

# BASHING *MIRANDA* IS UNJUSTIFIED—AND HARMFUL

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Readers of this Symposium have seen my views discussed at such length in Professor Paul Cassell's Article that many will feel little need to know more on that subject. And since Professor Cassell has characterized my position as "aggressive," "far-fetched" and "extreme,"<sup>1</sup> readers can hardly be blamed for concluding that it is a waste of their time to read further.

In this Article I seek only to make three simple points, all very conventional. I invite readers to compare my actual argument to the caricature that emerges from Professor Cassell's loose paraphrasing of things I have said, and above all to remember that the issue here is, or should be, *Miranda*,<sup>2</sup> not me.

Three points about *Miranda* should remain in focus. First, the *Miranda* protections are required by the Fifth Amendment. Second, law-enforcement damage cannot be a reason to disregard a constitutional requirement; therefore the claim of law-enforcement damage, though emotionally charged, is constitutionally irrelevant. Because that claim is emotionally charged, however, I do not want to leave the impression that I am ducking it. As my third point, I will address that claim head on. I will show why the great majority of academics and police officials are correct in believing that *Miranda* does not burden our law enforcement effort at all.

My third point—that *Miranda* does not damage law enforcement—has a subsidiary implication that is worth stressing at the outset. Academics thrive on challenging conventional wisdom, and so the conventional view about

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1. Paul G. Cassell, *Miranda's Negligible Effect on Law Enforcement: Some Skeptical Observations*, 20 HARV. J.L. PUB. POL'Y 327, 334-36 (1997).

2. *Miranda v. Arizona*, 384 U.S. 436 (1966) (instituting the *Miranda* warnings).

*Miranda's* negligible impact should not be immune from academic scrutiny. But the day is short, human energies are limited, there are victims of crime almost without number, and our law enforcement and crime prevention systems have glaring deficiencies that cry out for discussion and thoughtful repair. When die-hard efforts to blame *Miranda* for our ills distract attention from other, more serious concerns, even to the point of disparaging the importance of criminal justice resources and the number of police officers on the street,<sup>3</sup> then the victims of crime—present and future—are served very poorly indeed. Scapegoating *Miranda* is no idle academic exercise; it can become a dangerous diversion from the issues that truly make a difference for the safety of our streets and the quality of our civilization.

#### I. LAW ENFORCEMENT NEED AS AN EXCEPTION TO THE BILL OF RIGHTS?

I will take my second point first. I am one of those old-fashioned people who think that we should take seriously the intentions of the Framers.

In a Federalist Society symposium devoted to constitutional interpretation, it is surprising to find the potential impact on crime victims invoked, over and over, as the most important guide to interpreting what the Bill of Rights means. It is perhaps unfortunate, but nonetheless true, that interpreting the Constitution and protecting victims are not identical goals. In fact, we must acknowledge, however reluctantly, that sometimes these are antithetical goals.

What we have to ask ourselves is this: did the Framers think that the Fifth Amendment would *not* make law enforcement more difficult? Of course not. The Framers knew perfectly well that sometimes the Fifth Amendment would hinder law enforcement.

To be honest with ourselves, we must put the point even more strongly than that. The Fifth Amendment was intended—obviously *intended*—to make law enforcement more difficult. The Framers were suspicious of organized government power, for very good reasons. The Framers wanted to limit

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3. See Cassell, *supra* note 1, at 336 & n.44.

government's power to question suspects. They *intended*, in Professor Cassell's phrase, to put "shackles"<sup>4</sup> on questioning. So, if we are committed to respecting the intentions of the Framers, we have to respect the Fifth Amendment, even when it hinders law enforcement.

## II. MIRANDA AND THE FIFTH AMENDMENT

The Fifth Amendment provides that no person may be "compelled" to be a witness against himself in a criminal case. *Miranda's* critics want to permit relatively free-wheeling police interrogation, and therefore they must insist that such interrogation is not "compelling." What, they wonder, is so compelling about a policeman's asking a single question, "Did you kill your wife?"

In thinking about this issue, we have to remember that *Miranda* leaves police entirely free in questioning suspects prior to arrest. The *Miranda* limits apply only when officers want to question a suspect who is held in police custody under arrest. What *Miranda's* critics really claim not to understand, to put their question in a real-world context, is this: what, they wonder, is so compelling about arresting a suspect, surrounding him with three or four officers, isolating him in an interrogation room, and then asking him, over and over: "Why did you do it? Why did you kill your wife?"

To understand *Miranda's* link to the Fifth Amendment, all we have to do is to stop for a moment and imagine what it would feel like to be an arrested suspect in this kind of situation. No sweat?

Hardly. The compelling pressure to respond, whether you want to or not, is enormous. You might prefer to take a deep breath, go home and get some sleep. You might prefer to talk over your situation with your Dad, or your priest, or (God forbid!) your lawyer. Too bad. Remember—you are under arrest. You are staying right in that room, under those lights, in front of those four angry and impatient officers, until you answer—whether you want to or not.

There is nothing obscure about why this kind of situation puts a suspect under compelling pressure. What remains obscure

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4. See *id.* at 345.

(and completely formalistic) is the view, held tenaciously by *Miranda*'s critics, that custodial interrogation—without warnings and without any right to terminate the questioning—*does not* put the suspect under compelling pressure.

Under the Fifth Amendment, when Congress wanted to question Oliver North, when it wanted to do so in full view of the press, before millions of viewers on national television, he still had an attorney at his side, not just a potted plant, and he was told that he did not have to answer. When a criminal defendant comes into open court with an attorney right at his side, he still cannot be questioned at all unless he agrees.

So, when a suspect is under arrest and isolated in the interrogation room, it takes a lot to explain why he should not at least be told he does not have to answer.

Professor Cassell agrees that the suspect should get a warning. That much of *Miranda* he accepts. But what if the suspect then says he doesn't want to answer? Professor Cassell would let the police keep questioning him anyway. Professor Cassell's view, what he calls the "common sense" view, is that "these suspects would not be compelled to *answer* police questions; they would only be compelled to *listen*."<sup>5</sup>

No one ever thinks of reading the Fifth Amendment that way when the issue is what Congress can do if it wants to question Oliver North. No one ever thinks of reading the Fifth Amendment that way when the issue is what a trial judge can do to a criminal defendant in the courtroom. Unless we are willing to resort to pure sophistry, the Fifth Amendment cannot mean that an isolated suspect in custody can be compelled to undergo questioning—compelled to "listen" to demands for information—after he clearly and specifically asks to be left alone.

The Supreme Court has understood this problem perfectly well, not only in *Miranda* but ever since.<sup>6</sup> Writing for the Court in 1984, Justice Byron White, initially a bitter critic of *Miranda*, noted that coercion was "inherent" in custodial interrogation because the suspect "is painfully aware that he literally cannot

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5. Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW. U. L. REV. 1084, 1123 (1996) (emphasis added).

6. *See, e.g.*, *Edwards v. Arizona*, 451 U.S. 477 (1981) (decided unanimously).

escape a persistent custodial interrogator.”<sup>7</sup> Similarly, in 1993, Justice David Souter, writing for the Court in *Withrow v. Williams*,<sup>8</sup> acknowledged that “[p]rophylactic’ though it may be, in protecting a defendant’s Fifth Amendment privilege against self-incrimination *Miranda* safeguards a fundamental trial right.”<sup>9</sup>

In short, respect for our Constitution, respect for judicial restraint, and respect for principled adjudication all require that we respect the Fifth Amendment. We should expect the Court to apply the Fifth Amendment conscientiously, even if that means some inconvenience and even if *Miranda* does put some constraints on law enforcement, because the Fifth Amendment was intended to put constraints on law enforcement.

### III. *MIRANDA*’S EFFECT

The two preceding points conclude my discussion of the most important issues, but I do not want readers to think I concede Professor Cassell’s claim about *Miranda*’s terrible effects. Professor Cassell has portrayed *Miranda* as “an undeniable tragedy.”<sup>10</sup> I reject not only the obvious exaggeration of that position but also the split-the-difference logic that observers of this debate could be tempted to adopt. Some might think that even if Professor Cassell’s claims are only half true, there is still a serious problem to worry about. But his claims are not even half true. So far as the available evidence indicates, there is no reason to believe that *Miranda* has burdened the law enforcement effort at all.

In mentioning the need for *evidence*, I do not disparage the importance of common sense, nor do I imply that legal conclusions must always have rigorous statistical support. But *Miranda*’s impact in the real world is not the kind of fact that can be determined on the basis of faith, *a priori* logic or pure intuition. Severe restrictions on police interrogation presumably would reduce the flow of confessions. But porous or largely nominal restrictions might have little or no effect. An *illusion* among suspects that police are severely restricted might lead

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7. *Minnesota v. Murphy*, 465 U.S. 420 (1984).

8. 113 S. Ct. 1745 (1993).

9. *Id.* at 1752 (emphasis in original).

10. See Cassell, *supra* note 1, at 344.

suspects to lower their guard, and as a result the flow of confessions could actually *increase*. We need to know not only whether the facts bear out these logical possibilities, but also whether *Miranda* is a regime of the first, second or third types. To the extent that *Miranda*, as actually implemented, has elements of all three regimes, its effects are doubly or triply indeterminate on the basis of logic or "common sense" alone.

Alarmists who see *Miranda* as a severely restrictive regime may feel little need for empirical evidence to confirm what "common sense" tells them about its impact. But that picture of *Miranda* is itself an assumption, no better or worse than the cynic's assumption that the *Miranda* regime is an empty illusion.<sup>11</sup> To shed light on the empirical issues, we cannot tip the scales from the outset by assuming, as Professor Cassell sometimes seems to do, that one answer is more logical or commonsensical than the other. We must look to the evidence. And when we do, we consistently find that evidence of *Miranda's* supposed harmful effects fails to materialize.

In so far as we are willing to base our conclusions on the available facts, therefore, the only tenable assessment is that the *Miranda* rules do not hinder law enforcement. The evidence consistently shows that the rules are porous, and that police are quite good at getting waivers. That evidence does not imply that *Miranda* is meaningless, or that it does nothing whatever to further the Fifth Amendment. There is a big difference between getting suspects to talk by fear and intimidation, and getting them to talk as police now do, by exploiting their misplaced confidence in their ability to talk their way out of trouble.<sup>12</sup> What the evidence does mean is that, so far as we can tell, *Miranda* does not hamper law enforcement—not at all.

This conclusion about *Miranda's* lack of any harmful effect is the prevailing view among academics, but it is not the view of academics alone. Most police professionals in the field have come to the same conclusion. Most police professionals say the

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11. The cynics on this subject appear to be far more numerous than the alarmists. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE* 326-29 (1991); DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* 199 (1991).

12. See Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 561-62 (1996).

same thing, openly and emphatically.<sup>13</sup>

Professor Cassell's Article places great stress on the anti-*Miranda* reactions of some police officials in the late 1960s.<sup>14</sup> In that era, many officers familiar with the old way of doing business had not yet adapted to the new regime, and many others overestimated *Miranda's* likely impact.<sup>15</sup> By the early 1970s, such views were seldom heard any more. For the past twenty years, the great majority of police officials have consistently expressed the opposite view—that *Miranda* does *not* burden law enforcement.<sup>16</sup>

Professor Cassell's response to the *current* police view is to ask dismissively, "How would they know?"<sup>17</sup> Is it so naive to assume that police *do* know what makes their work easier or more difficult? Police officers (like everyone else) sometimes complain unnecessarily; sometimes they unjustifiably try to pass blame to politicians or to the courts. So police complaints about *Miranda* could sometimes be overstated. But if *Miranda* poses a problem for the police, wouldn't we expect them to notice it? And if they noticed it, why on earth would they be keeping so quiet about it for the past twenty years?

#### A. Data on Confession Rates

Professor Cassell's claim of damage to law enforcement rests heavily on his reading of the available data on confession rates. But when you look closely, each item of his evidence melts away. In a previous article, I discussed each of these pieces of evidence in detail.<sup>18</sup> In the brief space available here, I will try to touch quickly on the main issues.

The first item is Professor Cassell's reanalysis of before-and-

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13. See *id.*, at 501 nn.3-4, 504 nn.9-13, 507 n.23, 559-60 nn.250-252 (1996).

14. See Cassell, *supra* note 1, at 341-42 & nn.55-60.

15. For example, James Witt's study of an unnamed California city begins with the finding, which Professor Cassell emphasizes, see Cassell, *supra* note 1, 341-42, that detectives there "were in almost complete agreement . . . that they were getting many fewer confessions." But Witt goes on to report that an empirical study designed to test the accuracy of these impressions found that in fact there was no significant change in the confession rate. 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, 325 (1973); Schulhofer, *supra* note 12, at 528-30.

16. See Schulhofer, *supra* note 12.

17. Cassell, *supra* note 5, at 1109.

18. For a detailed discussion, see Schulhofer, *supra* note 12, and Stephen J. Schulhofer, *Miranda and Clearance Rates*, 91 NW. U. L. REV. 278 (1996).

after studies that are now almost thirty years old. Professor Cassell says these studies show that, because of *Miranda*, convictions are lost in 3.8 percent of all arrests.<sup>19</sup> But there are major problems buried in virtually every step of that analysis.

First of all, Cassell's crucial figure—the alleged loss of 3.8% of the cases—is based on 1967 and 1968 data, so it makes no allowance for all the adjustments that police have made in the last twenty-five years. Yet police repeatedly tell us that, whatever the initial problems, they have now learned how to live with *Miranda*.<sup>20</sup>

Another problem is that in order to build up the case attrition rate to the 3.8% level, Professor Cassell has to exclude one major city, Los Angeles, where *more* confessions were obtained after *Miranda* than before. Professor Cassell argues that there might have been a difference between the ways the data were collected in Los Angeles in the “before-*Miranda*” and in the “after-*Miranda*” phases. But when he has studies showing a *drop* in the confession rate, then differences in methodology usually do not concern him.

For example, in Philadelphia and Brooklyn, elected district attorneys who were publicly attacking *Miranda*—this was back in 1966—conducted studies of *Miranda's* impact in the following way: they counted the number of confessions after *Miranda* and then compared that figure to their own seat-of-the-pants guess about the number of confessions before *Miranda*. They said, oh, the confessions rate before *Miranda* was much higher, probably about 45%.<sup>21</sup>

We must remember that small differences matter a lot here. We are talking about a net loss of 3.8%. How can you possibly derive a reliable and sufficiently precise number from a ballpark estimate by an advocate in a highly-partisan public debate? You simply can't. But in Professor Cassell's analysis, the Philadelphia and Brooklyn estimates stay in. The Los Angeles study was an actual count before and after, and it was a count by a district attorney who happened to be opposed to *Miranda*. Yet the Los Angeles study gets excluded.

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19. See Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 438 (1996).

20. See Schulhofer, *supra* note 12, at 507-10.

21. See *id.*, at 524-28; 532-33.

Another study featured in Professor Cassell's presentation is his own 1994 research in Salt Lake County. He reports that "only" 42% of the suspects questioned gave a confession or incriminating statement.<sup>22</sup> But Professor Cassell neglects to mention his own research showing that confession rates commonly reported *before Miranda* were in the range of 40-45% or even lower, in such cities as Philadelphia, Kings County (Brooklyn, N.Y.), the District of Columbia, New Orleans, Los Angeles, and Baltimore.<sup>23</sup> In addition, Professor Cassell's 42% figure for Salt Lake County excludes two important categories of statements—confessions that he deemed "volunteered" and incriminating "denials with explanation" (such as the statement of an assault suspect who admitted striking the victim but claimed self-defense). When these incriminating statements are added back into the count, as any valid comparison with pre-*Miranda* figures requires, the success rate in Salt Lake County's custodial interrogations, on Professor Cassell's own data, rises to at least 54%, a total that easily equals or exceeds pre-*Miranda* results.<sup>24</sup>

In sum, a careful look at the sources from which Professor Cassell has selectively culled his data shows that there is no empirical support for the argument that *Miranda* measurably reduced confession rates.<sup>25</sup>

I must add a comment here, just for the record, about Professor Cassell's claim that I "agree"<sup>26</sup> that *Miranda* caused a 9.7% drop in the confession rate. I do *not* agree and have never said otherwise.<sup>27</sup>

### B. Clearance Rates

The other major point stressed in Professor Cassell's Article is the trend in clearance rates, that is, the percentage of known

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22. See Cassell, *supra* note 1, at 342 n.61.

23. See Cassell, *supra* note 19, at 459 & 459 tbl.3.

24. See Schulhofer, *supra* note 12, at 509 n.28.

25. See Schulhofer, *supra* note 12.

26. See Cassell, *supra* note 1, at 330 & nn.17-18.

27. In a critique of Professor Cassell's earlier work, I do note that in five cities the confession rate drop, in comparison to a regime with no warnings at all, was 9.7%, but I stress throughout my article numerous factors that render this figure an unduly inflated estimate of *Miranda's* causal impact, and I emphasize that "with all necessary qualifications in mind, we find that the properly adjusted attrition rate [due to *Miranda*] is . . . at most only 0.78%." Schulhofer, *supra* note 12, at 502 (emphasis in original).

crimes that police are able to solve. Those rates plunged after *Miranda* and then stabilized a few years later. But does it make sense to say that *Miranda* caused this development?

In an earlier article,<sup>28</sup> Professor Cassell claimed to have ruled out the most plausible alternative explanations for the clearance-rate trend and wrote that “the challenge for those who cling to the notion that [*Miranda*] did not harm law enforcement is to provide an alternative ‘X factor’ that explains the change.”<sup>29</sup> In response to Professor Cassell’s invitation, I pointed out an important law-enforcement variable, omitted from his analysis, that provides a highly plausible candidate for his “X factor”—that is, the development that might explain a sudden drop in clearance rates in 1966. This variable is clearance *capacity*, measured by the number of dollars and officers available to investigate each reported offense. My suggestion is that there is simply no mystery: clearance *rates* declined precipitously just at the time that clearance *capacity* plunged. There is no reason to assume that interrogation rules, rather than disasterously shrinking resources, were responsible for the trend that Professor Cassell so dramatically blamed on *Miranda*. Figure 1 below shows why the clearance rate drop is anything but mysterious.<sup>30</sup>

I have presented elsewhere a more complete discussion of the clearance rate story,<sup>31</sup> but a few comments here are necessary to dispel some misconceptions that might arise from the way Professor Cassell has tried to paraphrase my argument. First, to clear the ground, I summarize my claim and indicate how it differs from the caricature that Professor Cassell attacks in his Article. I will then bring the merits back into focus and explain why, after allowing for clearance capacity changes, a residual “*Miranda*” effect cannot be inferred from the evidence.

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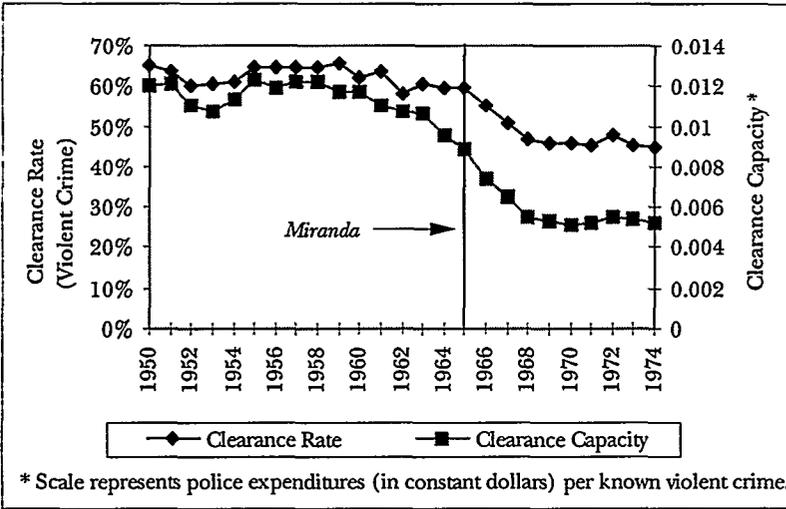
28. Cassell, *supra* note 5.

29. *Id.* at 1090-91 n.33.

30. Except as otherwise noted, the data in Figure 1 and in the other Figures presented here are drawn from JAMES ALAN FOX, FORECASTING CRIME DATA: AN ECONOMETRIC ANALYSIS 81-86 (1978). I focus on the period 1950-74 because data for this period are conveniently available in Fox’s book, *see id.*, and because developments after 1974 have no bearing on the arguments that Professor Cassell makes about the 1965-69 period. For further discussion of the data underlying the Figures I include here, see Schulhofer, *Miranda and Clearance Rates*, *supra* note 18.

31. *See* Schulhofer, *Miranda and Clearance Rates*, *supra* note 18.

FIGURE 1: CLEARANCE RATE AND CLEARANCE CAPACITY



1. Misconceptions and Distractions

My argument, in a nutshell, is that clearance capacity collapsed in the late 1960s, and that this dramatic change provides the most likely explanation for the sudden decline in clearance rates that occurred at the same time.

Clearance capacity obviously is not the *only* factor that affects clearance rate trends; the complexity of the forces impacting on law enforcement is a point I have repeatedly stressed.<sup>32</sup> Readers may therefore wonder whether Professor Cassell is being helpful in repeatedly attributing to me the absurd view that clearance capacity was the “sole” reason for the clearance rate decline.<sup>33</sup> Many forces contributed to clearance rate trends; as I will

32. See Schulhofer, *supra* note 12; Schulhofer, *Miranda and Clearance Rates*, *supra* note 18.

33. See Cassell, *supra* note 1, at 334 (“Professor Schulhofer singles out rising crime rates during the 1960s as solely responsible for the dramatic decline in clearance rates”); *id.* at 335 (“Schulhofer points an accusing finger at—and only at—declining clearance capacities.”).

explain, however, there is no reason to think that one particular factor—*Miranda*—was among the factors playing a causal role.

A similar caveat is necessary regarding the data on crime clearance totals that will become a part of my inquiry. It is hard to understand why Professor Cassell thinks I am arguing that such totals are decisive in themselves, or why he accuses me of ignoring the capacity of a large police department to generate higher clearance totals than a smaller one.<sup>34</sup> Crime clearance totals alone cannot prove anything. They are, however, one place to look for evidence of *Miranda's* impact, especially if one focuses, as I do, on the number of crimes cleared *per officer* and *per dollar* of police expenditure.

Professor Cassell himself was the first to bring clearance totals into the debate, claiming (incorrectly) that “*about one out of four violent crimes that was cleared before Miranda was not cleared after!*”<sup>35</sup> In fact, as we shall see, the number of violent crimes cleared after *Miranda* did not decline at all. That fact may not be the most revealing item of all time, but I wonder why it should be considered inappropriate to mention it when *Miranda* critics like Professor Cassell write as if the opposite were true.

In an era of rapidly rising crime rates, crimes become easier to solve, and one would not necessarily expect clearance totals to decline.<sup>36</sup> But if *Miranda* hindered law enforcement, the decision might produce a temporary dip, or at least slow the rate of increase in the number of crimes cleared per officer and per dollar. That no effect of this sort is observable is one more reason to be skeptical of claims that *Miranda* “handcuffed” (or even incrementally burdened) the police.

## 2. Why clearance capacity?

In his effort to account for the late 1960s drop in clearance rates, Professor Cassell initially dismissed the trends in crime rates and resource levels because neither factor *alone* fit the pattern of clearance rate changes. Using multiple regression analysis, he tested the effect of each of these variables with the other held constant. Rising crime rates did not seem to explain

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34. *Id.* at 337-38 & fig.2.

35. Cassell, *supra* note 5, at 1090 (emphasis in original).

36. See Schulhofer, *Miranda and Clearance Rates*, *supra* note 18, at 287 & n.19 (noting the “obvious caveat” that “rising crime levels . . . made high clearance totals easier to achieve”).

the change, because clearance rates stabilized around 1970, when crime was still rising. Similarly, resource levels did not seem to explain the clearance rate drop, because resource levels rose steadily throughout the period, as Figure 2 below shows.

FIGURE 2: CRIMINAL JUSTICE SYSTEM NEEDS VS. RESOURCES

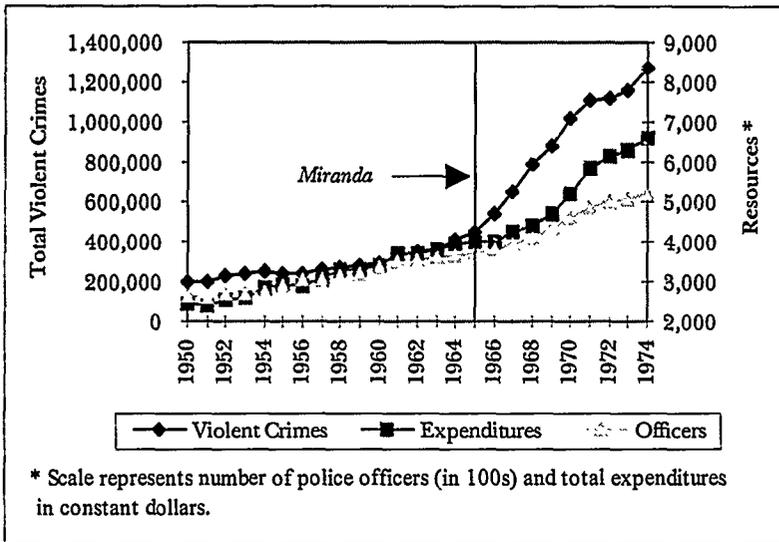


Figure 2 depicts the levels of violent crime and of police resources. The violent crime rate is on the top line, the level of expenditures on police (in constant dollars) is on the middle line, and the number of officers is on the lowest line. The vertical bar points to 1965, the last pre-Miranda year. At first glance there appears to be no trend in these variables that fits the pattern of a sudden shift in clearance rates during the late 1960s.

Yet a closer look at Figure 2 suggests that a structural change did occur precisely at the time when clearance rates plummeted. Violent crime soared in the mid-1960s, but police resources increased much more slowly. The *spread* between crime and

resources widened dramatically after 1965, just when clearance rates dropped. By 1969, the spread stopped growing, just when clearance rates stabilized.

Why might this change in the *relationship* between crime and resources be important? My hypothesis is that when there is a decline in the number of officers and dollars available to investigate each reported crime, it is plausible to expect the percentage of those crimes that police can solve to decline also. Each officer will have to divide his time over more and more cases. More crime reports will have to be ignored, just for lack of time to investigate them. These trends would tend to drive down clearance rates even if the legal rules governing police work did not change at all.

To test that hypothesis, we need to compare two patterns. One is the pattern of changes in clearance rates, and the other is the pattern of changes in police *capacity* to clear crime, measured by the ratio of police expenditure or personnel to the number of reported crimes. The change in *dollar* capacity to clear crime was presented in Figure 1 above. The pattern of changes in the ratio of police *personnel* to the number of crimes is virtually identical and is shown in Figure 3 below.

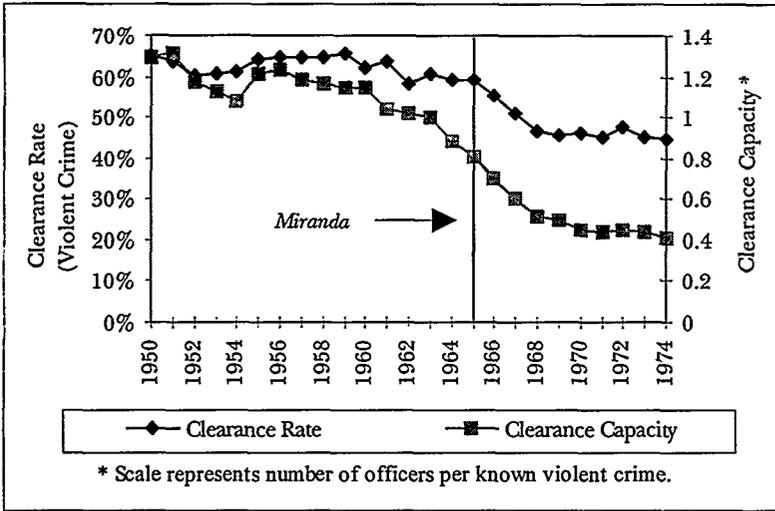
In Figure 3, the top line shows clearance rates, and the bottom line shows clearance capacity, expressed as the total number of police officers per known violent offense. As Figure 3 shows, police capacity to clear crimes declined precipitously in the mid-1960s, and then it stabilized by 1970. The clearance rates follow a virtually identical pattern.

What Professor Cassell does, with his dramatic clearance rate chart, is in effect to show only the top line on Figure 3 and then to point an accusing finger at *Miranda*. But once we know what was happening to police investigative capacity, we can see that there is no reason to blame *Miranda*, rather than drastically shrinking resources, for the clearance rate trend.<sup>37</sup>

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37. Professor Cassell makes much of the point that the match between clearance-rate changes and clearance-capacity changes is not perfect. For example, clearance capacity fell slightly in 1963 and then started falling sharply the year after, but clearance rates *rose* in 1963 and then declined only slightly for the next two years before starting their precipitous decline in 1966. See Cassell, *supra* note 1, at 335. Professor Cassell appears to believe that such a discrepancy proves that declining clearance capacity did not hinder police efforts. See *id.* ("Why didn't the declining capacity hinder police then?"). But it seems at least equally plausible to attribute such lack of perfect congruence to a lag effect, see Schulhofer, *Miranda* and Clearance Rates, *supra* note 18, at 292-93, or to the

FIGURE 3: CLEARANCE RATE AND CLEARANCE CAPACITY (OFFICERS)



3. Crime Clearance Totals

A possible question raised by these trends is whether, because clearance rates are affected by the level of crime, *Miranda's* impact is masked by data on clearance rates. One way to avoid that problem is to shift our focus from the *percentage* of crimes cleared to the *total number* of crimes cleared. If *Miranda* hurt the police in solving crimes, we would expect to see some impact, around 1966, in trends in the number of crimes police were able to clear. Figure 4 below presents the data for the number of violent crimes cleared every year.

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impact of the many other factors that also play a causal role. For example, the sharp rise from 1963 to 1965 in the proportion of violent crime located in smaller cities (where clearance rates are higher) could be part of the reason why clearance rates resisted the decline in clearance capacity during the 1963-65 period. See *infra* text accompanying notes 42-46.

FIGURE 4: VIOLENT CRIMES CLEARED PER YEAR

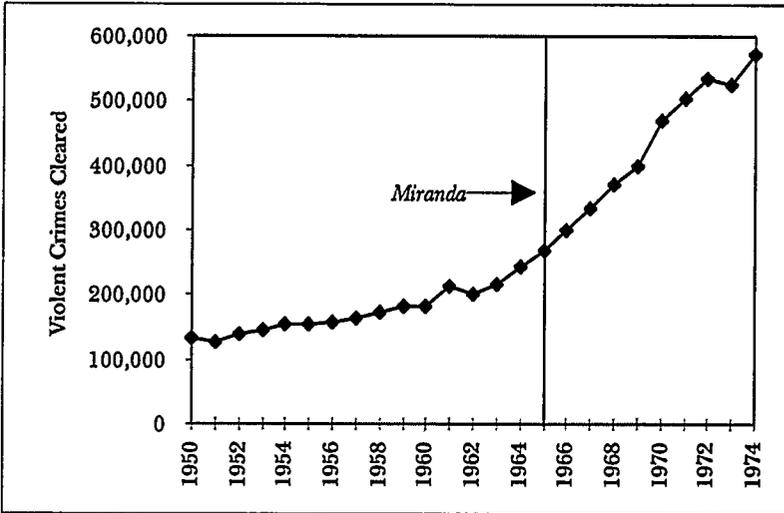


Figure 4 should come as a bit of a surprise to anybody who believes, with Professor Cassell, that "law enforcement never recovered from the blow that *Miranda* inflicted."<sup>38</sup> As Figure 4 shows, the number of crimes cleared did not drop at all. Clearance totals were rising before *Miranda*, partly because crime rates were rising, so there were more crimes that were easy to solve. But after 1965, *after Miranda*, the number of crimes cleared *continued* to rise. There was no dip, not even a temporary dip. There was not even a pause in the rate of increase. If *Miranda* did hinder law enforcement, there is no hint of that impact here.

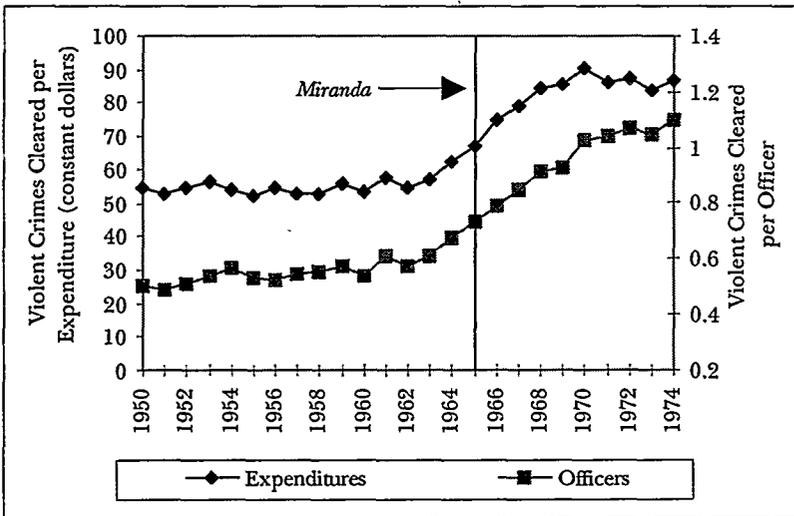
Figure 4 by itself is not completely decisive, because resource levels (in absolute terms) were rising. The increase Figure 4 shows in the number of crimes cleared could result from the fact that there were more officers available to do the investigations. Thus, to see whether *Miranda* had an impact, we

38. Cassell, *supra* note 5, at 1091.

have to know the number of crimes cleared *per officer* and *per dollar* of law enforcement expenditure. If *Miranda* hurt the crime-control effort, we should detect some impact, around 1966, in the number of crimes each officer was able to clear. Figure 5 below presents the relevant trends.

FIGURE 5: CLEARANCE EFFECTIVENESS

*Violent Crimes Cleared per Officer and per Expenditure*



The top line in Figure 5 indicates the number of crimes cleared each year per dollar of law enforcement expenditure; the bottom line indicates the number of crimes cleared each year per officer. The data show that before *Miranda*, police effectiveness in clearing crimes was rising; presumably, once again, because crime rates were rising, so there were more crimes that were easy to solve. But police effectiveness in clearing crimes continued to rise after 1965. Again, there was no dip, and there was no pause in the rate of increase. There is

simply no hint in this data that *Miranda* in any way hurt police efforts to solve crime. So whether we look at clearance rates or clearance totals, there is no evidence—none—that *Miranda* hindered law enforcement.

### C. Regression evidence?

Professor Cassell now appears to concede that a substantial structural shift in clearance capacity was at least partly responsible for the 1966 clearance rate drop. But he argues—relying on a regression analysis he is in the process of conducting—that the collapse of police clearance capacity in the late 1960s did not account for *all* of the clearance rate drop. The regression analysis shows, Cassell suggests, that some other development centered in 1966 (presumably *Miranda*) must be the explanation for the remainder of the decline in clearance rates.

In essence, Professor Cassell's entire argument for a *Miranda* effect on clearance rates now turns on his regression analysis, a study that is as yet unpublished and is described only in sketchy terms. The simplest point to make, therefore, is that the supposed *Miranda* effect remains unknown until the regression analysis is fully presented and explained, a task that Professor Cassell has not yet attempted.

Even from Professor Cassell's sketchy description, however, one can see, on close reading, that his regression model is artificial and misleading. In a previous article, I explained in detail seven serious defects in his model, any of which is sufficient to render the model useless as a guide to *Miranda's* effect.<sup>39</sup> Without retracing all of that ground here, I will focus on three especially critical flaws. First, Professor Cassell still fails to take the collapse of clearance capacity fully into account. Second, he continues to exclude other structural changes that were occurring the late 1960s, and as a result, his regression model attributes the cumulative effect of the excluded factors to the 1966 event he misleadingly labels "Miranda." The third

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39. The problems, in a nutshell, include: Professor Cassell's omission of key variables; failure to disaggregate data where necessary; use of misspecified resource variables; use of a misspecified *Miranda* variable; use of an inappropriate time period; and failure to consider lag effects and tipping points. For a full discussion and explanation of how these flaws undermine the reliability of the model, see Schulhofer, *Miranda and Clearance Rates*, *supra* note 18, at 291-94.

problem is more technical, but critically important; Professor Cassell's analysis relies on *aggregate* national data, and it therefore involves a methodologically crude, error-prone model that professional social scientists have long discredited.

1. *Clearance capacity*. The most striking problem is Professor Cassell's continued failure to take adequate account of clearance capacity, which eroded precipitously with the sudden decline in the ratio of dollars and resources to the number of crimes to be solved. Despite my stress on this point in previously published criticism of Professor Cassell's claim,<sup>40</sup> he has made only an incomplete adjustment, by including a new variable for the ratio of police resources to the crime *rate*. But officers do not solve crime *rates*, they need to solve *crimes*. When the population is rising, a steady crime *rate* implies a rising *number* of crimes to be solved. A steady ratio of officers to the crime rate will obscure a decline in clearance capacity, because the increase in population necessarily means that the number of crimes to be investigated by each officer is increasing, even though the ratio of officers to the crime rate remains unchanged. By defining clearance capacity relative to the crime *rate*, Professor Cassell systematically understates the actual erosion of police clearance capacity.

2. *Other omitted variables*. Readers unfamiliar with regression analysis must understand that in a model like Professor Cassell's, spanning a forty-four-year period, the before-after dummy variable centered on the year 1966—the variable he chooses to call "Miranda"—does not measure only the impact of causal factors that changed in that year alone. When important factors that affect clearance rates are omitted in such a model, and when the average value of such factors over the period before the pivotal year is different from their average value over the period after the pivotal year, the impact of *all* such factors inevitably gets included in the dummy variable that carries the "Miranda" label.<sup>41</sup> Numerous causally important variables, all

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40. See *id.* at 283-85.

41. It is essential here for readers to understand how a dummy variable works. The dummy variable acts as a catch-all. It puts aside factors that were included separately (like crime rates and unemployment); it then takes all remaining social, structural and legal factors whatsoever, as they stood on average during in the period 1950-65, and compares their impact to the impact that such factors had on average during in the period 1967-94. In a time series analysis spanning the period 1950-94, the dummy variable does not simply compare 1965 to 1967; it compares the average state of the

ignored in Professor Cassell's model, made well-known or probable contributions to the clearance rate decline that the dummy variable identifies. It is conceivable, of course, that *Miranda* also contributed to that clearance rate drop. But labeling the dummy variable "Miranda" does not establish the extent—if any—to which *Miranda* effects were present. To do that, we must first take account of the factors that had a known or probable effect, and see whether there remains an impact we cannot otherwise explain. Thus, until we allow for other factors that we know to be important, we have no reason to assume that *Miranda* was responsible for any part of the clearance rate drop that Professor Cassell assigns to the so-called "Miranda" variable. Among the many factors that could, or clearly did, contribute to clearance rate trends, the following are especially relevant:

(a) *Urbanization*. Clearance rates are consistently lower in the larger cities. For example, in 1954 the clearance rate for violent crimes stood at 71% in cities with less than 250,000 inhabitants, but it was only 60% in cities larger than that size.<sup>42</sup> By 1969 these clearance rates had fallen substantially in cities of all sizes, but the smaller cities still enjoyed a significant advantage—a violent crime clearance rate of 54%, compared with a rate of only 42% for the cities with population over 250,000.<sup>43</sup>

Because of this small-city advantage, a shift in the *distribution* of crime between large and small cities will alter aggregate clearance rates for the nation as a whole, even if police in each city maintain exactly the same clearance rate year after year. For example, if clearance rates in every individual city remain constant, but if the larger cities get a greater share of the nation's violent crimes, aggregate national clearance rates will drop. The importance of allowing for urbanization in studies of crime rates, clearances and arrests is well known, and stressed in

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world over the entire before-1966 period to the average state of the world over the entire after-1966 period. In a rough way, it amounts to comparing the year 1958 (the approximate mid-point of the 1950-65 period) to the year 1980 (the approximate mid-point of the 1950-65 period). The time trend variable included in Professor Cassell's model will capture the effect of any omitted variables that are changing in a simple linear fashion over the period in question, but non-linear trends could be picked up in the before-after dummy variable instead.

42. Percentages were calculated from FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 1954, at 48 tbl.15 (Semiannual Bulletin, vol. 26, no. 1, 1955).

43. Percentages were calculated from FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 1969, at 98-99 tbl.12 (1970).

the FBI's *Uniform Crime Reports*.<sup>44</sup> Yet Professor Cassell's model takes no account of this easily quantifiable factor.

In order to see whether Professor Cassell's omission of urbanization data could cause his results to be biased, we need to examine the distribution of violent crime between large and small cities. When we calculate—for the total violent crime reported in all cities—the portion of the total that was reported in cities with less than 250,000 residents, we find no clear trend in the data. The percentage of total city crime that was located in the smaller cities fluctuates frequently, and that percentage is roughly the same in 1974 (39.4%) as it was in 1950 (41.6%).<sup>45</sup>

But if we compare the trends in small-city share to the trends in the aggregate national clearance rates over the same period, some striking patterns emerge. Figure 6 below presents the relevant data, with aggregate national clearance rates on the top line and the small-city share of all reported violent crime on the bottom line.<sup>46</sup>

As Figures 1 and 3 above showed, clearance rates held roughly steady from 1962 to 1965 and again from 1969 to 1974, even though clearance capacity was dropping somewhat during both of these periods. The trend in small-city shares shows one of the many factors that could in part account for this result: the small-city share rose sharply during both periods, helping to offset the negative effect of declining clearance capacity and thus to sustain aggregate national clearance rates.

Precisely the opposite trend prevails in the 1965-69 period that is crucial to Professor Cassell's claim about *Miranda's* supposed impact. From 1965 to 1969, there is a brief, sudden turnaround, and for four years, the small-city share drops. Downward trends in *both* clearance capacity and small-city share converge, right after 1965, to reinforce one another in pulling clearance rates sharply lower.

To underscore the obvious, I do *not* claim that small-city shares are the only explanation for clearance-rate trends. The small-city trends may even be a relatively small part of the overall story. But the distribution of crime between large and

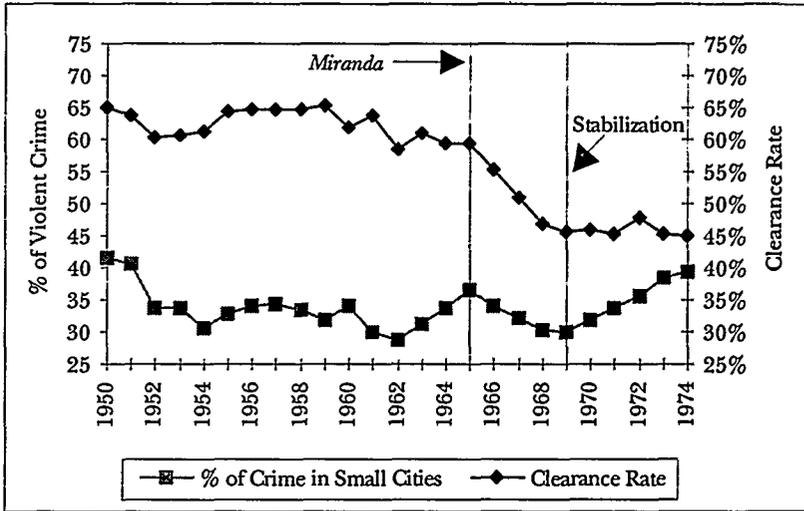
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44. See, e.g., *id.* at vi (stressing population density, community size and numerous other factors essential to interpretation of crime data).

45. See *infra* Figure 6.

46. Calculations for all the data underlying Figure 6 are on file with the editors of this journal.

FIGURE 6: TOTAL CLEARANCE RATE, AND PERCENT OF VIOLENT CRIME IN CITIES WITH LESS THAN 250,000 RESIDENTS



small cities is one factor that clearly must be taken into account before we can assume that *Miranda* must have caused the clearance-rate drop after 1965.

(b) *Professionalization*. Careless and unprofessional recordkeeping procedures were endemic in American police departments in the 1950s and early 1960s. Jerome Skolnick's famous 1966 study devoted a full chapter to the arbitrary and inflated character of the clearance-rate reports of that period.<sup>47</sup> Matters began to change in the late 1960s. The report of the President's Crime Commission, published in 1967, focused on the need to upgrade police personnel and procedures.<sup>48</sup> Greater

47. Jerome H. Skolnick, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 164-81 (1966). Skolnick describes one case in which a burglary suspect provided the police with more than 400 "fake" clearances. *See id.* at 178.

48. *See* U.S. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 106-115 (1967).

attention to accurate record keeping was a part of the overall movement for greater professionalism that occurred, coincidentally or not, almost exactly at the time of *Miranda*.<sup>49</sup> If clearance rates are now lower, all else being equal, than they were in the period from 1950 to 1965, part of the explanation almost certainly is that the clearance-rate figures of that earlier era were to some degree artificially inflated.

(c) *Greater Reporting*. Clearance rates reflect the percentage of reported crimes that police solve, but reported crime is a fraction of total crime, and reporting rates vary substantially from crime to crime, from year to year, and from decade to decade. Although there are no accurate estimates of reporting rates for the 1950s and 1960s, the recent trends suggest that reporting rates have been increasing, and it is plausible to infer that a lower percentage of all crime was reported in the pre-1966 era than since.

Reporting rates are important because a higher rate of reporting will tend to bring into the system cases involving relatively less severe harms that have a weaker claim on police time and attention. If all else remained equal, including the crime rate, but if the proportion of less serious cases was higher, then the clearance rate could well have declined simply because the mix of cases, and the priority police placed on investigating them, had shifted.

(d) *Other legal changes*. Apart from all the social and structural changes that accompanied the upheavals of the late 1960s, there were numerous legal changes—other than *Miranda*—that could easily effect a police clearance rate. None of these changes occurred precisely on July 1, 1966. But the before-after dummy variable compares the average effect of legal restrictions operative in the 1950-65 period to the average effect of such restrictions during the 1967-94 period. As a result, *Miranda* is not the only legal change of the Warren era that could have contributed to the effect that is picked up by the dummy variable in Professor Cassell's regression model. Other

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49. *See id.* at 109 (recommending higher standards of education for all police personnel); 114 (recommending that all medium- and large-sized police departments employ a full-time legal advisor); 114-15 (recommending centralized control); 266-69 (noting unreliability of current data and recommending improved record-keeping and information systems).

potentially important decisions include *Mapp v. Ohio*,<sup>50</sup> creating an exclusionary remedy for illegal search and seizure (1961); *Rogers v. Richmond* (1961)<sup>51</sup> and *Haynes v. Washington* (1963),<sup>52</sup> tightening the due process limits on interrogation; *United States v. Wade*<sup>53</sup> and *Stovall v. Denno*,<sup>54</sup> imposing Sixth Amendment and due process limits on police line-ups (1967); and *Terry v. Ohio*,<sup>55</sup> imposing limits on police stops and frisks (1968).

Needless to say, if legal rules such as these did contribute to clearance-rate trends, it does not necessarily follow that these rules should be abandoned. Clearance-rate impact is not a test for constitutionality. Professor Cassell appears to endorse one of the major 1960s innovations (the more sensitive due-process voluntariness test), and others (such as the due-process limits on suggestive line-ups) are ones he should find hard to criticize.

The impact on clearance rates of accepted doctrinal changes other than *Miranda* is not known with any precision, of course. But it is indefensibly speculative (and implausible) to ignore such cases as *Haynes*, *Mapp*, *Stovall* and *Terry*, and to assume that clearance-rate changes must have been due to *Miranda* instead. Unless Professor Cassell can offer some basis for determining what part of the clearance rate drop is due to legal innovations he supports, like *Haynes*, and separating those effects from the impact of legal innovations he opposes, the claim that law enforcement has suffered because of *Miranda* will continue to rest on faith, not on evidence.

3. *Methodology*. The last point is the most technical, but it is crucial. Although Professor Cassell claims to be using “[t]he standard statistical technique for answering [causal] questions,”<sup>56</sup> few professional social scientists would agree. Most econometricians recognize that regression analysis is at best a crude tool. Its use requires many caveats, and even at its best, it is often unsuited to teasing out subtle questions of causation when several social and legal variables are dramatically changing

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50. 367 U.S. 643 (1961).

51. 365 U.S. 534 (1961).

52. 373 U.S. 503 (1963).

53. 388 U.S. 218 (1967).

54. 388 U.S. 293 (1967).

55. 392 U.S. 1 (1968).

56. Cassell, *supra* note 1, at 338.

in close proximity.<sup>57</sup>

Apart from this standard concern, there is a more specific problem; the *kind* of regression analysis Professor Cassell uses—an analysis of aggregate data for the nation as a whole—is *not* the “standard statistical technique.” Even those economists most sanguine about the value of regression analysis stress the flaws of using *aggregate* national data: That approach masks effects and distorts relationships because crime variables are subject to pervasive measurement errors, and because trends in one State frequently offset or reinforce unrelated trends occurring simultaneously in other States.<sup>58</sup> The standard procedure for minimizing these effects is *cross-sectional* time-series analysis, in which data for resource levels, crime rates and all other variables are recorded separately for each affected jurisdiction. Econometric studies of the impact of legal rules on the criminal justice system almost invariably rely on cross-sectional analysis,<sup>59</sup> and almost twenty years ago, the National Academy of Sciences panel on research methodology in this area stressed the need for using the cross-sectional approach.<sup>60</sup>

4. *Summary.* The preceding discussion touches on many of the important flaws in Professor Cassell’s regression model; I have discussed others elsewhere.<sup>61</sup> The points I have covered here should be sufficient, nonetheless, to indicate why that model, in its present form, is not even suggestive of a possible *Miranda* effect on clearance rates. The effect identified by the 1966 dummy variable could easily be a spurious artifact of a substandard model, and if the effect identified is real, we have no reason—none—to attribute that effect to *Miranda* rather than to the many other social, structural and legal circumstances omitted from the model that were changing dramatically at the

57. See NATIONAL ACADEMY OF SCIENCES, PANEL ON RESEARCH ON DETERRENT AND INCAPACITATIVE EFFECTS, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 22-50 (1978).

58. See John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUDIES (forthcoming Jan. 1997) (noting a similar problem of heterogeneity even within States); Schulhofer, *Miranda and Clearance Rates*, *supra* note 18, at 291.

59. E.g., Lott & Mustard, *supra* note 58; Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. (No. 3) 397 (1975); Raymond Atkins & Paul H. Rubin, *The Impact of Changing Criminal Procedure on Crime Rates* (Oct. 28, 1995) (working paper cited in Cassell, *supra* note 1, at 335 n.38).

60. NATIONAL ACADEMY OF SCIENCES, *supra* note 57, at 49.

61. See Schulhofer, *Miranda and Clearance Rates*, *supra* note 18, at 291-94.

same time.

#### IV. CONCLUSION

There is one final point to be made. Let us go back to Figure 3, the chart that shows clearance rate trends on the top line and police clearance capability at the bottom.<sup>62</sup>

Looking at Figure 3, it is easy to see why people feel nostalgic for the good old 1950s. Clearance rates were well over 60% for most of this period and were as high as 64% or 65% for many of these years. Those who want to restore that world sometimes think they can bring back the days of effective law enforcement by bringing back the *law* of those days, especially by overruling *Miranda*. Lawyers and legal scholars are especially prone to think in these "law-centric" terms.

The fallacy in that view is that in 1955, when we had a clearance rate of 64%, we also had 121 police officers for every 100 violent crimes.<sup>63</sup> By 1970, the police personnel figure had fallen from 121 to 45, and today we have only 28 police officers for every 100 violent offenses, less than one-fourth the personnel we deployed in the 1950s.<sup>64</sup> Does anyone really think it makes no difference whether you have 121 officers on hand, or only 28 officers, to handle a workload of 100 reported offenses? Can anyone really think it's because of *Miranda* that today's police are unable to solve more crimes?

The yearning for the 1950s is understandable, but it is a fantasy to assume that overruling *Miranda* will move us toward the law enforcement results that police forces of that era were able to achieve. To restore law enforcement to where it was in the 1950s, we have to start making serious improvements in police resources.

All the talk about "terrible *Miranda*" is therefore worse than just wrong. That kind of talk amounts to picking on a convenient scapegoat and distracting our attention from the real problem.

Obviously, it is smarter politics to blame *Miranda* and the Warren Court for all our ills than it is to whisper even a single word about raising taxes. But we should not kid ourselves. If we

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62. See *supra* pp. 360-61 & fig.3.

63. See Schulhofer, *Miranda and Clearance Rates*, *supra* note 18, at 288.

64. See *id.*

care about victims, and if we care about the quality of our civilization, we have to stop playing games with public fear. We have to insist that criminal justice discussions focus on the issues that can make a difference. *Miranda* isn't one of them.

