MIRANDA'S "NEGLIGIBLE" EFFECT ON LAW ENFORCEMENT: SOME SKEPTICAL OBSERVATIONS

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"*Miranda*[1] has no effect on law enforcement." This is the story told, and retold, by many of the nation's leading criminal procedure academics.[2] Warming to the task, some even go so far as to maintain that the *Miranda* requirements[3] "actually facilitate[] law enforcement efforts."[4] Yet, consider for a moment the striking incongruity of the tale. To a degree unparalleled in our nation's history, *Miranda* restricts police interrogation of criminal suspects—the "nerve center of crime detection."[5] It requires every criminal suspect to be encouraged, before custodial questioning, to keep quiet. It allows suspects to prevent any police questioning by the simple expedients of declining to waive their rights or asking for a lawyer. Such constraints make no difference at all!?

This Article raises some skeptical notes about this conventional wisdom.[6] The myth of *Miranda*'s benign effects is

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1. Miranda v. Arizona, 384 U.S. 436 (1966) (instituting the *Miranda* warning).

2. *See* Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 645 (1996) (concluding that the view that *Miranda* has had a negligible effect on law enforcement "has become the conventional wisdom").

3. *Miranda* requires police to give suspects in custody warnings of certain rights and to obtain an affirmative "waiver" of those rights before questioning. Moreover, if the suspect asks for a lawyer at any time, the questioning must stop.

4. *The Jury and the Search for Truth: Hearings on S. 3 Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995) (testimony of Professor Carol Steiker) (on file with author).

5. *Miranda*, 384 U.S. at 501 (1966) (Clark, J., dissenting).

6. Because of space limitations, I can sketch my argument here with only broad strokes. For more detailed treatment, see my articles cited in the footnotes. For a reply to the specific criticisms Professor Schulhofer makes in this journal, see Paul G. Cassell,

unsupported and unsupportable in the available empirical data. To the contrary, there is every reason to believe our intuitions have it right in suggesting—indeed, crying out—that *Miranda* has impeded law enforcement. We owe it to those who suffer from unsolved crimes and unconvicted criminals to pay more careful attention to *Miranda*'s costs.

Before turning specifically to *Miranda*'s harms, let me note in passing that this Article will not develop at any length another promising line of attack against *Miranda:* that nothing in the Fifth Amendment authorized the Court to create such a code-like set of rules. That sort of conclusion seems almost preordained. It is hard to argue that *Miranda* follows from the constitutional history and traditions of this country. Professor Grano's thorough book *Confessions, Truth and the Law*[7] explicates this point brilliantly. Indeed, one of the other participants in this Panel, Professor Stephen Schulhofer, recently acknowledged that the *Miranda* holding was "a radical departure . . . from the assumption of the times" and that the Fifth Amendment approach to regulating police interrogation "seemed so contrary to the weight of then-prevailing precedent that Miranda's lawyers decided not even to *argue* the Fifth Amendment claim."[8] The characterization that the moderator of this Panel, Professor Ely, has given to *Roe v. Wade* seems equally applicable to *Miranda.* The decision, he wrote, is bad "because it is not constitutional law and gives almost no sense of an obligation to try to be."[9]

In its recent cases, the Court has frankly confessed that the *Miranda* requirements are not themselves constitutional rights

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Reply to Schulhofer's Bashing *Miranda* is Unjustified (working title), 20 HARV. J.L. & PUB. POL'Y (forthcoming 1997).

7. JOSEPH D. GRANO, CONFESSIONS, TRUTH AND THE LAW (1993).

8. Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs,* 90 NW. U. L. REV. 500, 552 n.214 (1996) [hereinafter Schulhofer, Miranda*'s Practical Effect*]. Perhaps attempting to seize the home court advantage in front of the Federalist Society, in his reply in this journal Schulhofer claims to be "one of those old-fashioned people who think that we should take seriously the intentions of the Framers." Stephen J. Schulhofer, *Bashing* Miranda *Is Unjustified—And Harmful,* 20 HARV. J.L. & PUB. POL'Y 347, 348 (1997) [hereinafter Schulhofer, *Bashing* Miranda]. Observant Federalist Society members will note, however, that Schulhofer fails to provide any reference to James Madison reciting the *Miranda* warnings or to show that anyone—Framer or otherwise—had even heard of the *Miranda* warnings before the Warren Court revolution of the 1960s.

9. John H. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973).

but rather are merely something called "prophylactic rights" designed to safeguard the real Fifth Amendment right against compelled self-incrimination.[10] Having gone beyond the boundaries of the Fifth Amendment, the Court tells us that its writ runs as far as the cost-benefit analysis will take it. Today the Court solemnly claims that the *Miranda* decision embodies a "carefully crafted balance designed to fully protect both the defendant's and society's interests."[11] Academic acolytes of *Miranda* likewise justify the decision through instrumental calculation. Professor Yale Kamisar, one of *Miranda*'s leading defenders, reports that striking a balance "is the way *Miranda*'s defenders—not its critics—have talked about the case for the past twenty years."[12]

The starting point for the cost-benefit justification of *Miranda* is the decision's putative failure to harm law enforcement. But the empirical props for that position are collapsing. *Miranda*'s defenders most often cite the 1966 New Haven study, which claimed that the number of confessions there declined only slightly after the *Miranda* decision was made.[13] Recently, I reanalyzed the study's underlying data and found that, while the number of confessions fell only slightly, the number of *admissible* confessions fell sharply. That summer, the New Haven police obtained many confessions by violating *Miranda*'s requirement to stop questioning when asked to do so by the suspect. Excluding these inadmissible confessions reveals that the admissible confession rate (the rate that counts in criminal prosecutions) actually dropped sixteen percentage points after *Miranda*.[14]

Other real-world data is unkind to the hypothesis of nugatory effects from *Miranda*. My review of the before-and-after studies conducted around the time of *Miranda* was the first attempt to

10. *See, e.g.*, Michigan v. Tucker, 417 U.S. 433, 443-44 (1974).

11. Moran v. Burbine, 475 U.S. 412, 434 n.4 (1986) (emphasis added).

12. Yale Kamisar, *The "Police Practice" Phases of the Criminal Process Revolution and the Three Phases of the Burger Court: Rights and Wrongs in the Supreme Court, 1969-86, in* THE BURGER YEARS 143, 150 (Herman Schwarz ed., 1987).

13. *See, e.g.*, 1 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 6.5, at 484 (1984 & 1991 Supp.) (citing Project, *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519 (1967).

14. *See* Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 408-09 (1996), *analyzing* Project, *supra* note 13; *see also* Schulhofer, Miranda*'s Practical Effect*, *supra* note 8, at 530 (agreeing that these suspects' confessions would be excluded and concluding that the New Haven study shows a confession rate decline of 12.3%).

quantify how many criminals go free as a result of *Miranda.* Averaging data from eight reliable studies around the country, I concluded that the rate at which suspects confessed dropped by about sixteen percentage points after *Miranda* (*i.e.*, if the confession rate was 60% before the decision, it fell to around 44% after).[15] This drop in the confession rate results in the nonprosecution of many dangerous criminals, a substantial social cost.[16]

Responding to my article, Professor Stephen Schulhofer read the same studies as suggesting that the confession rate fell 9.7 percentage points.[17] The implications of Schulhofer's response have not, I think, been widely appreciated. Here is one of the most ardent *defenders* of *Miranda* apparently agreeing that the before-and-after studies suggest that *Miranda* weakened about one in every ten criminal cases. Professor Schulhofer then made further technical adjustments to argue that the true overall social cost of *Miranda* is "vanishingly small."[18] In turn, I replied to Schulhofer's arguments and explained why they appeared, to me, to be unavailing.[19] That full debate requires extensive discussion of individual before-and-after studies that we will not repeat at length here. Since the publication of those articles, however, one important piece of information supporting my position has become available.

The quantitatively most significant difference between my position on confession rates, and that of Professor Schulhofer, is whether to include a figure from the Los Angeles District Attorney's Office. The Office reported that the confession rate *rose* ten percentage points within three weeks after *Miranda*—allegedly from 40% before the decision to 50% after. I exclude the Los Angeles figure as unreliable, pointing out that it is far-

15. *See* Cassell, *supra* note 14, at 418.

16. *See id.* at 437-40, 483-86.

17. *See* Schulhofer, Miranda's *Practical Effect, supra* note 8, at 538 (concluding that "reanalysis . . . modifies the average before-after change from a 16.1% drop (Professor Cassell's figure) to a confesssion-rate drop of only 9.7% in comparison to the 1960s voluntariness test"); *see also id.* at 539 (conceding that 9.7% figure may rest on studies that are "perhaps slightly low"). *Cf.* George C. Thomas, III, *Is* Miranda *A Real-World Failure? A Plea for More (and Better) Empirical Evidence,* 43 UCLA L. REV. 821, 826-31 (1996) (reviewing studies and concluding that we cannot reject the null hypothesis of no effect from *Miranda*); George C. Thomas, III, *Plain Talk About the* Miranda *Empirical Debate: A "Steady-State" Theory of Confessions,* 43 UCLA L. REV. 933, 939-44 (1996) (emphasizing the importance of a "conservative approach" to *Miranda* warnings and their effects).

18. *See* Schulhofer, Miranda's *Practical Effect, supra* note 8, at 544-47.

19. *See* Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda's *Defenders,* 90 NW. U. L. REV. 1084 (1996).

fetched to believe that confessions increased within three weeks of the decision. This result is attributable not to some sudden rise in the loquaciousness of criminal suspects, but rather to a problem with the survey instruments. The Los Angeles prosecutors received an "after questionnaire" that had been redesigned, with the result that it swept in more statements (including non-incriminating statements) than did the "before questionnaire."[20] In response, Schulhofer characterizes the Los Angles figures as "a careful study"[21] and claims that my disparagement rests only on the "'summary sheet' used by the law clerk who subsequently tabulated these questionnaires," not the actual questionnaires themselves.[22] Schulhofer further argues that there is no indication that the law clerk recorded different things in the before and after surveys or even that the forms were redesigned.[23] Schulhofer concludes that the Los Angeles number "is one of the least vulnerable" of those available.[24]

To help resolve the difference between the interpretations Professor Schulhofer and I give to the Los Angeles figures, I spoke to the law clerk who actually tabulated the data—now United States Court of Appeals Judge Stephen S. Trott.[25] He reports that the collection of the data—both the before data and the after data—was "extremely haphazard" with little, if any, attention paid to insuring representative samples or consistent survey instruments.[26] The forms were completed and collected under "chaotic" conditions and "ended up measuring apples and oranges." No controls were maintained over who was given the forms and who completed them; many deputies simply ignored them. Those who completed the forms received no adequate instructions on how to do so. Judge Trott states that he reported these problems to his supervisors at the time,

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20. *Id.* at 1097-1101.

21. Stephen J. Schulhofer, *Pointing in the Wrong Direction*, LEGAL TIMES, Aug. 12, 1996, at 21.

22. Schulhofer, Miranda*'s Practical Effect*, *supra* note 8, at 535.

23. *See id.*

24. *Id.* at 538.

25. *See Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 349 (1967) (alluding to Trott's involvement).

26. Telephone Interview with Judge Stephen S. Trott, U.S. Court of Appeals for the Ninth Circuit (Aug. 20, 1996). All information and quotations in this paragraph are based on the interview with Judge Trott.

suggesting that the whole process was badly flawed. His supervisors replied that, because nothing else was available, the data collected would have to be used. Judge Trott now concludes that the Los Angeles figures "prove nothing" and that researchers should "not draw any conclusions" about *Miranda*'s effects from them.

The more reasonable approach to determining *Miranda*'s effect, at least to my mind, is to exclude the Los Angeles figure from consideration.[27] But ultimately, regardless of how the before-and-after data from Los Angeles and other cities is interpreted, our debate about these studies might be regarded as inconclusive. The studies report confession rates in 1966 and 1967, immediately after *Miranda* was handed down. As a result, defenders of *Miranda* can argue that, even if these studies show law enforcement impairment, police have since adjusted their questioning methods to eliminate *Miranda*'s harmful effects.[28] A competing possibility, of course, is that the before-and-after studies understate *Miranda*'s harms, because the police had not yet complied with all of its requirements[29] or suspects had not yet realized how to take advantage of them.[30]

To sort through these possibilities, we need data not just from the year following *Miranda*, but from the decades following the decision. Unfortunately, no direct data on the number of confessions is available from law enforcement reports. Fortunately, an indirect measure is available. The FBI collects data on crime "clearance" rates, that is, the rates at which police solve crimes. A lower confession rate presumably leads to fewer cleared crimes. Indeed, the clearance rate is an extremely conservative measure of *Miranda*'s effect; some lost confessions might be unnecessary to "clear" a crime but nonetheless necessary to successfully prosecute the criminal.[31]

A 1987 article by Professor Schulhofer maintained that within "a year or two" after *Miranda*, clearance rates "were thought to

27. *Accord* Thomas, *supra* note 17, *Plain Talk About the* Miranda *Empirical Debate*, at 942 (rejecting "out of hand" the Los Angeles figure for purposes of determining *Miranda*'s effects).

28. *See, e.g.*, Schulhofer, Miranda*'s Practical Effect*, *supra* note 8, at 507-10.

29. *See* Cassell, *supra* note 19, at 1087-88 (collecting evidence on this point).

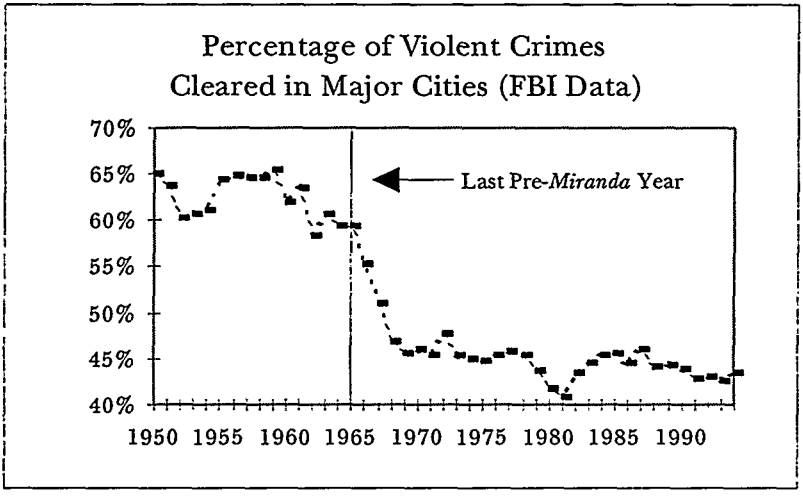
30. *Cf.* 1 LAFAVE & ISRAEL, *supra* note 13, at § 6.5(c), p. 484 (wondering whether effects of *Miranda* have increased over time "now that . . . the rights declared therein are more widely perceived by the public at large").

31. *See* Cassell, *supra* note 14, at 398-99.

be returning to pre-*Miranda* levels."[32] His article epitomizes the conventional academic wisdom, having been cited dozens of times for the proposition that *Miranda* did not hinder the police. For example, Professor Yale Kamisar has concluded that the article "effectively refutes this contention [that *Miranda* has harmed law enforcement]."[33]

Yet Professor Schulhofer did not actually collect data on clearance rates but, as the quotation above reveals, simply reported the conventional opinion about such rates. Skeptical of the received wisdom, I collected the FBI's actual data on crime clearance rates, focusing on violent crimes where *Miranda* might be expected to have much of its effect. Figure 1 reveals that, contrary to the view from academe, on the streets of America violent crime clearance rates fell precipitously immediately after *Miranda* and never recovered.

FIGURE I: VIOLENT CRIME CLEARANCE RATE



In 1965, the violent crime clearance rate had been stable for the previous three years and stood at nearly 60%. Then, as

32. Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 456 (1987); *see also* Stephen J. Schulhofer, *The Fifth Amendment at Justice: A Reply*, 54 U. CHI. L. REV. 950, 954 n.17 (1987) (arguing that clearance rates coupled with other evidence refute the notion that *Miranda* harmed law enforcement).

33. Yale Kamisar, *Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REFORM 537, 586 n.164 (1990).

police and suspects adjusted to the new rules in the next three years—1966, 1967, and 1968—the clearance rate plunged below 47%, a drop of more than twelve percentage points. Clearance rates have remained roughly stable ever since. What was it that caused this sudden three-year fall? My hypothesis is the commonsensical one—that *Miranda* was, at least in part, responsible.

Professor Schulhofer now concedes that violent crime clearance rates fell dramatically immediately after *Miranda.* Rather than acknowledge that this is evidence of *Miranda*'s harmful effects, as his previous article suggested,[34] he now searches for a new theory to account for what appears to be strong evidence of *Miranda*'s harmful effects. Instead of *Miranda,* Professor Schulhofer singles out rising crime rates during the 1960s as solely responsible for the dramatic decline in clearance rates. He argues that rising crime rates stretched police agencies thinner and that this overload reduced their ability to solve crimes. He concludes that "there is no reason—none—to blame *Miranda,* rather than precipitously shrinking resources, for the decline in clearance rates during the late 1960s"[35] and that "soaring rates of violent crime and stagnant levels of police resources easily explain the observed clearance rate trends."[36]

While rising crime rates may well have had some dampening effect on clearance rates, it seems unnecessarily extreme to argue *Miranda* had no effect whatsoever. Among other things, the no-effect claim appears to conflict with Schulhofer's own earlier reading of the before-and-after studies, which concluded that confession rates fell more than 9% after *Miranda.*[37] Schulhofer's claim also requires us to assume that *Miranda* itself

34. In his 1987 article, *Reconsidering* Miranda, *see supra* note 32, Schulhofer argued that the putative return of clearance rates to their pre-*Miranda* levels is evidence of *Miranda*'s lack of harm. If that assertion meant anything—in other words, if it was falsifiable—the converse should also have been true: that the persistence of clearance rates below their pre-*Miranda* levels is evidence of *Miranda*'s harm.

35. Schulhofer, *supra* note 21, at 24.

36. Stephen J. Schulhofer, Miranda *and Clearance Rates,* 91 Nw. U. L. Rev. 278 (1996) 278, 280; *accord id.* (stating "we need only turn to levels of crime and police resources during the period" to understand the clearance rate decline); *id.* at 285 ("Police efforts to fight violent crime were indeed severely handicapped in the late 1960s—not by *Miranda*'s relatively subtle change in interrogation procedure, but by the stark reality that in the brief period between 1960 and 1990, the number of officers available, relative to the level of violent crime, fell by 61 percent.") (emphasis deleted).

37. *See supra* note 17 and accompanying text.

made no contribution to overloading the police. Yet *Miranda* may itself have increased the crime rate.[38] Moreover, by reducing confessions, *Miranda* forces police to do more legwork to build prosecutable cases against suspects,[39] leaving less time available for other investigative activities.

The basis for Professor Schulhofer's aggressive position turns out to be several charts plotting clearance rates against what he styles the "clearance capacity" of the criminal justice system—essentially, the number of police officers per known violent crime and the number of real dollars spent on law enforcement per known violent crime.[40] Noting that the clearance capacity declined during the 1960s, Schulhofer points an accusing finger at—and only at—declining clearance capacities, arguing that the system became overloaded precisely when *Miranda* was decided.

A careful inspection of his charts, however, reveals a few disconcerting points for one staking out so strong a claim. To begin with, clearance capacity as measured both by available officers and dollars fell noticeably from 1962 to 1965 while clearance rates rose slightly during these years.[41] Why didn't the declining capacity hinder police then? Moreover, Professor Schulhofer's charts end in 1974.[42] Yet, it turns out that clearance rates remained roughly stable over the next two decades while the clearance capacity continued to fall significantly.[43]

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38. *Cf.* Raymond Atkins & Paul H. Rubin, *The Impact of Changing Criminal Procedure on Crime Rates* (Oct. 28, 1995) (finding that the creation of the exclusionary rule had an effect on crime rates starting in 1961) (working paper on file with author).

39. *See* Richard A. Leo, *Police Interrogation and Social Control*, 3 SOC. & LEG. STUD. 93, 99 (1994) (reporting that a detective believes "[i]f he gets a confession (or even good admissions) he doesn't have to spend hours tracking down witnesses, running fingerprints, putting together line-ups, etc.").

40. *See* Schulhofer, *Bashing* Miranda, *supra* note 8, at 358-61 & figs.2-3; Schulhofer, *supra* note 36, at 283.

41. *See* Schulhofer, *Bashing* Miranda, *supra* note 8, at 357 fig.1 (clearance capacity in dollars drops from 1962-65 while clearance rate rises slightly); *id.* at 361 fig.3 (same in officers).

42. Schulhofer relies on a compilation of FBI data that ends in 1974. *See* Schulhofer, *Bashing* Miranda, *supra* note 8, at 356 n.30 (relying on JAMES ALAN FOX, FORECASTING CRIME DATA: AN ECONOMETRIC ANALYSIS 81-86 (1978)).

43. *Compare* Schulhofer, *supra* note 21, at 24 (reporting that 51 officers per violent crime were available in 1968 while today there are only 28 officers per violent crime) *with* Schulhofer, *Bashing* Miranda *supra* note 8, at 357 fig.1 (showing that the violent crime clearance rate from 1968 to 1974 remained roughly stable); *see also* Paul G. Cassell, *The Costs of the* Miranda *Mandate: A Lesson in the Danger of Inflexible, "Prophylactic" Supreme Court Inventions*, 28 ARIZ. ST. L.J. 299, 308 (1996) (charting crime rates vs. clearance rates for violent crimes and noting that the patterns do not track each other).

Schulhofer's overload effect thus operates rather erratically both before *Miranda* and after. In large measure, it is a convenient will-o'-the-wisp, apparently materializing with Chief Justice Warren's opinion in *Miranda*, and then floating away in the decades after. Schulhofer has company in his failure to document this effect convincingly. Other criminal justice researchers searching for confirming proof of overload have generally met with little success.[44] System overload may be *part* of the story for declining clearance rates. But to think that it explains *all* of the decline seems far-fetched.

Professor Schulhofer also deploys another new argument to deflect blame away from *Miranda*. Shifting ground from examining clearance *rates* to clearance *totals*,[45] he notes that police cleared more violent crimes in the years following *Miranda*.[46] Why, he wonders, isn't *Miranda*'s harmful effect visible in this data?

The answer is straightforward. The depressing effect is found

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44. *See* PEGGY S. SULLIVAN, DETERMINANTS OF CRIME AND CLEARANCE RATES FOR SEVEN INDEX CRIMES 171 (1985) (unpublished Ph.D. dissertation, Vanderbilt Univ.) (finding that police officers and law enforcement dollars do not significantly influence violent crime clearance rates but do influence property crime clearance rates); Richard R. Bennett, *The Effect of Police Personnel Levels on Crime Clearance Rates: A Cross-National Analysis*, 6 INT'L J. COMP. & APPLIED CRIM. JUST. 177, 186 (1982) (finding that a previous increase in the number of crimes increases police ability to solve them in cross-national study); Dale O. Cloninger & Lester C. Sartorius, *Crime Rates, Clearance Rates and Enforcement Effort: The Case of Houston, Texas*, 38 AM. J. ECON. & SOC. 389 (1979) (finding that clearance rates did not respond to small changes in police expenditures but did respond to large changes in police efforts); Michael Geerkin & Walter R. Gove, *Deterrence, Overload, and Incapacitation: An Empirical Evaluation*, 56 SOC. FORCES 424, 439 (1977) (concluding that system overload operates primarily not on arrest rates but on imprisonment rates); David F. Greenberg & Ronald C. Kessler, *The Effect of Arrests on Crime: A Multivariate Panel Analysis*, 60 SOC. FORCES 771, 782 (1982) (finding no consistent evidence on relationship between crime rates and clearance rates); *see also* David F. Greenberg, Ronald C. Kessler, and Charles H. Logan, *A Panel Model of Crime Rates and Arrest Rates*, 44 AM. SOC. REV. 843, 849 (1979) (finding no consistent, statistically significant relation between either instantaneous or lagged effect of crime rates on arrest rates); Eric Rasmussen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519, 522 (1996) (concluding that "the overload theory... cannot explain the U.S. pattern of crime"). In his reply, Professor Schulhofer seeks to justify the shift from clearance *rates* to clearance *totals* by suggesting that I was "the first to bring clearance totals into the debate." Schulhofer, *Bashing* Miranda, *supra* note 8, at 358. But he cites a passage in my earlier article that actually discusses a chart depicting clearance *rate* data. *See* Cassell, *supra* note 19, at 1090 (arguing that "looking just to the clearance *rate* data... one would conclude that about one out of every four violent crimes that was 'cleared' before *Miranda* was not cleared after") (discussing "Figure 1—Violent Crimes Clearance *Rates*") (emphasis rearranged).

45. The clearance total is simply the total number of crimes police clear. The clearance rate is this total number of cleared crimes divided by the number of crimes reported to the police.

46. *See* Schulhofer, *Clearance Rates*, *supra* note 36, at 286 & fig.4.

not by looking at the number of *cleared* crimes, but rather at the number of *uncleared* crimes. Uncleared crimes accelerated immediately following *Miranda.* As shown in Figure 2, police consistently cleared the majority of violent crimes from 1950 to 1965. Then, in 1966 the gap narrowed, in 1967 the gap essentially disappeared, and in 1968, for the first time, police failed to clear most violent crimes. Since then, the gap has persisted.[47]

FIGURE 2: CLEARED VS. UNCLEARED CRIMES

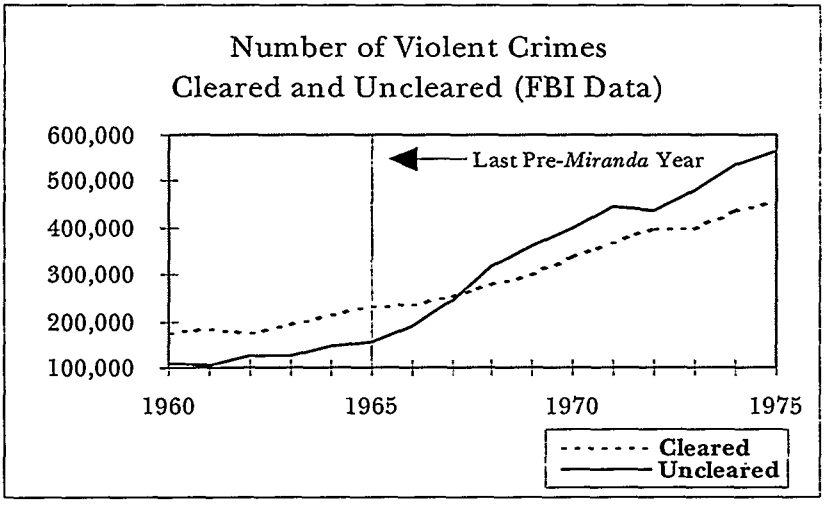

Figure 2 reveals the fallacy in Professor Schulhofer's position: we cannot determine police effectiveness by looking solely at the number of cleared crimes. By this measure, the Chicago Police Department is undoubtedly several times more effective than the Salt Lake City Police Department; each year, the number of cleared crimes in Chicago is most assuredly many times the number of cleared crimes in Salt Lake City simply because there are many more crimes in Chicago. But police effectiveness is never appraised in such terms. Instead, the longstanding measure is clearance rates, a police "batting average" that

47. For clarity of presentation, the chart stops (as does Schulhofer's) with 1975. From 1976-1994, the gap persists and grows slightly as the total number of crimes increases from year to year.

considers both cleared and uncleared crimes.[48] This practice is so universal that I have been unable to locate even a single scholarly article on either police effectiveness or *Miranda* focusing on clearance totals rather than clearance rates.

This problem permeates Schulhofer's reliance on rising numbers of clearances after 1966. In each of those years, police had more opportunities to clear crimes because of rising crime rates—more "at bats," if you will. A certain number of crimes will be cleared almost as soon as they are committed, either because of their nature (*e.g.*, barroom brawls, domestic violence)[49] or because of the stupidity of their perpetrators.[50] To look solely at clearance totals is akin to discussing the number of hits of a batter without reporting his strikeouts at the plate. To tout a rising number of clearances as proof of rising police effectiveness misses this critical point. By that measure, police were much more "effective" in 1970 than in 1960. Clearance rates paint a different—and more accurate—picture. Police performance declined sharply from 1966 to 1968.

Of course, to resolve conclusively what caused declining clearance rates in this period requires more than simply eyeballing charts. The standard statistical technique for answering such questions is multiple regression analysis. Along with Professor Richard Fowles of the University of Utah's Department of Economics, I have run multiple regression analysis on violent crime clearance rates from 1950 to 1994. Much of the post-*Miranda* drop is explained by assuming the ability of police to clear crimes shifted in the middle of 1966, immediately after *Miranda* was decided. As shown in Table 1, a basic model of violent crime clearance rates, controlling for relevant criminal justice, demographic, and economic factors,

48. *See, e.g.*, FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1994, at 206-15 chart 3.1 & tbls.25-28 (1995) (reporting crime clearance rates but not clearance totals). *See generally* JOHN I. GRIFFIN, STATISTICS ESSENTIAL FOR POLICE EFFICIENCY 69 (2d ed. 1958) ("The most important measure of [police] efficiency is the proportion of offenses cleared by arrest.").

49. *See generally* Wesley G. Skogan & George E. Antunes, *Information, Apprehension, and Deterrence: Exploring the Limits of Police Productivity*, 7 J. CRIM. JUST. 217 (1979) (discussing the role of information in solving crimes).

50. Humorous illustrations of dumb crooks are collected weekly in "News of the Weird," a column that appears in many newspapers. *See, e.g.*, Chuck Shephard, *News of the Weird*, ATLANTA JOURN. & CONST., Jan. 28, 1997 (describing a convenience store robber captured because he had forgotten to pull down his face mask before robbing the store and was consequently filmed from the store's surveillance camera).

indicates that clearance rates shifted downward at the time of *Miranda*, a result that is significant at a high confidence level.

TABLE 1—VIOLENT CRIME CLEARANCE RATES (1950-1994)

OLS Regressions on Clearance Rates for Cities (FBI Data)

Variable[51]	Basic Model	With Capacity Variables
Miranda	-8.756 (-5.213)**	-7.329 (-4.194)**
Crime Rate	-0.00292 (-3.169)**	0.000952 (0.600)
Police Officers	-3.979 (-0.807)	-5.944 (-1.050)
Police Dollars	164.7 (1.742)†	-92.83 (-0.687)
Juveniles	-37.7 (-1.377)	-11.10 (-0.277)
Unemployment	0.488 (2.285)*	0.314 (1.273)
Per Capita Income	0.0014 (1.265)	0.00211 (1.278)
Trend Over Time	-0.431 (-2.342)*	-0.452 (-1.201)
Constant	907.2 (2.566)**	919.2 (1.259)
Officer Capicity	-	2526.9 (0.355)
Dollar Capacity	-	12.54 (2.837)**
Adjusted R^2	.978	.977
Root MSE	1.414	1.301
Durbin-Watson	1.441	1.612

** = significant at .01 level * = significant at .05 level
† = significant at .10 level

51. For variable definitions, see *infra* Appendix 1.

Responding to a preliminary version of this regression analysis, Professor Schulhofer claimed that it was flawed in failing to consider interactions among the criminal justice variables. Schulhofer wrote: "Cassell's model tests for the effect of officer and expenditure levels *alone*, with crime rates held constant.... A well-specified clearance capacity variable must take into acount the changing *ratio* of available resources to needs...."[52] To see whether this made any important difference to the conclusion, Professor Fowles and I ran a second equation that included variables measuring the ratio of resource levels to crimes. Even after adding these variables, the parameter associated with the *Miranda* variable is -7.3, a result that is highly statistically significant. The parameter means that a structural shift centered on July 1966 is associated with a 7.3% reduction in the clearance rate. In other words, if the clearance rate was 60% before July 1,1966, it fell to below 53% after. As is expected, the inclusion of more explanatory variables in the second equation reduced the value of the parameter slightly, to 7.3% from 8.7%. It should be noted that the second equation may give slightly exaggerated treatment to Schulhofer's theory because it contains five variables that should capture, directly or indirectly, Schulhofer's resource effects: *Crime Rate, Police Officers, Police Dollars, Officer Capacity,* and *Dollar Capacity.*[53]

The regression equations are limited. They only tell us that, even after controlling for other relevant variables, a structural shift in the ability of police to clear crimes appears to have taken place in the middle of 1966. The equations, however, do not answer the question of what caused the shift. We must identify a reasonable cause. Having controlled for the criminal justice resource variables identified by Professor Schulhofer and for

52. *See* Schulhofer, *supra* note 36, at 291 (emphasis in original).

53. Although Professor Schulhofer claims that our capacity variables are flawed because they are based on crime rates rather than total crimes, see Schulhofer, *supra* note 21, at 24, our Table 1 divides *Police Officers* by *Crime Rate* to produce the *Officer Capacity* variable. Arithmetically, officers/population divided by crimes/population produces officers/crimes—a figure based on total crimes and not crime rates.

For further discussion of this and other such issues, see Paul G. Cassell & Richard Fowles, *Handcuffing the Cops?: A Thirty Year Perspective on* Miranda*'s Harmful Effects* (manuscript in progress) (copies available upon request to Cassell). In this forthcoming article, Professor Fowles and the author of this Article will present a more detailed rebuttal of Professor Schulhofer's assertions than is here possible. In addition, we plan to conduct a more refined analysis of the clearance rates by individual crime categories and review more extensively other competing hypotheses to the *Miranda* effect, such as those now proffered by Professor Schulhofer.

other economic and demographic factors, *Miranda* becomes the obvious remaining candidate. At the doctrinal level, *Miranda* seems to have been the most significant legal change affecting the ability of police to clear crimes in the 1966 to 1968 period.[54]

Practical confirmation of this conclusion comes from asking people who would know: law enforcement officers who adjusted their questioning practices to conform to *Miranda*'s requirements. The surveys of police in the years immediately following *Miranda* uniformly reported harmful effects. Perhaps the best interviews were done by Otis Stephens and his colleagues, who found virtually all of the officers surveyed in Georgia in 1969 and 1970 believed that Supreme Court decisions had adversely affected their work; most attributed this negative influence first and foremost to *Miranda*.[55] Other surveys at the time noted similar concern about *Miranda*. In New Haven in 1966, Yale law students interviewed detectives, who "continually told us that the decision would hurt their clearance rate and that they would therefore look inefficient."[56] Law student Gary L. Wolfstone sent letters in 1970 to police chiefs and prosecutors in each State and the District of Columbia. Most agreed that *Miranda* raised obstacles to law enforcement.[57] In pseudonymous "Seaside City," James Witt interviewed forty-three police detectives sometime before 1973.[58] He reported that the detectives "were in almost complete agreement over the effect that the *Miranda* warnings were having on the outputs of formal interrogation. Most believed that they were getting many

54. Some of the other leading Warren Court decisions were decided well before 1966, *e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961), or affected the prosecution of crimes only *after* they were cleared by police, *e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963). In any event, if the regression equations are read as suggesting that other Warren Court decisions combined with *Miranda* to reduce clearance rates, that finding would still have considerable significance. Legal academics have frequently denied any such connection. *See, e.g.*, Robert Weisberg, *Criminal Procedure Doctrine: Some Versions of the Skeptical*, 76 J. CRIM. L. & CRIMINOLOGY 832 (1985).

55. *See* Otis H. Stephens, Jr., Robert L. Flanders, & J. Lewis Cannon, *Law Enforcement and the Supreme Court: Police Perceptions of the* Miranda *Requirements*, 39 TENN. L. REV. 407 (1972); *see also* OTIS H. STEPHENS, JR., THE SUPREME COURT AND CONFESSIONS OF GUILT (1973).

56. Project, *supra* note 13, at 1612 n.265.

57. *See* Gary L. Wolfstone, Miranda—*A Survey of Its Impact*, 7 THE PROSECUTOR 26, 27 (1971).

58. *See* 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).

fewer confessions, admissions and statements."[59]

These consistent police reports pose a substantial problem for academic defenders of *Miranda.* While the academicians recount a "no effects" story, the officers on the streets saw things quite differently.[60] Their first-hand descriptions confirm our intuition that *Miranda* hindered police effectiveness after June 1966.

Other data support these police reports. For example, in 1994 Bret Hayman and I collected data on the confession rate in Salt Lake County. We found that 16.3% of suspects given their *Miranda* rights invoked them to prevent any police questioning.[61] We also found that only 42.2% of the suspects questioned and 33.3% of the suspects in the overall sample gave a confession or incriminating statement.[62] These success rates for police questioning in Salt Lake County in 1994 were considerably below those reported in many other cities before *Miranda.*[63]

Data from Britain and Canada allow a cross-national comparison that provides further confirmation of declining confession rates after *Miranda.* Until recently, British police told suspects they had the right to remain silent, but did not follow the other particularly onerous features of the *Miranda* system, such as the waiver and questioning cutoff rules. Under this regime, British police obtained confessions in 61% to 85% of their cases, a rate that is at least 20% higher than the prevailing

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59. *Id.* at 325.

60. These surveys are the most informative on the question of *Miranda*'s effect during the 1960s, because they were done contemporaneously with the decision when officers had experience questioning both with and without the *Miranda* rules. Today, few officers have personal experience with pre-*Miranda* interviewing techniques. The two surveys of current police attitudes on *Miranda* are subject to varying interpretations. *Compare* Cassell, *supra* note 19, at 1108-10 (discussing Police Executive Research Forum and ABA surveys on police attitudes in 1980s) *with* Schulhofer, Miranda*'s Practical Effect, supra* note 8, at 507-08 (same).

61. *See* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 860 & tbl.3 (1996).

62. *See id.* at 869 tbl.4.

63. *See id.* at 871-75 (collecting all available pre-*Miranda* confesssion data). The limited other data on post-*Miranda* confession rates supports our conclusions. *See id.* at 875-76. *But see* Thomas, *Plain Talk About the* Miranda *Empricial Debate, supra* note 17, at 939-44 (reviewing Cassell-Hayman study and disputing this claim); Thomas, *Is* Miranda *A Real-World Failure?, supra* note 17, at 833-37 (concluding we need more information about *Miranda*'s effects); Richard A. Leo, *Inside the Interrogation Room,* 86 J. CRIM. L. & CRIMINOLOGY 266, 280-81 (1996) (presenting California data and arguing that police have become increasingly successful in gaining confessions).

American confession rate after *Miranda.*[64] One observes the same result in Canada, where it appears that the police obtain confessions around 70% of the time.[65] These high foreign confession rates are not attributable to police overbearing; some of the data comes from studies of videotaped or independently observed interrogations.[66]

The British experience not only lets us assess confession rates without the *Miranda* rules, but also allows us to review what happens as a country moves to a *Miranda*-style regime. In 1986, Britain adopted a heavily regulated structure for police interrogations that tracks *Miranda* in many respects. Since then, British confession rates have declined towards American levels. Because of law enforcement protests, Parliament recently modified the warnings given to suspects and made other changes to facilitate police questioning.[67]

What is striking about all of these different methodologies—before-and-after studies, clearance rate trends over time, first-hand police reports, recent confession rate data, cross-national comparisons—is that they all point in the same direction: *Miranda* hampered law enforcement. The important bottom line is that our initial skepticism about *Miranda*'s supposedly benign effects is borne out in the available empirical evidence.

Naturally, there is a danger in relying solely on empirical evidence to capture the harm of *Miranda.* Statistics tell us little about the horrors of crimes that go unsolved and criminals that go unpunished. How does one quantify, for example, *Miranda*'s effects in *State v. Oldham*?[68] After arrest, Oldham declined to make a statement and was taken to a jail cell. A new shift then arrived, and a new policewoman went to read him his rights again. Oldham said he knew his rights, had talked to a lawyer, but wanted to confess. He then gave a full and free confession to having horribly abused his two-year-old step daughter, acts requiring hospitalization and surgery. The Missouri courts, following *Miranda* doctrine,[69] held that this confession had to be

64. *See* Cassell, *supra* note 14, at 419-21.
65. *See id.* at 421-22.
66. *See id.* at 478.
67. *See id.* at 420.
68. *See* State v. Oldham, 618 S.W.2d 647 (Mo. 1981); 136 CONG. REC. S9027 (June 28, 1990) (statement of Senator Hatch).
69. *See* Edwards v. Arizona, 451 U.S. 477 (1981).

suppressed.[70] *Miranda*'s real-world effect was to send the defendant home to live again with the stepdaughter he had abused.

The evidence collected here strongly suggests that *Oldham* is far from the only case in which criminals have avoided capture or conviction because of the *Miranda* rules. Each of these cases has a tale to tell—of victims denied justice or left to cope with debilitating fear.[71] The pattern of cases itself tells a story of *Miranda*'s disproportionate impact on the poor and racial minorities, who bear the brunt of the burden from unsolved crimes.[72] While *Miranda*'s supporters should be troubled by these costs, they appear to pay scant attention. As Professor Caplan has noted, "[a] striking characteristic of the academic literature on *Miranda* (and criminal procedure generally) is the absence of anxiety about the decision's impact on public safety and the community's sense of well-being."[73]

While *Miranda*'s social costs are significant in themselves, what makes them an undeniable tragedy is that they are in large measure avoidable. *Miranda* is but one approach among many to regulating police interrogation consistently with the historical understanding of the Fifth Amendment. Before *Miranda*, a wide range of options were under consideration, such as taking arrested suspects to magistrates for questioning or tape-recording police interrogations, as the American Law Institute proposed around the time of *Miranda*.[74] The longstanding, pre-*Miranda* "voluntariness test" must also be regarded as a constitutionally viable, less-costly approach to regulating police questioning.[75] All these alternatives would lead to many more

70. *See Oldham*, 618 S.W.2d at 649 (holding that trial court erred in not supressing the confession, and overturning the conviction).

71. *Cf.* Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373 (discussing victims' perspectives on crime).

72. *Cf.* CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980, 117 (1984) (analyzing crime statistics and concluding: "Put simply, it was much more dangerous to be black in 1972 than it was in 1965, whereas it was not much more dangerous to be white.").

73. Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1425 n.47 (1985).

74. *See* Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224, 1239); Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 898-99, 908-09 (1995); A.L.I., A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 130.4 (1975). *See generally* Cassell, *supra* note 43, at 310-13 (collecting proposed alternatives).

75. *See generally* GRANO, *supra* note 7, at 199-222; OFFICE OF LEGAL POLICY, U.S. DEP'T

confessions, and thus more convictions, of dangerous criminal suspects. Some of them, such as videotaping, would undoubtedly provide better protection for innocent suspects.[76] Yet *Miranda*'s supporters seem uninterested in finding the least restrictive constitutional means of regulating society's agents of law and order. Instead, *Miranda* seems to have petrified the discussion about how to regulate police questioning.

It is time for a new *Miranda* narrative—not the myth that it is costless to indulge this Warren Court invention, but an accurate account of real-world consequences from unprecedented shackles on the police. As common sense told us all along, tradeoffs inhere in the *Miranda* regime no less than in other controversial social policies. So far, legal academics (or the Court itself, for that matter) have failed to offer a convincing explanation of why we should ignore the human suffering *Miranda* inflicts. Perhaps these human costs seem unworthy of much attention from the vantage of the ivory tower. But *Miranda*'s countless victims would doubtless tell a different story.

OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRETRIAL INTERROGATION, REP. NO. 1 (1986), *reprinted in* 22 U. MICH. J.L. REFORM 437 (1989); HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE 66-87 (1996).

76. *See* Cassell, *supra* note 14, at 479-83, 488-89; Leo, *supra* note 2, at 689-92.

APPENDIX I: DEFINITIONS FOR VARIABLES IN TABLE I[77]

Clearance Rates: violent crime clearance rates for cities as reported in the FBI's *Uniform Crime Reports.*

Miranda: dummy variable assuming the value of 0 from 1950 to 1965, ½ in 1966, and 1 in 1967.

Crime Rate: the FBI crime rate for index crimes per 100,000 resident population, for 1960 to 1994 as found in the *Uniform Crime Reports* (latest revised data) and for 1950 to 1959 as calculated from George D. Brower, The Supreme Court and the Growth of Crime (unpublished Ph.D. dissertation, State Univ. of N.Y. at Buffalo 1985).

Police Officers: the rate of police officers per 1,000 inhabitants, as reported in the FBI's *Uniform Crime Reports.*

Police Dollars: millions of real dollars (adjusted by the CPI) spent on state and local enforcement, as reported by U.S. Bureau of the Census government finances reports, per resident population.

Juveniles: proportion of the population aged 15-24.

Unemployment: the unemployment rate.

Per Capita Income: per capita income in real dollars.

Officer Capacity: *Police Officers* divided by *Crime Rate.*

Dollar Capacity: millions of real dollars (adjusted by the CPI) spent on state and local law enforcement, divided by *Crime Rate.*

77. Further information on the construction of the variables can be found in Cassell & Fowles, *supra* note 53.