitalize on the Supreme Court’s ruling in *Harris v. New York*,<sup>98</sup> which established the impeachment exception to *Miranda*. As a result of *Harris*, police can use incriminating evidence and information (such as the names of witnesses, the identities of accomplices or the suspect’s modus operandi) obtained during a *Miranda* violative interrogation against a defendant at trial and prosecutors can even use *Miranda*-violative statements to impeach the defendant at trial should he take the stand. Police interrogators question “outside *Miranda*” precisely because the Supreme Court created the incentive for them to do so. As several commentators have observed, the practice of questioning “outside *Miranda*” has been extensive in the last decade, particularly in California.<sup>99</sup>

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unless he talks to them about homicide, they will write it up as a first degree murder and turn him over to a “bloodsucking” assistant state’s attorney. They are tricking the suspect: They are leading him to believe that it is in his best interest to tell them his side of the story; indeed, they are pretending that this is the suspect’s only chance to get the homicide charge reduced or dismissed. What they are really doing in Baltimore (and who knows how many other places) is subjecting individuals to “interrogation” before they waive their rights.

*Id.* at 6-7.

96. Some interrogators issue what are known as “bifurcated warnings” to leave open the possibility that they may re-contact suspects who choose to terminate interrogation. Detectives who use this technique do not tell a suspect about his right to appointed counsel unless the suspect first waives his right to silence. For if the suspect invokes his right to silence, he can still be re-approached for subsequent interrogation. However, if the suspect invokes his right to counsel, he cannot be re-approached. Seth Rosenfeld, *How Improper Interrogation By Police Derailed a Murder Prosecution*, S.F. EXAM., June 18, 2000, at A6; see also *Michigan v. Tucker*, 417 U.S. 433 (1974); *Edwards v. Arizona*, 451 U.S. 477 (1981).

97. Leo & White, *supra* note 49, at 460-463; Weisselberg, *supra* note 41, at 132-36.

98. 401 U.S. 222 (1971).

99. Weisselberg, *supra* note 41; Weisselberg, *supra* note 56; Seth Rosenfeld, *supra* note 96; Seth Rosenfeld, *Miranda Ignored — Will it be Erased?*, S.F. EXAM., June 10, 2000, at A1.

### 5. *The Bigger Picture: The Police Advantage in Miranda*

As discussed above in Section II, the lost convictions and system chaos feared by law enforcement in the immediate wake of *Miranda* have not materialized. Instead, American police have successfully adapted to the requirements of *Miranda* in ways that allow them to legally dodge the reading of rights or invocation rules, or allow them to use psychological strategies that result in a surprisingly high percentage of waivers, or allow both police and prosecutors to use the fruits of *Miranda*-violative statements to incriminate suspects. All of these developments are, arguably, exactly the opposite of what the Warren Court intended when it created the *Miranda* rules. If the goal of *Miranda* was to reduce the kinds of interrogation techniques and custodial pressures that create stationhouse compulsion and coercion, then it appears to have failed miserably:<sup>100</sup> The reading of rights and the taking of waivers has become, seemingly, an empty ritual,<sup>101</sup> and American police continue to use the same psychological methods of persuasion, manipulation, and deception that the Warren Court roundly criticized in *Miranda*.<sup>102</sup> Not only has *Miranda* largely failed to achieve its stated and implicit goals, but police have transformed *Miranda* into a tool of law enforcement, a public relations coup that could not have been foreseen at the time it was decided. By largely controlling when and how the *Miranda* warnings are issued, as well as the construction of case facts surrounding *Miranda* disputes,<sup>103</sup> American police have taken the advantage in *Miranda*.

In other words, for the most part, *Miranda* has helped,<sup>104</sup> not hurt, law enforcement. As argued above, *Miranda* has helped law enforcement by de facto displacing the case-by-case voluntariness standard as the primary test of a confession's admissibility, in effect shifting courts' analysis from the voluntariness of a confession to the voluntariness of a *Miranda* waiver.<sup>105</sup> By creating the opportunity for police to read

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100. SIMON, *supra* note 53.

101. H. RICHARD UVILLER, VIRTUAL JUSTICE: THE FLAWED PROSECUTION OF CRIME IN AMERICA 124 (1996) ("Most people I have spoken to say the warnings have become largely an empty ritual, embarrassing to cops and superfluous to suspects.").

102. Malone, *supra* note 4, at 367; Martin Bezsky, *Living With Miranda: A Reply to Professor Grano*, 43 Drake L. Rev. 127, 127 ("Interviews, questioning, and interrogations are conducted almost exactly as they had been before *Miranda*, except for the addition of warning cards in formal settings.").

103. DAVID NEUBAUER, CRIMINAL JUSTICE IN MIDDLE AMERICA 187 (1974) ("Although we are accustomed to thinking of these cases in terms of the formal law, a more basic issue is what is happening at the police station. The question over the facts provides the basic dynamics of the process. Contrary to popular belief, the police have not been overwhelmed by the Court's decisions because they largely control the facts.").

104. As Peter Arenella has correctly pointed out, "*Miranda* has actually legitimated moderately coercive interrogation practices." Arenella, *supra* note 43, at 387.

105. See Leo, *supra* note 64.

suspects their constitutional rights and by allowing police to obtain a signed waiver form that signifies consensual and non-coercive interrogation, *Miranda* has helped the police shield themselves from evidentiary challenges, rendering admissible otherwise questionable and/or involuntary confessions.<sup>106</sup> *Miranda* not only fails to provide police with any guidelines about which police interrogation techniques are impermissible, but, because it is seen as a symbol of professionalism, *Miranda* also reduces the pressure on police to reform their practices on their own initiative.<sup>107</sup> Perhaps the most telling evidence of *Miranda*'s lack of harm to law enforcement effectiveness is the fact that, for the most part, law enforcement supports *Miranda*.<sup>108</sup> Numerous members of the law enforcement community have publicly expressed support for *Miranda*.<sup>109</sup> Police, by and large, do not seem to see the *Miranda* procedures as an impediment to effective criminal investigation.<sup>110</sup> As Schulhofer has pointed out, since the mid-1970s, police have consistently reported that complying with *Miranda* has not produced adverse effects for law enforcement.<sup>111</sup> As others have pointed out, in the mid-1980s, none of the major police lobbying groups, such as the International Association of Police Chiefs, joined in Attorney General Edwin Meese's call to overrule *Miranda*.<sup>112</sup> In 1988, an American Bar Association survey found that an overwhelming majority of police agreed that compliance with *Miranda* did not present serious problems for law enforcement or hinder their ability to garner confessions.<sup>113</sup> In 1993, several police organizations (The Police

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106. Garcia, *supra* note 60, at 478; see also White, *supra* note 76.

107. Leo, *supra* note 64; Bezsky, *supra* note 102.

108. Leo, *supra* note 10, at 671. As one police manager reported:

*Miranda* has been so institutionalized now that it really isn't an impediment to law enforcement. The officers understand it, they don't try to get around it, they don't try to play with it. And what they're basically doing is working with it. . . . Instead of being an impediment, *Miranda* has probably made us do our job better. It gives a better appearance. It gives us a more professional appearance to the prosecutorial staff and the defense bar, and most importantly — and I can't emphasize how importantly — it gives us a professional appearance in the eyes of a jury, the trier of facts. And those are the people we are trying to impress. They are the ones who must make a decision between guilt and innocence.

*Id.*

109. See Weisselberg, *supra* note 41, at 165 n.285 (collecting citations).

110. See Leo, *supra* note 10, at 671 ("Yet police officers and detectives no longer view the *Miranda* requirements as handcuffing their investigative abilities, but have come to accept *Miranda* as a legitimate and routine part of the criminal process, simply another aspect of the rules of the game.").

111. Schulhofer, *supra* note 10, at 507.

112. See OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRETRIAL INTERROGATION (1986), reprinted in 22 U. MICH. J.L. REFORM 437 (1989).

113. AMERICAN BAR ASS'N, CRIMINAL JUSTICE IN CRISIS 28 (1988) ("A very strong majority of those surveyed — prosecutors, judges, and police officers — agree that compliance with *Miranda* does not present serious problems for law enforcement."); *id.* ("Police



Foundation, Police Executive Research Forum, International Union of Police Associations, and the National Black Police Association) filed amicus curae briefs on behalf of *Miranda* in *Withrow v. Williams*.<sup>114</sup> To be sure, a number of law enforcement organizations recently filed Amicus Curae briefs in support of *Dickerson v. United States*, but these briefs appear to be the result of Paul Cassell's impressive lobbying and advocacy efforts, not the natural inclination of law enforcement, on its own, to abandon *Miranda*. If there is, in fact, widespread opposition to *Miranda*, police in the trenches have expressed surprisingly little desire to overrule it.<sup>115</sup>

#### D. Prosecutors

Surprisingly, the empirical study of *Miranda*'s impact has almost entirely neglected the ruling's effects on the practices, attitudes, and decisionmaking of prosecutors. Prosecutors are, arguably, the most powerful and important actor in the criminal justice system. Their discretion — especially with the rise of determinate sentencing schemes — is simply unmatched by any other actors in the criminal justice system. Prosecutors decide whether to drop or file charges, the amount and type of charges to file, whether to recommend bail and at what amount, whether to engage in plea bargaining, and, if so, which charging and sentencing outcomes to recommend to courts. Any failure to properly issue *Miranda* warnings, any violation of *Miranda*'s invocation rules, as well as any police misconduct or illegality during interrogation can be undone by the prosecutor with a stroke of a pen. Future *Miranda* impact studies need to examine the influence of *Miranda* on the gate-keeping function and decisionmaking of prosecutors if we are to have a complete understanding of its real world effects.<sup>116</sup>

In the last thirty-five years, there has been only one academic study of prosecutorial attitudes toward *Miranda*. In 1981, John Gruhl and Cassia Spohn published a study analyzing 195 questionnaires from local prosecutors in forty-three states. They found that local prosecu-

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witnesses consistently testified that they comply with *Miranda* and still obtain statements from many suspects.”).

114. 507 U.S. 680 (1993). These four organizations asked the Supreme Court to keep *Miranda* claims within the reach of federal habeas corpus in part because, “[t]he law enforcement community has seen the enforcement of *Miranda* and its progeny lead to an increased professionalism within police and sheriff's departments throughout the country. *Miranda*'s bright-line rules have proven relatively easy to follow.” Brief Amici Curiae of the Police Foundation et al. in Support of Respondent at 7, *Withrow v. Williams*, 507 U.S. 680 (1983) (No. 91-1030).

115. Arenella, *supra* note 43, at 380.

116. Gruhl & Spohn, *supra* note 29, at 33.

tors overwhelmingly supported *Miranda*.<sup>117</sup> Over 81% of the prosecutors surveyed agreed that police should be required to read suspects their rights. However, 69% believed that the Courts should continue to reduce the strictness with which *Miranda* was applied, though most felt that the Burger Court's post-*Miranda* rulings — including *Harris v. New York*'s holding that police could use illegally obtained statements to impeach a suspect's credibility at trial — had a limited effect on their decisions to prosecute.<sup>118</sup> Instead, Gruhl and Spohn found that the primary influence on prosecuting attorneys' practices was the degree to which local judges required strict adherence to the *Miranda* guidelines.<sup>119</sup>

Gruhl and Spohn's finding of overwhelming prosecutorial support for *Miranda* is consistent with other sources of data. In the 1988 American Bar Association survey of criminal justice practitioners, for example, prosecutors reported that *Miranda* was not a significant factor that impedes their ability to prosecute criminals successfully.<sup>120</sup> On the contrary, as George Thomas and others have pointed out, *Miranda* facilitates the prosecutor's task of getting statements admitted, gaining leverage during plea-bargaining and ultimately winning convictions.<sup>121</sup> Prosecutors like *Miranda* because it makes law enforcement appear more professional,<sup>122</sup> causes juries to attach greater weight to confession evidence,<sup>123</sup> and allows prosecutors to argue that an otherwise involuntary confession was constitutionally obtained.<sup>124</sup> Just as importantly, *Miranda* rarely imposes significant costs on prosecutors; it is rare that an admission or confession will be suppressed from evidence in trial proceedings because of a *Miranda* violation.<sup>125</sup> In short, there

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117. *Id.* at 35.

118. *Id.* at 40-41.

119. *Id.* at 43.

120. AMERICAN BAR ASSOCIATION, *supra* note 113, at 9. This is consistent with Younger's finding more than twenty years earlier — that the *Miranda* requirements did not decrease the percentage of felony complaints issued by prosecutors or the success in prosecuting cases at the preliminary stage or at trial. Younger, *supra* note 9, at 262.

121. Thomas, *supra* note 5, at 18-22.

122. AMERICAN BAR ASSOCIATION, *supra* note 113, at 8, 20.

123. *Id.* at 29.

124. Garcia, *supra* note 60.

125. In a study of criminal courts in nine medium-sized counties (ranging from 100,000 to 1 million) in Illinois, Michigan, and Pennsylvania, Nardulli found that only five of 7,035 cases (.07%) resulted in lost convictions as a result of judges suppressing confessions. Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule: An Empirical Assessment*, AM. B. FOUND. RES. J. 585, 601 (1983). In a subsequent study of 2,759 cases in the city of Chicago, Nardulli reported that judges suppressed confessions in .04% of all cases. Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, 1987 U. ILL. L. REV. 223, 232. Guy and Huckabee found that only 12 of 2,354 cases (.51%) appealed to either the Indiana Supreme Court or the Indiana Court of Appeals from 1980 to 1986 resulted in exclusion of evidence as a result of *Miranda* violations. Karen L. Guy & Robert G. Huckabee, *Going*

are a number of reasons why *Miranda* benefits prosecutors without undermining effective law enforcement.

### E. Trial Courts

*Miranda* has also eased the lot of trial judges — to the likely detriment of criminal defendants. By creating a seemingly objective, regular, and consistent rule, *Miranda* has made it far simpler for trial courts to decide whether a confession should be admitted into evidence. As Malone has pointed out, “staccato *Miranda* conversations, with their uniform statements and check the box answers, are easier for courts to evaluate than sprawling hours-long interrogations.”<sup>126</sup> The cost of this simplification, however, appears to be borne by the accused. Virtually all observers seem to agree that *Miranda* has shifted the legal inquiry from whether the confession was voluntarily given to whether the *Miranda* rights were voluntarily waived. The Supreme Court has said as much in *Dickerson*, observing that when the police have “adhered to the dictates of *Miranda*,” a defendant will rarely be able to make even “a colorable argument that his self-incriminating statement was compelled.”<sup>127</sup> As White points out, “A finding that the police have properly informed the suspect of his *Miranda* rights thus often has the effect of minimizing the scrutiny afforded interrogation practices following the *Miranda* waiver.”<sup>128</sup> Others have gone further, suggesting that as long as *Miranda* warnings were given, courts ignored interrogation misconduct, freeing the police to coerce suspects as long as they had first Mirandized them.<sup>129</sup> There is data to support this view. A survey of recent decisions by Welsh White suggests that once police have complied with *Miranda* and received a waiver, it is, indeed, difficult to establish that the defendant’s confession was coerced or involuntary.<sup>130</sup> Thus, while *Miranda* has done very little to change the psychological methods and process of interrogation, it has changed, de facto, the standard by which confessions are admissible

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*Free on a Technicality: Another Look at the Effect of the Miranda Decision on the Criminal Justice Process*, 4 CRIM. JUST. RES. BULL. 1 (1988). Even Paul Cassell concedes that successful pre-trial *Miranda* suppression motions are rare, and that courts rarely reverse a conviction on appeal because of a motion to suppress under *Miranda*. Cassell, *supra* note 9, at 392-93. As Alex Nguyen points out, having a conviction reversed because of a *Miranda* violation is so rare that many long time police and prosecutors have never seen it happen. Nguyen, *supra* note 44, at 60.

126. Malone, *supra* note 4, at 377.

127. *Dickerson v. United States*, 120 S. Ct. 2326, 2336 (2000).

128. White, *supra* note 76, at 1220.

129. Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 742-47 (1992); see also Leo, *supra* note 64, at 276-77; Malone, *supra* note 4, at 377-79; Garcia, *supra* note 60, at 465, 475-76.

130. White, *supra* note 76, at 1219.

into evidence, creating a bright line but diminishing the salience and effectiveness of the voluntariness test by lulling judges into admitting confessions with little inquiry into voluntariness.<sup>131</sup> For if a dispute over the facts arises — the so-called “swearing contest” — judges virtually always believe the police officer’s testimony, especially if the suspect had signed a written waiver.<sup>132</sup>

### III. CONCLUSION: *MIRANDA*, VIDEOTAPING, AND THE FUTURE OF EMPIRICAL SCHOLARSHIP

*Miranda* is one of the most well-known and controversial Supreme Court decisions in American history, simultaneously celebrated and reviled. There is no question that *Miranda* has been enormously influential in the last four decades, redefining the character of police interrogation as we now know it. Elsewhere, I have argued that *Miranda* has exercised a long term impact on police behavior, court cases, and popular consciousness in at least four ways.<sup>133</sup> First, *Miranda* increased the professionalism of police detectives, removing the last entrenched vestiges of the third degree.<sup>134</sup> Second, *Miranda* has transformed the culture of police detecting in America by fundamentally reframing how police talk and think about the process of custodial interrogation. Third, *Miranda* has increased public awareness of constitutional rights. And fourth, *Miranda* has inspired police to develop more specialized, more sophisticated, and seemingly more effective interrogation techniques with which to elicit inculpatory statements from custodial suspects.

Despite its influence on policing in the 1960s and 1970s, however, *Miranda*’s impact in the twenty-first century appears rather limited.<sup>135</sup> In the last four decades, police, prosecutors, and courts have all adapted to and diluted *Miranda*, using it to advance their own bureaucratic objectives rather than to meaningfully enforce the privilege

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131. Thomas, *supra* note 121, at 31 (“Lower courts routinely admitted confessions using the voluntariness test in the Pre-*Miranda* days, but today’s judges have grown up (as judges at least) with the *Miranda* rule firmly in place . . . powerful institutional pressures encourage judges to admit confessions. Unless the judge believes the confession to be false, suppressing the confession will deprive the state of its strongest evidence and might result in a guilty defendant going free. Current judges might experience these institutional pressures and react in the same way as judges from the 1940s, 1950s, and early 1960s.”).

132. Leo, *supra* note 10, at 687; Neubauer, *supra* note 9, at 163-88; Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785 (1970).

133. Leo, *supra* note 10, at 668-75.

134. This point was also raised in Gerald Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1444 (1985). See also SIMON, *supra* note 53, at 199.

135. See *supra* Section II.B.

against self-incrimination or the right to counsel.<sup>136</sup> Once feared to be the equivalent of sand in the machinery of criminal justice, *Miranda* has now become a standard part of the machine. Police have learned how to sidestep the necessity of *Miranda* or to use clever strategies to elicit a high percentage of *Miranda* waivers. Prosecutors have learned to use *Miranda* to facilitate the admission of confession evidence, to add leverage to plea bargaining negotiations, and to buttress cases at trial. And trial judges have learned to use *Miranda* to simplify the decision to admit interrogation-induced statements and to sanitize confessions that might otherwise be deemed involuntary if analyzed solely under the more rigorous Fourteenth Amendment due process voluntariness standard.

*Miranda* imposes few, if any, serious costs on the individual actors of the criminal justice system or the system as a whole; by virtually all accounts, it is a low-cost proposition. It does not impede effective law enforcement. Contrary to the arguments of Paul Cassell, there is no compelling evidence that *Miranda* causes a significant number of lost convictions — certainly not the tens and hundreds of thousands of convictions lost annually that Cassell imputes to *Miranda*.<sup>137</sup> Indeed, the best evidence suggests that this difficult-to-ascertain figure is likely to be very low.

If *Miranda* in 2001 imposes low costs on those whom it was intended to regulate, it also offers few benefits for its intended recipients. Contrary to the visions of its creators, *Miranda* does not meaningfully dispel compulsion inside the interrogation room. *Miranda* has not changed the psychological interrogation process that it excoriated, but has only motivated police to develop more subtle and sophisticated — and arguably more compelling — interrogation strategies. How police “work” *Miranda* in practice makes a mockery of the notion that a suspect is effectively apprised of his rights and has a continuous opportunity to exercise them. *Miranda* offers no protection against traditionally coercive interrogation techniques, but may have, instead, weakened existing legal safeguards in this area. And *Miranda* offers suspects little, if any, protection against the elicitation and admission into evidence of false confessions. As a safeguard, *Miranda* produces very few benefits.

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136. *Miranda* is an inherently weak safeguard; as Yale Kamisar has pointed out, “[a] system that allows the police themselves (rather than a magistrate or other judicial officer) to obtain waivers of a person’s constitutional rights — and to do so without requiring the presence of a disinterested observer or a tape recording of the proceedings — is an inherently weak procedural safeguard.” Yale Kamisar, *Miranda Does Not Look So Awesome Now*, LEGAL TIMES, June 10, 1996, at A22.

137. See *supra* Section II.B.

As many scholars seem to agree,<sup>138</sup> electronic audio- or video-recording of interrogations is the most promising interrogation reform of our era.<sup>139</sup> Like *Miranda*, video-taping imposes few costs, but unlike *Miranda* video-taping promises high benefits. The fundamental value of electronic recording is that it creates an objective, comprehensive, and reviewable record of the interrogation for all parties. By preserving the evidentiary record, electronic recording eliminates the swearing contest, improves police practice, reduces court costs by preventing unnecessary litigation about what did or did not occur during interrogation, and provides criminal justice officials and triers of fact with the necessary data to make informed decisions about truth and justice. By preserving the evidentiary record for all to see, electronic recording deters false allegations of impropriety just as it deters police misconduct inside the interrogation room. To be sure, electronic recording is a means, not an end: it leaves unanswered the enduring legal and moral questions that animate criminal procedure, such as when interrogation pressure becomes excessive, what constitutes an involuntary statement, and how much we ought to value confession evidence. Still, electronic recording coupled with a return to a meaningful voluntariness standard — what Bill Stuntz calls “voluntariness with better evidence”<sup>140</sup> — may be a far superior basis for dispelling coercion, regulating overbearing police methods, and preventing false confessions than the overrated *Miranda* regime.

Apart from its value as a policy reform, the electronic recording of interrogation provides scholars with a virtually unrivaled (and heretofore virtually unplumbed) source of empirical data. Scholars who wish to better understand the contemporary, real world impact of *Miranda*, as well as what happens inside police interrogation rooms after *Miranda* is waived and why, might consider studying the case files and videotapes of interrogations in Alaska and Minnesota, where elec-

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138. E.g., Leo, *supra* note 10, at 681-92; Cassell, *supra* note 9, at 486-92; Wayne T. Westling & Vicki Waye, *Videotaping Police Interrogations: Lessons From Australia*, 25 AM. J. CRIM. L. 493 (1998).

139. In both Alaska and Minnesota, police are required by law to electronically record interrogations. *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985) (holding that “an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect’s right to due process, under the Alaska Constitution, and that any statement thus obtained is generally inadmissible”); *State v. Scales*, 518 N.W. 2d 587, 592 (Minn. 1994) (holding that “all custodial interrogation including any information about rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention. If the law enforcement officers fail to comply with this recording requirement, any statements the suspect makes in response to the interrogation may be suppressed at trial. . . . [S]uppression will be required of any statements obtained in violation of the recording requirement if the violation is deemed ‘substantial.’ ”).

140. William J. Stuntz, *Miranda’s Mistake*, 99 MICH. L. REV. 975, 996 (2001).

tronic recording of all interrogations is mandated by law.<sup>141</sup> Assuming police cooperation, the preservation of records, and sufficient resources, scholars could randomly select cases and study, both qualitatively and quantitatively, the impact of *Miranda* on police work, case processing, and conviction rates.<sup>142</sup> Although it is impossible to ascertain the number of lost confessions as a result of *Miranda*, with an adequate sample size scholars could — using multiple regression analysis to control potentially confounding variables and statistical significance to infer likely causation — measure whether *Miranda* depresses, increases or has no effect on current conviction rates. Scholars could, in addition, do matched jurisdiction studies — comparing police files and videotapes in a jurisdiction that has videotaping with the police files of a demographically similar jurisdiction that does not — to analyze the impact of videotaping on police work, case processing, and conviction rates. Such a study might begin to resolve some of the empirical and legal debates that have animated the first and second generation of *Miranda* impact scholarship. It might also help us better understand whether *Miranda*, and all that *Miranda* requires and entails, is all that relevant to regulating police interrogation in the twenty-first century.

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141. See *supra* note 139. Some police departments voluntarily record interrogations. William A. Geller, *Police Videotaping of Suspect Interrogations and Confessions* (1992) (A Report to the National Institute of Justice, unpublished manuscript).

142. George Thomas has made similar suggestions. Thomas, *supra* note 58, at 833-37.