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## Attitudes of Police Executives toward Miranda and Interrogation Policies, The

Marvin Zalman

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# CRIMINOLOGY

## THE ATTITUDES OF POLICE EXECUTIVES TOWARD *MIRANDA* AND INTERROGATION POLICIES

MARVIN ZALMAN & BRAD W. SMITH\*

*Top administrators of the largest American municipal police departments were surveyed regarding interrogation law and practice. Major findings include: (1) Most big city police administrators do not wish to overturn Miranda; officers in their departments complied with Miranda rules. Administrators agreed with the results of the majority opinions in both U.S. v. Patane and Missouri v. Siebert. (2) Administrators disagreed with the practice of deliberately evading Miranda rules known as interrogation "outside Miranda." (3) Three-quarters of the respondents disagreed with the proposition that aggressive psychological interrogation causes false confessions. (4) Three-fifths of big city police administrators favored the videotaping of interrogation sessions. (5) Disciplining officers for Miranda*

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This Article is dedicated to the memory of James Fyfe. With characteristic generosity Jim took time out of his busy schedule as NYPD Deputy Commissioner and Professor at John Jay College of Criminal Justice to provide us with extremely helpful and detailed advice about an initially overlong survey instrument that helped to make this a successful project. Because Jim believed fervently that police must be law abiding and that the law must take the practical concerns of police officers seriously, we feel that this tribute is fitting.

We gratefully acknowledge the research assistance of Ms. Angie Kazaleh Kiger and Ms. Shamsun Nehar, and the helpful comments of Gerry Cliff, Ed Dadisho, John Firman, Lorie Fridel, Richard Leo, Victoria Time, and anonymous reviewers. The authors, of course, are responsible for the interpretations of data, all conclusions, and any errors.

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*violations is uncommon. The survey indicates “wholesale” compliance with legal rules designed to guide police interrogations. However, support for violations is sufficient to be of concern for a legal system that espouses the rule of law. Although some failures to comply are a result of frequent changes in Miranda law by the Supreme Court, police agencies have an obligation to closely monitor the actions of officers.*

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## I. INTRODUCTION

### A. FRAMEWORK OF THIS STUDY

Important issues of confessions law and police interrogation practices are presently on the constitutional and public agendas. The Supreme Court’s recent decisions have left confessions law almost as confused today as it was before 2000, when the Court was on the verge of overruling *Miranda v. Arizona*.<sup>1</sup> The stage is set for additional judicial refinement.<sup>2</sup> Long-standing questions about the impact of legal rules on police interrogation practices have become more urgent with the knowledge that a number of police departments have taken advantage of *Miranda* “loopholes” to flout some *Miranda* rules. Is knowledge and practice of interrogation “outside *Miranda*” widespread or is it confined to its apparent region of origin?<sup>3</sup> Questions about the effectiveness of legal controls on police behavior are even more pointed now that it is known that police interrogation, with some regularity, generates false confessions that contribute to wrongful convictions.<sup>4</sup> Are police administrators aware of or concerned about false confessions? Knowledge that abusive interrogation causes some false confessions has led to calls for reform, chief among them the videotaping of interrogations. How prevalent is the recording of interrogations by police departments?

Answers to such questions are important to legal and criminal justice scholars and to policy-makers, including legislators, judges, and law

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<sup>1</sup> 384 U.S. 436 (1966); see George C. Thomas III, *The End of the Road for Miranda v. Arizona?: On the History and Future of Rules for Police Interrogation*, 37 AM. CRIM. L. REV. 1 (2000); Colloquy, *Will Miranda Survive?: Dickerson v. United States: The Right to Remain Silent, the Supreme Court, and Congress*, 37 AM. CRIM. L. REV. 1165 (2000) (Professor Paul Cassell v. Mr. Robert Litt).

<sup>2</sup> See *United States v. Patane*, 542 U.S. 630 (2004); *Missouri v. Seibert*, 542 U.S. 600 (2004); *Chavez v. Martinez*, 538 U.S. 760 (2003); *Dickerson v. United States*, 530 U.S. 428 (2000). These cases and their implications for interrogation practice are discussed in the following section.

<sup>3</sup> Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 132-40 (1998).

<sup>4</sup> Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004).

enforcement administrators.<sup>5</sup> Supreme Court rulings, of course, are implemented by the police, and an understanding of the “law in action” includes knowledge of police attitudes and opinions as well as descriptions of interrogation practices. This study explores these issues concerning interrogation practices through a survey of administrators of large police agencies. A variety of related issues are examined, including executives’ global attitudes toward *Miranda*, their knowledge of and attitudes toward evasion of *Miranda* rules (a practice known as interrogation “outside *Miranda*”), their beliefs about links between aggressive psychological interrogation and false confessions, their support for the electronic recording of interrogations, and their views on legal and administrative sanctions for abusive interrogations. This legal impact research study<sup>6</sup> is designed to explore policy issues rather than to advance or test theories of legal impact, although impact theory helps to illuminate some of our findings.

The importance of this subject, indeed of most aspects of criminal procedure, transcends its specific boundaries and raises fundamental questions about the relationship of individuals and the state in our constitutional order.<sup>7</sup> The enormous power held by police officers over confined suspects during routine interrogation sessions was adumbrated in Chief Justice Earl Warren’s classic *Miranda* opinion.<sup>8</sup> He initiated his comments on the isolation, secrecy, and concomitant lack of knowledge

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<sup>5</sup> Criminal procedure scholars have supported the usefulness of social scientific research in understanding the context in which legal rules are implemented and enforced. See, e.g., Susan R. Klein, *Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1063-78 (2001) (arguing that social science cannot establish constitutional norms but can assist the courts in informing legal decision-making and developing rules to protect underlying rights, but also noting that the courts do not always accurately understand or apply social science data); Tracey L. Mearns & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733 (2000) (reviewing many of the more recent empirical studies of *Miranda*).

<sup>6</sup> See Bradley C. Canon, *Courts and Policy: Compliance, Implementation, and Impact*, in THE AMERICAN COURTS: A CRITICAL ASSESSMENT 435, 435-66 (John B. Gates & Charles A. Johnson eds., 1991); see also discussion *infra* Part I.C.

<sup>7</sup> The individual–state relationship lies at the core of politics and is the subject of a vast political theoretic, constitutional law, and human rights literature. It should be kept in mind, especially in empirically grounded studies of rights, that these relations occur and must be evaluated in the context of the constitutional regime that exists in a particular time and place. As it could take one or more volumes to specify the sociopolitical context of a study like ours, we forego extended discussion but only call the reader’s attention to such context, which will become more salient in the conclusion to this Article.

<sup>8</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

about what transpires in the interrogation room and on the various techniques recommended by proponents of psychological interrogation<sup>9</sup> with the reminder that “[t]he cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime.”<sup>10</sup> An appreciation that the most mundane interrogation session involves the application of state power, even at the retail level, raises questions about whether deviations from courts’ rulings by police officers undermine the values of legality that undergird our constitutional system. We comment on this subject in the Conclusion.<sup>11</sup>

The complexities of the subject at hand and the nature of the institutions being studied ensure that a single study will never be comprehensive. For example, *Miranda* law is a composite of many rules, is in flux, and, as a result of the Supreme Court’s ideological divisions, is somewhat self-contradictory. After four decades, compliance with *Miranda* cannot be measured simply by the frequency with which the warnings are read prior to interrogation.<sup>12</sup> These factors preclude a simple causal model in which legal rules have a direct and unidirectional effect on police practices. Police behavior will be the result of multiple social and administrative causes, and it is likely that some level of mutual causation is at work.<sup>13</sup> In a notable example, Chief Justice Burger, appointed to the

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<sup>9</sup> *Id.* at 448-55.

<sup>10</sup> *Id.* at 439.

<sup>11</sup> See discussion *infra* Part V.B.

<sup>12</sup> This issue is well understood by scholars who have explored the way in which police have applied the Supreme Court’s interrogation rules. See, e.g., Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators’ Strategies for Dealing with the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397 (1999) [hereinafter, Leo & White, *Adapting to Miranda*].

<sup>13</sup> This Article is a policy study rather than one that seeks to develop or test theory about the impact of law on social behavior. Even a policy study rests on implicit theories about the influence of law on social behavior. We assume that the influence of legal rules on police behavior is quite complex, and that to a degree, courts are themselves influenced by the behavior of the police. The complexity of the law and society relationship was suggested by two great works of “realist” jurisprudence by Benjamin Cardozo and Oliver Wendell Holmes. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., Belknap Press 1963) (1881). Without finer quantitative data it is not possible to make firm causal statements about the mutual influences of legal rules and social behavior. See HUBERT M. BLALOCK, JR., *CAUSAL INFERENCES IN NONEXPERIMENTAL RESEARCH* 62-94 (1964). Nevertheless, policy studies like ours can at least contribute to a better understanding of the policy environment of legal rules.

In all policy writing and analyses, readers must be alert to misinterpretation that can arise from ideological or partisan use of data. A blatant and even inane use of a spurious correlation occurred when Senator John M. McClellan of Mississippi, in the debates leading

Supreme Court by President Nixon in part to unravel the *Miranda* decision, stayed his hand as it became clear that police enforced *Miranda* in a manner that weakened its effectiveness.<sup>14</sup> While the Supreme Court's post-*Miranda* decisions have been influenced in part by the Court's reactions to and perceptions of police behavior, evidence also supports the view that when implementing the law, the police have reacted in complex ways based on their own perceptions of the mixed signals sent by the Court.<sup>15</sup> Research into American policing is further complicated by the great diversity in size, experience, and professionalism among the approximately twelve thousand local law enforcement agencies in the United States.<sup>16</sup> Finally, law compliance is never perfect and is influenced by a number of cultural, situational, and administrative or structural factors. The behavior we study—police interrogation—is far from a simple, discrete event and, as noted, raises a number of pressing legal and policy issues. A single study based on one survey can illuminate the subject and provide helpful policy information but has to be triangulated with other relevant research to provide a full understanding of the subject.

With these limitations in mind, the survey research reported in this Article amplifies existing knowledge regarding interrogation policies, including the link between interrogation and false confessions, and procedures that tend to undermine the effectiveness of *Miranda*. It supplements empirical studies of police interrogation published in the past decade.<sup>17</sup> The survey asked attitude and fact questions. In addition to

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to the passage of Title II of the Omnibus Crime Control Act of 1966, purporting to "overrule" *Miranda*,

propped up in the rear of the Senate chamber a huge facsimile of the F.B.I.'s crime graph. The titles of key Supreme Court decisions were marked at the peaks along the rising line, to show the embarrassing parallel between Supreme Court activity on behalf of defendants and the crime rise.

FRED P. GRAHAM, *THE DUE PROCESS REVOLUTION: THE WARREN COURT'S IMPACT ON CRIMINAL LAW* 12 (1970). Senator McClellan's implicit assumption that increases in crime rates were the result of Supreme Court decisions (and little else) was so simplistic as to suggest that his two-variable chart was motivated more by partisan politics than the search for scientific truth.

<sup>14</sup> *Rhode Island v. Innis*, 446 U.S. 291, 304-05 (1980); see LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* 196-97 (1985).

<sup>15</sup> Weisselberg, *Saving Miranda*, *supra* note 3, at 132-40.

<sup>16</sup> MATTHEW J. HICKMAN & BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *LOCAL POLICE DEPARTMENTS, 2003* 1 tbl.1 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/lpd03.pdf> (reporting 12,656 local police departments in the U.S. in 2003, not including state police agencies or sheriffs' departments).

<sup>17</sup> Some of these studies are discussed *infra*, Part II. More policy-relevant information is needed. A search of the National Criminal Justice Reference Service (NCJRS) website, under "Law Enforcement—Criminal Investigation," turned up no material on interrogation

questions on specific policy issues (such as false confessions), the survey also asked questions about knowledge of recent developments in confessions law and interrogation practices. Finally, we explore the drop-off in law compliance that may result from confusing and oft-changed rules. If following the Supreme Court's gyrations on confessions law is challenging to practicing lawyers, it is likely to be even more so for police administrators, given their broad responsibilities and lack of specialized legal training. Having information regarding administrators' knowledge, as well as their opinions, is important in the formulation of sound policy.

Section I.B presents a brief overview of aspects of confessions law relevant to the research issues addressed in this study. Section I.C sets this study in the context of impact research that has been conducted mainly by political scientists. In Section II, we review prior research concerning the policy questions addressed by the survey. Section II.A reviews the second wave of major empirical studies of the impact of *Miranda* on police interrogation practices that were conducted since 1996. This literature grounds our survey questions, which inquire into the general attitudes of police officials toward *Miranda*. Sections II.B-II.E review the relevant research in regard to specific policy issues that form the basis of the remaining questions in our survey: interrogation "outside *Miranda*," false confessions and psychological interrogation practices, the videotaping of interrogations, and legal and administrative controls on police interrogation. Section III describes our research methodology and specifies the research-policy questions addressed by this study. Section IV presents the results of the survey and includes policy-oriented discussions of the findings. Finally, Section V reviews the contributions that our findings make to better understand the policy issues presently surrounding *Miranda* and discusses the meaning of the results for the rule of law.

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or confessions out of 190 entries. Topic—National Criminal Justice Reference Service, <http://www.ncjrs.gov/App/Topics/MorePublications.aspx?TopicId=166&hSortBy=&hResultPerPage=10&reuse=1&page=1&lowerrangeboundary=13> (last visited May 7, 2007). A few of the 190 items dealt with wrongful conviction and eyewitness identification techniques. The lack of federally funded studies of interrogation may be simply fortuitous or may instead reflect a lack of interest, the sensitive nature of interrogation issues, the difficulty of studying the process, or a judgment that existing knowledge is a sufficient basis for good policy-making. In contrast, Paul Cassell and Bret Hayman noted that a number of official studies on interrogation had been sponsored by the British government. Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 U.C.L.A. L. REV. 839, 849 (1996).



## B. CONSTITUTIONAL CONFESSIONS LAW: A BRIEF OVERVIEW

Prior to *Miranda*, the Supreme Court constitutionalized the common law rule that excluded involuntary confessions from trial evidence. The voluntariness test was applied in federal cases under the Fifth Amendment privilege against self-incrimination<sup>18</sup> and in state cases under the Fourteenth Amendment Due Process Clause.<sup>19</sup> Over the next three decades, the Court decided a series of due process cases finding that overbearing police practices, short of torture, violated the voluntariness test.<sup>20</sup> The Supreme Court was more proactive in federal cases, using its supervisory authority to strike down confessions obtained after prolonged interrogation.<sup>21</sup> In the 1960s, an invigorated and liberal Supreme Court incorporated the Fifth Amendment privilege against self-incrimination<sup>22</sup> and ruled that an interrogated suspect has a right to counsel under limited conditions.<sup>23</sup> Within two years of those rulings, the Court, dissatisfied with the voluntariness test, issued its arguably most famous decision, *Miranda v. Arizona*.<sup>24</sup> *Miranda* did not outlaw police interrogation or require that defense attorneys be present, but sought instead to tame abusive practices by the relatively anodyne practice (in hindsight) of informing criminal suspects that they actually have a constitutional right to remain silent in the face of police questioning—a right that they could exercise in the context of police interrogation.<sup>25</sup>

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<sup>18</sup> *Bram v. United States*, 168 U.S. 532, 541-43 (1897).

<sup>19</sup> *Brown v. Mississippi*, 297 U.S. 278 (1936) (holding that torture violates Fourteenth Amendment due process); see also *Mincey v. Arizona*, 437 U.S. 385 (1978).

<sup>20</sup> See, e.g., *Culombe v. Connecticut*, 367 U.S. 568 (1961) (vigorous interrogation of a mentally defective or insane suspect violated due process); *Spano v. New York*, 360 U.S. 315 (1959) (confession obtained by importuning of police officer-friend violated due process); *Payne v. Arkansas*, 356 U.S. 560 (1958) (confession obtained under threat of releasing suspect to lynch mob violated due process); *Leyra v. Denno*, 347 U.S. 556 (1954) (confession obtained by physician feigning help violated due process); *Malinski v. New York*, 324 U.S. 401 (1945) (keeping suspect naked for several hours before questioning violated due process); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (excessively long interrogation without a break violated due process); *Chambers v. Florida*, 309 U.S. 227 (1940) (moving suspect to avoid contacting family or counsel violated due process). For contemporaneous accounts, see ALAN BARTH, *LAW ENFORCEMENT VERSUS THE LAW* 61-76 (1961); DAVID FELLMAN, *THE DEFENDANT'S RIGHTS* 175-85 (1958). See also WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* (2001).

<sup>21</sup> *Mallory v. United States*, 354 U.S. 449 (1957); *McNabb v. United States*, 318 U.S. 332 (1943).

<sup>22</sup> *Malloy v. Hogan*, 378 U.S. 1 (1964).

<sup>23</sup> *Escobedo v. Illinois*, 378 U.S. 478 (1964).

<sup>24</sup> 384 U.S. 436 (1966).

<sup>25</sup> *Id.* at 471.

*Miranda*, bitterly criticized by the political right and by most prosecutors and police chiefs, was an important domestic issue in the 1968 presidential campaign.<sup>26</sup> Intense dislike of *Miranda* led Congress to pass Title II of the Omnibus Crime Control and Safe Streets Act of 1968,<sup>27</sup> a law purporting to overrule the decision and to reinstate the voluntariness test in federal cases.<sup>28</sup> The Supreme Court's lack of clarity in interpreting *Miranda* for the guidance of police officers is best understood by viewing post-*Miranda* law as a field of ideologically charged political conflict between a Court divided (more or less) between conservative "crime control model" advocates and liberal supporters of the "due process model" of criminal justice.<sup>29</sup> The liberal Warren Court that decided *Miranda* by a 5-4 margin was soon replaced by a more conservative Court.<sup>30</sup> It is telling that in the three decades between *Brown v. Mississippi*<sup>31</sup> and *Miranda v. Arizona*,<sup>32</sup> more than thirty due process confessions decisions led the Court to decide that a more clear-cut rule was needed. Yet as Justice Scalia noted in his dissent in *Dickerson v. United States*, "in the 34 years since *Miranda* was decided, this Court has been called upon to decide nearly 60 cases involving a host of *Miranda* issues."<sup>33</sup> This fact, raised by Justice Scalia to show that *Miranda* was no more "workable" than the voluntariness test, instead indicates that a conservative Court, unable or unwilling to kill off *Miranda*, has inconsistently applied its holding in the four decades since its promulgation.<sup>34</sup>

The Court's ideological division produced a set of rules that upheld but watered down *Miranda* protections. For example, police are not required to clarify a suspect's inarticulate question about obtaining counsel if it is not

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<sup>26</sup> BAKER, *supra* note 14, at 232-60.

<sup>27</sup> Pub. L. No. 90-351, 82 Stat. 197 (1968); see RICHARD HARRIS, *THE FEAR OF CRIME* (1968).

<sup>28</sup> See Yale Kamisar, *Foreword: From Miranda to § 3501 to Dickerson to . . .*, 99 MICH. L. REV. 879, 879-80 (2001).

<sup>29</sup> HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 147-256 (1968).

<sup>30</sup> BAKER, *supra* note 14, at 272.

<sup>31</sup> 297 U.S. 278 (1936).

<sup>32</sup> 384 U.S. 436 (1966).

<sup>33</sup> *Dickerson v. United States*, 530 U.S. 428, 463 (2000) (Scalia, J., dissenting) (emphasis in original).

<sup>34</sup> More complex and more charitable interpretations are provided by Klein, *supra* note 5 (in addition to basic constitutional rights, the Supreme Court has of necessity created a variety of ancillary criminal procedure rules that may be categorized as prophylactic, safe harbor, and incidental right rules), and by Jeffrey Standen, *The Politics of Miranda*, 12 CORNELL J.L. & PUB. POL'Y 555 (2003) (the Supreme Court's seemingly ad hoc *Miranda* jurisprudence is "political" in the Platonic sense of superior statesmen carefully crafting precise decisions to fit specific cases rather than general law).

an explicit request for a lawyer;<sup>35</sup> questioning by a probation officer bent on obtaining an incriminating statement and turning it over to the police does not require a *Miranda* warning;<sup>36</sup> a suspect who has claimed the right to silence may be re-interrogated under certain conditions despite *Miranda*'s categorical prohibition;<sup>37</sup> and misleading warnings have all been upheld.<sup>38</sup> These and other cases are straightforward attempts to interpret *Miranda* so as to weaken its legal controls on police interrogation.<sup>39</sup>

In another set of cases, the Court injected an intriguing anomaly into confessions law that brought *Miranda* to the brink of extinction and opened the door to police practices that undermined *Miranda* in practice.<sup>40</sup> These cases declared that the *Miranda* warnings were not in themselves constitutional rights but rather prophylactic devices designed to protect the underlying privilege against self-incrimination. As a result, the Court created three categories of *collateral use* of improperly obtained statements and one clear exception to the *Miranda* rule.

In these cases, *Miranda* was violated either by not giving warnings, by reading defective warnings, or by ignoring a suspect's invocation of rights. The first collateral use, *impeachment*, allows illegally obtained statements to be read to a jury where a suspect took the stand and testified in contradiction to a statement made during interrogation; the statement is admitted to impeach the suspect's veracity and not to prove guilt.<sup>41</sup> The Court so ruled even though it does not allow statements obtained in direct violation of the Due Process or Self-Incrimination Clauses to be used for impeachment.<sup>42</sup> In the second collateral use, *derivative "leads,"* even though statements resulting from *Miranda*-violated interrogations are not admissible in court, information derived from the statements could be used

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<sup>35</sup> *Davis v. United States*, 512 U.S. 452 (1994); see also Kenworthy Bilz, *The Fall of the Confession Era*, 96 J. CRIM. L. & CRIMINOLOGY 367 (2005) (reviewing LAWRENCE M. SOLAN & PETER M. TIERSMA, *SPEAKING OF CRIME: THE LANGUAGE OF CRIMINAL JUSTICE* (2005)).

<sup>36</sup> *Minnesota v. Murphy*, 465 U.S. 420, 426-40 (1984).

<sup>37</sup> *Michigan v. Mosley*, 423 U.S. 96, 100-07 (1975).

<sup>38</sup> *Duckworth v. Egan*, 492 U.S. 195 (1989). For an example of how the confusion between the Fifth Amendment right to counsel established by *Miranda* and the Sixth Amendment right to counsel can leave an indigent suspect without any lawyer at a critical stage, with tragic results, see ROGER PARLOFF, *TRIPLE JEOPARDY* 32-34 (1996).

<sup>39</sup> Leo & White, *Adapting to Miranda*, *supra* note 12, at 414-33.

<sup>40</sup> Professor Stephen Schulhofer denotes this as "Fifth Amendment exceptionalism." Stephen J. Schulhofer, *Miranda, Dickerson, and the Puzzling Persistence of Fifth Amendment Exceptionalism*, 99 MICH. L. REV. 941 (2001).

<sup>41</sup> *Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971).

<sup>42</sup> *New Jersey v. Portash*, 440 U.S. 450, 450 (1979) (self-incrimination); *Mincey v. Arizona*, 437 U.S. 385, 398 (1978) (due process).

by the police as leads to further incriminating evidence.<sup>43</sup> The rule excluding such derivative evidence in search and seizure law, the “fruits of the poisonous tree” doctrine, was held not to apply to *Miranda* violations. The third form of collateral use, *cured statements*, occurs when a suspect incriminates himself after questioning not preceded by *Miranda* warnings and then makes a second confession after warnings are properly administered in a subsequent interrogation. The first, unwarned admission is inadmissible, but the post-*Miranda* confession is admissible.<sup>44</sup> Finally, a *public safety exception* was created, admitting statements made in answer to unwarned police questions when the questions concerned immediate threats to public safety.<sup>45</sup> The exception was based on the reasoning that *Miranda* is not a constitutional rule.<sup>46</sup>

These doctrinally confusing cases led legal scholars to develop a number of theories to explain the confusion created. Liberal defenders of *Miranda* thought that the Court was preparing to overrule the case.<sup>47</sup> Some conservative scholars questioned these rulings as inapposite in that the Court has no jurisdiction to impose a non-constitutional rule on the states.<sup>48</sup> Nevertheless, the Court continued to support the basic *Miranda* rules.<sup>49</sup> Such doctrinal gyrations have become a minefield for police officers who wish to fairly apply the law.

The prophylactic cases threatened the constitutional legitimacy of *Miranda*, but a collision was slow in coming. Finally, in 2000, the Supreme Court was confronted with a Court of Appeals decision holding that under 18 U.S.C. § 3501, an otherwise voluntary confession (under the due process voluntariness test) was admissible in a trial even though *Miranda* warnings had not been read.<sup>50</sup> The lower court ruled that *Miranda* was not a constitutional decision “and that therefore Congress could by statute have

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<sup>43</sup> *Michigan v. Tucker*, 417 U.S. 433, 450-52 (1974).

<sup>44</sup> *Oregon v. Elstad*, 470 U.S. 298, 307-09, 318 (1985); see Kirsten Lela Ambach, Notes & Comments: *Miranda's Poisoned Fruit Tree: The Admissibility of Physical Evidence Derived from an Unwarned Statement*, 78 WASH. L. REV. 757, 768 (2003) (coining the term “cured statement exception”).

<sup>45</sup> *New York v. Quarles*, 467 U.S. 649, 654 (1984).

<sup>46</sup> *Id.* at 657.

<sup>47</sup> See, e.g., Susan R. Klein, *Miranda Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide*, 143 U. PA. L. REV. 417, 419, 428, 433-34 *passim* (1994).

<sup>48</sup> JOSEPH D. GRANO, *CONFESSIONS, TRUTH, AND THE LAW* 183-98 (1993).

<sup>49</sup> See, e.g., *Dickerson v. United States*, 530 U.S. 428 (2000); *Davis v. United States*, 512 U.S. 452 (1994); *Minnick v. Mississippi*, 498 U.S. 146 (1990); *Pennsylvania v. Muniz*, 496 U.S. 582 (1990).

<sup>50</sup> *Dickerson*, 530 U.S. at 432.

the final say on the question of admissibility.”<sup>51</sup> In a surprising about-face, Chief Justice Rehnquist, an architect of the prophylactic theory, held that *Miranda* is “a constitutional decision of this Court” and “may not be in effect overruled by an Act of Congress.”<sup>52</sup> Although the Court in *Dickerson* “saved” the *Miranda* rule, it did not touch the exceptions, leaving the possibility that *Miranda* would be alive but neutered.<sup>53</sup> In doing so, the Court seems to have created a unique Fifth Amendment niche that can be viewed either as constitutionally unstable or as having “manufacture[d] immunity from criticism on legal grounds.”<sup>54</sup> Three Supreme Court decisions following *Dickerson* paint a more nuanced picture.

*Chavez v. Martinez*<sup>55</sup> was a civil case in which a person subjected to abusive interrogation sought damages for injuries to his civil rights. Leaving aside the reasoning of its fractured decision, a plurality of the Supreme Court held that the Fifth Amendment is an exclusionary rule and that “core” violations occur only when coerced statements are entered into evidence, not when the coercion occurs.<sup>56</sup> *Chavez* was important as a practical matter because it undermined the Ninth Circuit’s ruling (described below) that allowed civil suits for injuries resulting from interrogation “outside *Miranda*.”<sup>57</sup> The effect of *Chavez* was to eliminate a strong sanction against police departments that were deliberately flouting *Miranda* rules.<sup>58</sup>

*Chavez* was followed by two decisions in 2004 that split on the collateral use of statements obtained after *Miranda* violations. *United*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> A symposium issue of the Michigan Law Review was devoted to attempting to unravel the meaning of *Dickerson*. Symposium, *Miranda After Dickerson: The Future of Confession Law*, 99 MICH. L. REV. 879-1247 (2001).

<sup>54</sup> Standen, *supra* note 34, at 567.

<sup>55</sup> 538 U.S. 760 (2003).

<sup>56</sup> *Id.* at 770; see *United States v. Bin Laden*, 132 F. Supp. 2d 168, 181-82, 187 (S.D.N.Y. 2001); Marvin Zalman, *The Coming Paradigm Shift on Miranda: The Impact of Chavez v. Martinez*, 39 CRIM. L. BULL. 334 (2003) [hereinafter Zalman, *Paradigm Shift*]; Marvin Zalman, *Reading the Tea Leaves of Chavez v. Martinez: The Future of Miranda*, 40 CRIM. L. BULL. 299 (2004) [hereinafter Zalman, *Tea Leaves*].

<sup>57</sup> *Cal. Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1050 (9th Cir. 1999).

<sup>58</sup> The basis of a civil action against the police was not supported by the other circuits and is problematic if the privilege is viewed as an exclusionary rule, although three Justices deemed the Self-Incrimination Clause the basis of a cause of action for the infliction of “severe compulsion or extraordinary pressure” in order to gain a confession. 538 U.S. at 789 (Kennedy, J., dissenting, joined by Stevens and Ginsburg, JJ.). In any event, a majority in *Chavez* ruled that a violation of due process may be the basis of a cause of action. See Zalman, *Tea Leaves*, *supra* note 56, at 318-19.

*States v. Patane*<sup>59</sup> allowed a gun into evidence that came to the attention of an officer through brief questioning preceded by incomplete *Miranda* warnings. This decision confirmed the derivative “leads” collateral use exception of *Michigan v. Tucker*.<sup>60</sup> In *Missouri v. Seibert*,<sup>61</sup> to the contrary, the Court distinguished *Oregon v. Elstad*,<sup>62</sup> in which a Mirandized confession was held admissible under the cured statements exception after police had obtained an earlier admission without administering any warnings. Unlike *Elstad*, where the failure to administer warnings during the first questioning appeared to be inadvertent, the failure to read warnings in *Seibert* was part of a deliberate and carefully orchestrated two-step procedure. A woman, suspected of being involved in the arson of her mobile home by her teenaged son that led to the death of an occupant, was brought to a police station from the hospital where her son was recuperating at about 3:00 a.m.<sup>63</sup> The arresting officer was instructed not to read the *Miranda* warnings.<sup>64</sup> The interrogating officer questioned the unwarned Ms. Seibert for about a half-hour, using leading statements that indicated that she was involved in the arson with the intent of killing the youth.<sup>65</sup> After she made an admission, the officer allowed a fifteen minute break.<sup>66</sup> Thereafter, an interrogation session preceded by *Miranda* warnings began, and the officer confronted Ms. Seibert with her incriminating statements made in the previous session.<sup>67</sup> This mode of interrogation was taught to officers as an appropriate procedure by a proprietary training business.<sup>68</sup> By striking down the confession obtained by the “Missouri two-step” in *Seibert*, the Court has kept *Miranda* alive as a functioning rule that allows some meaningful judicial control over police interrogation practices.<sup>69</sup>

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<sup>59</sup> 542 U.S. 630 (2004).

<sup>60</sup> 417 U.S. 433 (1974).

<sup>61</sup> 542 U.S. 600 (2004).

<sup>62</sup> 470 U.S. 298, 313 (1985).

<sup>63</sup> *Seibert*, 542 U.S. at 604-05.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 605.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 609-11. Justice Souter’s opinion referred to the Police Law Institute, a proprietary school that provides training and instructional materials for police in Florida, Illinois, Missouri, and Ohio. The Police Law Institute, <http://www.policelawinstitute.org/plims/> (last visited May 7, 2007). Their police training businesses include Wicklander-Zulawski & Associates, <http://www.w-z.com/> (last visited May 7, 2007), and John E. Reid & Associates, [http://www.reid.com/training\\_programs/r\\_training.html](http://www.reid.com/training_programs/r_training.html) (last visited May 7, 2007).

<sup>69</sup> *Seibert*, 542 U.S. at 617 (confession obtained by a “question-first tactic” conducted by “[s]trategists dedicated to draining the substance out of *Miranda*” that “threatens to thwart

Whether this support of the *Miranda* rule will continue or whether it will be reduced only to an exhortatory exercise depends on Supreme Court decisions in the wake of *Seibert*.

### C. IMPACT AND COMPLIANCE RESEARCH

Professor Richard Leo began his empirical study of interrogation by referring to the “‘gap problem’—the gap between how law is written in the books and how it is actually practiced by legal actors in the social world.”<sup>70</sup> This abiding concern of legal realism and one of its successors, law and society scholarship, ought to be an important element in the calculations that are used in legal decision-making; one would think that legal impact studies would be common and that judges would use such knowledge in their decisions. In fact, however, the link between the empirical knowledge generated by legal impact studies and judicial decision-making is tenuous. This is in part because the effects of governmental policy-making or law-making cannot be known with the same precision as the effects, e.g., of modern medicines or engineering. In these more scientific endeavors, research and practice are tightly linked.<sup>71</sup> Public issues and even legal decisions may be driven by odd mixtures of knowledge, calculation, imagery, emotion, ideology, personality, and fortuitous events.<sup>72</sup>

In the appellate judicial sphere, “facts” are constructs that have been filtered through a trial process and can produce suspiciously altered realities.<sup>73</sup> Nevertheless, when the Supreme Court makes decisions, the Justices are surely aware of some likely effects of their decisions on society. However, this process is often a matter of guesswork in a sea of ambiguity. Justice Souter acknowledged as much in *Missouri v. Seibert* when he

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*Miranda*’s purpose of reducing the risk that a coerced confession would be admitted,” held inadmissible).

<sup>70</sup> Richard Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 266 (1996) [hereinafter Leo, *Interrogation Room*].

<sup>71</sup> This is not to disvalue the importance of policy analysis but only to assert that the role of empiricism in law and government is radically different than in scientific and technological endeavors, which are defined by and impossible in the absence of scientific theory and empirical research. “Policy analysis is as much an art and a craft as a science.” DAVID L. WEIMER & AIDAN R. VINING, *POLICY ANALYSIS: CONCEPTS AND PRACTICE*, FOURTH EDITION 37 (2005).

<sup>72</sup> A nation, after all, can take momentous action, such as shifting the wealth of different groups via economic legislation or going to war, based on confused, conflicting, and even flatly erroneous information. See WALTER LIPPMANN, *PUBLIC OPINION* 11-13 (Free Press, 1997) (1922).

<sup>73</sup> JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 14-36 (1950); George C. Thomas, III, *Stories About Miranda*, 102 MICH. L. REV. 1959, 1991-93 (2004).

opined that the Court had no statistics on the frequency of the *Miranda*-avoidance practices encountered in that case.<sup>74</sup> This lack of empirical knowledge did not stay the Court's decision, nor could it in this and other cases if the law is to function at all. Legal decision-making proceeds incrementally, one case at a time, and the empiricism that counts is the "facts" of the case, as interpreted by the deciding court.<sup>75</sup>

Despite the rough reality of legal policy-making, it remains important to attempt to gauge the impact of legal decisions, especially Supreme Court decisions, on society. "Impact research" is, therefore, an essential component of political science/judicial process scholarship, even if its "golden age" (1960-1975) has passed.<sup>76</sup> The impact of legal decisions involves four populations: the decision-maker (the court); the interpreting population (lower court judges, attorneys, legal scholars, and police legal advisors); the implementing population (police supervisors and officers); and the consumer population (suspects).<sup>77</sup> Impact studies of the *Miranda* doctrine have focused on the relationship between the Supreme Court and the police and have tended to be atheoretical.<sup>78</sup> A number of terms identify the breadth of this kind of research. The *total effect* of a Supreme Court's decision on society is such a broad concept as to complicate empirical study. *Impact* is taken to reflect the broad but measurable effects of decisions, while *compliance* implies a narrow focus on the extent to which a decision is followed or evaded by interpreting or implementing populations.<sup>79</sup>

Compliance involves two categories of responses by implementers: an *acceptance decision*, which is "the actor's psychological reaction to the decision," and a *behavior response*, or "what an actor actually does in response to a decision."<sup>80</sup> To the extent that a broad survey cannot plumb the depth of a respondent's feelings, conclusions about support for *Miranda*

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<sup>74</sup> *Seibert*, 542 U.S. at 609.

<sup>75</sup> See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 8-27 (1949). Standen asserts that the *Miranda* Court made empirical or predictive errors in believing that attorneys would be made part of the interrogation process, and that the "Court may also have made empirical mistakes in some of its post-*Miranda* cases." Standen, *supra* note 34, at 565.

<sup>76</sup> Canon, *supra* note 6, at 435. Canon discusses the first generation of *Miranda* studies in his essay. *Id.* The new wave of empirical studies, which began in 1996, is a significant chapter in court decision impact research, although it is less concerned with generating and testing political science theories and more focused on an atheoretical elucidation of the process. *Id.*

<sup>77</sup> *Id.* at 437.

<sup>78</sup> *Id.* at 456.

<sup>79</sup> *Id.* at 438-40; STEPHEN L. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES 27-42 (1970) [hereinafter WASBY, IMPACT].

<sup>80</sup> Canon, *supra* note 6, at 438.



ought to be triangulated with interview studies, such as the study conducted by Wasby in which small-town police and other officials were interviewed to gauge their receptiveness to recent Supreme Court criminal procedure decisions.<sup>81</sup> Similarly, observational studies of interrogation offer a baseline for comparison with the survey results.<sup>82</sup>

At least four overlapping, mid-level theories have been advanced to explain the causal mechanisms involved in compliance with or avoidance of court decisions.<sup>83</sup> Very few studies have applied *utility theory*, which explains compliance in terms of weighing the material and psychological costs and benefits of compliance.<sup>84</sup> Likewise, few studies have applied *legitimacy theory*, where a key explanatory variable in compliance is the degree to which the implementer believes the court's authority to render its decision is supported by the society's "political structure."<sup>85</sup> *Communications theories* attempt to relate compliance to the clarity of the Court's decision and the extent to which implementers know about the decision.<sup>86</sup> *Organizational theories* explore the relationships between compliance and the organizational goals of institutional implementers. These include analyses of organizational tension and inertia as compliance factors.<sup>87</sup>

This study is primarily concerned with policy questions rather than with impact theory. It is an impact study, however, in that it measures knowledge of legal cases, acceptance of *Miranda* and recent confessions decisions, and compliance with *Miranda* in the respondents' agencies. This study also explores policy issues that go beyond the specific question of compliance with Supreme Court decisions. The policy issue of false confessions, for example, involves legislation, administrative regulations, and state court decisions, such as those relating to videotaping interrogations. Were the primary goal of this Article theory testing,

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<sup>81</sup> STEPHEN L. WASBY, *SMALL TOWN POLICE AND THE SUPREME COURT: HEARING THE WORD* (1976) [hereinafter WASBY, *SMALL TOWN POLICE*].

<sup>82</sup> Cassell & Hayman, *supra* note 17; Leo, *Interrogation Room*, *supra* note 70.

<sup>83</sup> Canon, *supra* note 6, at 440-44.

<sup>84</sup> See, e.g., Don W. Brown & Robert V. Stover, *Understanding Compliance and Noncompliance With the Law: The Contributions of Utility Theory*, 56 SOC. SCI. Q. 363 (1975).

<sup>85</sup> See, e.g., THOMAS CARLYLE DALTON, *THE STATE POLITICS OF JUDICIAL AND CONGRESSIONAL REFORM* (1985).

<sup>86</sup> See, e.g., Stephen Wasby, *The Communication of the Supreme Court's Criminal Procedure Decisions: A Preliminary Mapping*, 18 VILL. L. REV. 1086 (1973).

<sup>87</sup> See, e.g., Lawrence Baum, *Implementation of Judicial Decisions: An Organizational Analysis*, 4 AM. POL. Q. 86 (1976); Charles A. Johnson, *Judicial Decisions and Organizational Change*, 14 LAW & SOC'Y REV. 27 (1979).

however, questions would focus more on knowledge of decisions and the states of mind of the respondents. Further, the use of mailed surveys alone may not generate the kind of data required to sustain a meaningful theoretical study. As noted in the introduction, *Miranda* doctrine has grown so complex and has been part of policing for such a long time that a theoretical study of *Miranda*'s impact should include its broad impact and the spiral of mutual influences between the police and the Court. The oft-repeated quotation in *Dickerson*, that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture,"<sup>88</sup> is a notable example of the broad influence of a case returning to influence a subsequent judicial decision. In sum, this study, although not designed to generate or test legal impact theory, is strengthened by considering the theoretical implications of impact studies, and in turn provides data that may be useful in advancing impact and compliance theories.

## II. PRIOR RESEARCH AND POLICY ISSUES

This section briefly explains the origin of the present study as an extension of recent survey research and describes five issues concerning the intersection of policing and confessions law. These issues are: knowledge held by the police about recent developments in *Miranda* law; interrogation "outside *Miranda*"; the role of police interrogation in generating false confessions; videotaping interrogations; and legal and administrative controls on interrogation practices.

### A. REACTIONS TO *MIRANDA*: RECENT RESEARCH

From the time of the *Miranda* decision, empirical studies have focused on compliance and attitudes toward the decision. Richard Leo's summarization of twelve "first generation" empirical studies of *Miranda* conducted between 1966 and 1973 led to five broad conclusions.<sup>89</sup> These studies demonstrated that (1) the immediate reaction to *Miranda* among varying police departments was inconsistent, but that soon all police departments complied with the letter of the *Miranda* warnings; (2) suspects frequently waived their *Miranda* rights; (3) once suspects waived, the police psychological interrogation methods criticized in *Miranda* continued to be employed; (4) suspects continued to confess and make incriminating

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<sup>88</sup> *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

<sup>89</sup> Richard Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000 (2001) [hereinafter, Leo, *Questioning the Relevance*].

statements during police interrogation; and (5) clearance and conviction rates were not adversely affected.<sup>90</sup>

After a two-decade hiatus, another round of *Miranda* studies was published. Leo divides them into quantitative studies of the impact of *Miranda* on confession and conviction rates and “those that qualitatively seek to assess *Miranda*’s real world impact on how police issue warnings and elicit waivers, whether and how they comply with or circumvent *Miranda*’s requirements, and *Miranda*’s effects on police interrogation methods and confessions.”<sup>91</sup> This qualitative research includes two important observational studies of interrogations in four police departments.<sup>92</sup> Studies of interrogation session transcripts have explored how police adapted to *Miranda*<sup>93</sup> and the dynamics of false confessions.<sup>94</sup> An additional, policy-oriented study by Charles Weisselberg surveyed prosecutors’ offices and police training institutions in California to understand better the dynamics of interrogation “outside *Miranda*.”<sup>95</sup> Reviewing these sources, Leo concludes:

First, police appear to issue and document *Miranda* warnings in virtually all cases. Second, police appear to have successfully “adapted” to the *Miranda* requirements. Thus, in practice, police have developed strategies that are intended to induce *Miranda* waivers. Third, police appear to elicit waivers from suspects in roughly 80% of their interrogations, though suspects with criminal records appear disproportionately likely to invoke their rights and terminate interrogation. Fourth, in some jurisdictions, police are systematically trained to violate *Miranda* by questioning “outside *Miranda*” (i.e., by continuing to question suspects who have invoked the right to counsel or the right to remain silent). Finally, some researchers have argued that *Miranda* eradicated the last vestiges of third degree interrogation present in the mid-1960s, increased the level of professionalism among interrogators, and raised public awareness of constitutional rights.<sup>96</sup>

A study of 211 randomly selected, published appellate cases by George Thomas confirms that police routinely give warnings, that suspects routinely waive their rights, and that police rarely use coercive tactics to get

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<sup>90</sup> *Id.* at 1001-05.

<sup>91</sup> *Id.* at 1006.

<sup>92</sup> Leo, *Interrogation Room*, *supra* note 70; Cassell & Hayman, *supra* note 17.

<sup>93</sup> Leo & White, *Adapting to Miranda*, *supra* note 12, at 433-50.

<sup>94</sup> Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997) [hereinafter Ofshe & Leo, *The Decision to Confess Falsely*].

<sup>95</sup> Weisselberg, *Saving Miranda*, *supra* note 3, at 132-40; Charles D. Weisselberg, *In the Stationhouse after Dickerson*, 99 MICH. L. REV. 1121, 1128-53 (2001) [hereinafter Weisselberg, *In the Stationhouse*].

<sup>96</sup> Leo, *Questioning the Relevance*, *supra* note 89, at 1009-10 (footnotes omitted).

waivers or to obtain confessions after a waiver is given.<sup>97</sup> Acknowledging that “facts” found in an appellate case can be a distortion of what happened in the stationhouse, Thomas gives one example from his sample where what was likely a coercive interrogation was whitewashed by the Florida Supreme Court.<sup>98</sup> As for interrogation “outside *Miranda*,” Thomas discovered six cases in which the police ignored the invocation of rights and the courts suppressed the statements and five in which questioning ceased.<sup>99</sup>

Thomas appears to miss the implications of this disturbing finding. Thomas’s sample of appellate cases found that exceptions and collateral uses where *Miranda* is violated are few in number: six cases in which the public safety exception was applied, two cases in which the *Harris v. New York*<sup>100</sup> impeachment rule was allowed, and three cases in which the *Oregon v. Elstad*<sup>101</sup> situation, a “cured” statement, was allowed.<sup>102</sup> Because these cases represented about 5% of his sample, Thomas concluded that these exceptions are not very significant. This interpretation is subject to several qualifications. The small percentage of cases in his sample, even if they reflect the universe of *Miranda* appeals, still translates into a large number of cases in which these collateral uses apply. Furthermore, these few cases suggest that in half the cases in which police have the *opportunity* to interrogate “outside *Miranda*,” they take it. Finally, the facts in *Missouri v. Seibert* demonstrate that proprietary police training establishments continue to promote methods that skirt the edges of *Miranda* aggressively.<sup>103</sup> Thus, the collateral use of statements that violate *Miranda* is indeed a significant issue.

According to Thomas, this research, when combined with the few studies on interrogation “outside *Miranda*,” false confessions, and videotaping of interrogation (discussed in subsequent sections), provides “somewhat sketchy, evidence . . . that the police have adapted very well to the *Miranda* regime.”<sup>104</sup> Even if these recent studies provide a fair approximation of how interrogation is typically conducted in most police departments, it would be foolish to suggest that they capture the entire

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<sup>97</sup> Thomas, III, *supra* note 73, at 1963.

<sup>98</sup> *Id.* at 1991-93.

<sup>99</sup> *Id.* at 1973-74.

<sup>100</sup> 401 U.S. 222 (1971).

<sup>101</sup> 470 U.S. 298 (1985).

<sup>102</sup> Thomas, III, *supra* note 73, at 1974-74, 1995-97.

<sup>103</sup> *Missouri v. Seibert*, 542 U.S. 600, 604-05 (2004).

<sup>104</sup> Thomas, III, *supra* note 73, at 1961.

reality, given the enormous fragmentation of criminal justice in America.<sup>105</sup> As Thomas notes, the major observational studies pinpointed practices in only four police departments in two localities in the United States, while his study of reported appellate court decisions provides a broad but possibly skewed sample.<sup>106</sup> Further, false confessions case studies<sup>107</sup> and surveys<sup>108</sup> demonstrate that something has gone seriously awry in a small proportion of cases. The *Miranda* studies conducted to date, including this survey, are instruments too blunt to ascertain the prevalence of significant but relatively rare events. The established existence of false confessions as a recurring reality, however, compels ethical leaders in criminal justice to explore this issue further.<sup>109</sup> These considerations lead us to assert that additional research probing the policy dimensions of *Miranda* law and interrogation practices are necessary. To this end, we have developed a survey based in part on one developed by Victoria Time and Brian Payne.<sup>110</sup>

Shortly after the decision in *Dickerson v. United States*,<sup>111</sup> Leo prematurely proclaimed the “end of history” for *Miranda* impact scholarship.<sup>112</sup> As noted in the previous section, *Dickerson* settled very little, and more recent cases have opened constitutional confessions law to further interpretation. Taking advantage of the impending decision in *Dickerson* as an opportunity for a natural experiment, Time and Payne explored the knowledge and attitudes of police chiefs about *Miranda* law and the practices of their agencies. They mailed a survey in the spring of 2000 to 182 police chiefs in Virginia, exploring their support for and

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<sup>105</sup> FRANCIS A. ALLEN, *THE HABITS OF LEGALITY: CRIMINAL JUSTICE AND THE RULE OF LAW* 58-60 (1996).

<sup>106</sup> Thomas, III, *supra* note 73, at 1963. The two observational studies referred to are Cassell & Hayman, *supra* note 17, and Leo, *Interrogation Room*, *supra* note 70.

<sup>107</sup> E.g., JOAN A. BARTHEL, *A DEATH IN CANAAN* (1976); additional case studies are listed *infra* note 137.

<sup>108</sup> E.g., Drizin & Leo, *supra* note 4; Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998) [hereinafter Leo & Ofshe, *The Consequences of False Confessions*].

<sup>109</sup> For a commentary that suggests that knowledge of false confessions should force rethinking of the constitutional basis of confessions law, see Samuel C. Rickless, *Commentary: Miranda, Dickerson and the Problem of Actual Innocence*, 19 CRIM. JUST. ETHICS 53 (2000).

<sup>110</sup> Brian K. Payne & Victoria M. Time, *Support for Miranda among Police Chiefs: A Qualitative Examination*, 25 AM. J. CRIM. JUST. 65 (2000) [hereinafter Payne & Time, *Support for Miranda*]; Victoria M. Time & Brian K. Payne, *Police Chiefs' Perceptions about Miranda: An Analysis of Survey Data*, 30 J. CRIM. JUST. 77 (2002) (our survey is modeled on the one developed in this study) [hereinafter, Time & Payne, *Chiefs' Perceptions*].

<sup>111</sup> 530 U.S. 428 (2000).

<sup>112</sup> Leo, *Questioning the Relevance*, *supra* note 89, at 1010.

perceptions of *Miranda*. The instrument consisted of fixed-choice and open-ended questions and was returned by ninety-seven chiefs (55% response rate), with seventy-five completing the open-ended questions (42.6% response rate).<sup>113</sup> In their first published article, Time and Payne examined the responses to the open-ended questions. Forty police chiefs of the seventy-five who responded to the open-ended questions “recommended keeping *Miranda* the same”; fourteen chiefs recommended abolishing the *Miranda* rule; nine noted ambiguity with the rule; and sixteen recommended narrowing the rule.<sup>114</sup> An interesting observation was that *Miranda* supporters were older and less well-educated than police chiefs who wished to abolish or modify the rule.<sup>115</sup>

In a subsequent publication evaluating fixed-choice questions, Virginia police chiefs generally accepted *Miranda*.<sup>116</sup> They “agreed” and “strongly agreed” with the fact that officers routinely read *Miranda* warnings (94.8% of those responding) and that officers received sufficient training to protect offenders’ *Miranda* rights (91.6%), but they did not believe that the warnings made it difficult to do their jobs (64.2%).<sup>117</sup> The Virginia chiefs indicated that *Miranda* warnings did not prevent “criminals” from confessing voluntarily (88.5%), although about half somewhat paradoxically believed that *Miranda* warnings hindered voluntary confessions (52.6%).<sup>118</sup> In accord with the qualitative results of the earlier study,<sup>119</sup> the analysis of the survey results indicated that “younger chiefs were . . . more likely to agree that *Miranda* hinders voluntary confessions.”<sup>120</sup> Chiefs who did not have college degrees and chiefs of smaller departments were more likely to agree that arresting officers must read offenders their rights in order to avoid dismissal of the case.<sup>121</sup> These findings suggest that chiefs who are more likely to have a sophisticated understanding of legal doctrines have a greater appreciation of the often contingent nature of law. An alternate interpretation is that younger and better educated chiefs may be more conservative than older and less educated chiefs.

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<sup>113</sup> Payne & Time, *Support for Miranda*, *supra* note 110; Time & Payne, *Chiefs’ Perceptions*, *supra* note 110.

<sup>114</sup> Payne & Time, *Support for Miranda*, *supra* note 110, at 67-68, 71-72.

<sup>115</sup> *Id.*

<sup>116</sup> Time & Payne, *Chiefs’ Perceptions*, *supra* note 110.

<sup>117</sup> *Id.* at 81 (questions 2, 3 and 12).

<sup>118</sup> *Id.* (questions 13 and 16).

<sup>119</sup> Payne & Time, *Support for Miranda*, *supra* note 110.

<sup>120</sup> Time & Payne, *Chiefs’ Perceptions*, *supra* note 110, at 82.

<sup>121</sup> *Id.*

The Time and Payne quantitative study provides an approach that is useful to elicit policy-oriented information concerning interrogation in a national sample, and provides a baseline of findings against which later studies can be measured. We modeled our survey in part on their instrument, replicating several questions for the sake of comparison. In addition, we fashioned questions about knowledge of *Chavez*,<sup>122</sup> which was decided in the year before our survey was administered, and about attitudes toward the decisions in *Patane*<sup>123</sup> and *Seibert*,<sup>124</sup> which were decided almost contemporaneously with the survey. Attitudes of police officials toward these decisions are useful markers of the acceptance of the Supreme Court's decisions, an important aspect of success in implementing law.

#### B. INTERROGATION "OUTSIDE *MIRANDA*"

Professor Paul Cassell and Bret Hayman's observational study in Salt Lake City found no evidence of police deliberately flouting *Miranda* to obtain impeaching statements, thus weakening the argument of "prestigious academic commentators" who speculated that post-*Miranda* cases opened the door to such practices.<sup>125</sup> Yet, two years later, a study discovered that such a practice occurred with some regularity in California police departments and that legal trainers advised police to strategically ignore the invocation of silence or counsel on the grounds that the Supreme Court had dissolved the constitutional stature of *Miranda* warnings.<sup>126</sup> Case law shows that such practices were not confined to California.<sup>127</sup> As for the frequency of the practice, Leo's observational study of three Bay Area police departments reported that such behavior occurred in seven cases (4% of the cases observed and 18% of the cases in which the suspect invoked constitutional rights).<sup>128</sup>

Subsequent to Weisselberg's 1998 article,<sup>129</sup> in *California Attorneys for Criminal Justice v. Butts*,<sup>130</sup> the Ninth Circuit ruled that the deliberate flouting of *Miranda*—interrogation "outside *Miranda*"—made police officers civilly liable under 42 U.S.C. § 1983. This ruling, when combined

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<sup>122</sup> *Chavez v. Martinez*, 538 U.S. 760 (2003).

<sup>123</sup> 542 U.S. 630 (2004).

<sup>124</sup> 542 U.S. 600 (2004).

<sup>125</sup> Cassell & Hayman, *supra* note 17, at 861.

<sup>126</sup> Weisselberg, *Saving Miranda*, *supra* note 3, at 133-36.

<sup>127</sup> *Id.* at 132-40, 160-62, 189-92.

<sup>128</sup> Leo, *Interrogation Room*, *supra* note 70, at 276.

<sup>129</sup> Weisselberg, *Saving Miranda*, *supra* note 3.

<sup>130</sup> *Cal. Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1045-50 (9th Cir. 1999).

with the Supreme Court holding that *Miranda* is a constitutional rule,<sup>131</sup> appeared to undermine interrogation “outside *Miranda*.” In a follow-up study of the impact of the risk of lawsuits, Weisselberg found that the California District Attorneys Association and the California Peace Officers’ Association had discouraged the practice,<sup>132</sup> and that police training materials in California withdrew support for interrogation “outside *Miranda*” with varying degrees of intensity in different departments.<sup>133</sup> Weisselberg concluded that the threat of litigation discouraged the deliberate violation of *Miranda* rules, but he was unsure whether interrogation “outside *Miranda*” would actually cease.<sup>134</sup> More recently, however, the Supreme Court undermined the Ninth Circuit precedent of *California Attorneys*<sup>135</sup> in *Chavez v. Martinez*.<sup>136</sup> *Chavez* appears to eliminate civil liability for flouting *Miranda*, making interrogation “outside *Miranda*” a continuing policy concern.

### C. FALSE CONFESSIONS AND PSYCHOLOGICAL INTERROGATION PRACTICES

The “DNA revolution” in criminal investigation has raised public concern about wrongful convictions and false confessions. The 340 “official exonerations” and the approximately 300 “mass exonerations” identified between 1989 and 2003 may be the tip of an iceberg of several thousand wrongful convictions each year.<sup>137</sup> A review of wrongful conviction research shows that false confessions have occurred in 14% to 25% of the cases in these studies.<sup>138</sup> Numerous case studies have elucidated the process by which entirely innocent persons confess to crimes they have not committed.<sup>139</sup> American and British studies have dissected the methods

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<sup>131</sup> See *Dickerson v. United States*, 530 U.S. 428, 438 (2000).

<sup>132</sup> Weisselberg, *In the Stationhouse*, *supra* note 95, at 1142-43.

<sup>133</sup> *Id.* at 1143-54.

<sup>134</sup> *Id.* at 1162.

<sup>135</sup> 195 F.3d 1039.

<sup>136</sup> 538 U.S. 760 (2003).

<sup>137</sup> Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 531-40 (2005); Robert J. Ramsey & James Frank, *Wrongful Conviction: Perspectives of Criminal Justice Professionals Regarding the Frequency of Wrongful Conviction and the Extent of System Errors*, in CRIME & DELINQUENCY (forthcoming 2007); Marvin Zalman, Brad Smith & Angie Kazaleh Kiger, *Officials’ Estimates of the Incidence of “Actual Innocence” Convictions*, JUST. Q. (forthcoming 2008).

<sup>138</sup> Drizin & Leo, *supra* note 4, at 906.

<sup>139</sup> See BARTHEL, *supra* note 107; EDWIN M. BORCHARD, CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE (1932); GERRY CONLON, IN THE NAME OF THE FATHER (Plume 1993) (1990); MARGARET EDDIS, AN EXPENDABLE MAN: THE NEAR-EXECUTION OF EARL WASHINGTON JR. (2003); JIM FISHER, FALL GUYS: FALSE CONFESSIONS



by which false confessions are obtained.<sup>140</sup> Two recent studies, applying conservative measures, have identified up to 125 proven false confessions.<sup>141</sup> Rob Warden, the Executive Director of the Center on Wrongful Convictions at Northwestern University School of Law, identified false confessions as a significant factor in eleven out of eighteen recent Illinois exonerations in capital cases.<sup>142</sup> The legality of police deception during interrogation is being questioned.<sup>143</sup> Several of these studies point to excesses in “psychological” interrogations and reliance on the “Reid technique,” under which a large number of police investigators have been trained, as partly responsible for false confessions.<sup>144</sup> Our research explores these issues.

#### D. REFORMING INTERROGATION PRACTICES: SPOTLIGHT ON VIDEOTAPING

The concern with false confessions has generated reform proposals, the most prominent of which is the videotaping of interrogation sessions.<sup>145</sup>

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AND THE POLITICS OF MURDER (1996); WILLARD J. LASSERS, *SCAPEGOAT JUSTICE: LLOYD MILLER AND THE FAILURE OF THE AMERICAN LEGAL SYSTEM* (1973); MARA LEVERITT, *DEVIL'S KNOT: THE TRUE STORY OF THE WEST MEMPHIS THREE* (2002); PAUL MONES, *STALKING JUSTICE* (1995); SELWYN RAAB, *JUSTICE IN THE BACKROOM* (1967); MICHAEL L. RADELET, HUGO ADAM BEDAU & CONSTANCE E. PUTNAM, *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* (1992); LAWRENCE WRIGHT, *REMEMBERING SATAN* (1994).

<sup>140</sup> See GISLI GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATION AND CONFESSIONS: A HANDBOOK* (2003); Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 94.

<sup>141</sup> Drizin and Leo, *supra* note 4, at 929-30 (noting 125 proven false confessions); see also Leo & Ofshe, *The Consequences of False Confession*, *supra* note 108, at 444-49 (reporting 60 proven, highly probable, and probable false confessions). Leo & Ofshe's results were challenged in part by then Professor (now judge) Paul Cassell. *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523 (1999). Although Cassell's tendentiousness has tended to cloud the accuracy of his scholarship, see, e.g., George C. Thomas, III, *Telling Half-Truths*, LEGAL TIMES, Aug. 12, 1996, at 20, there is some evidence that false confessions occur primarily among teenage and emotionally and mentally impaired suspects. See J. P. Blair, *A Test of the Unusual False Confession Perspective: Using Cases of Proven False Confessions*, 41 CRIM. L. BULL. 127 (2005).

<sup>142</sup> Rob Warden, *Illinois Death Penalty Reform: How it Happened, What it Promises*, 95 J. CRIM. L. & CRIMINOLOGY 381, 382-83 (2005).

<sup>143</sup> Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791 (2006).

<sup>144</sup> See, e.g., FRED. E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, *CRIMINAL INTERROGATION AND CONFESSIONS* (Aspen Publishers 4th ed. 2001) (1962).

<sup>145</sup> See DAVID M. BUCKLEY & BRIAN C. JAYNE, *ELECTRONIC RECORDING OF INTERROGATIONS* (2005) (approves of videotaping and discusses physical aspects, interrogator conduct, special situations, and detectives' testimony); Roberto Iraola, *The*

Both conservatives and liberals have supported this relatively popular reform.<sup>146</sup> A 1993 Department of Justice report indicated that at least one-third of all of the police departments in the United States were taping parts of interrogations.<sup>147</sup> More recently, Thomas Sullivan surveyed 238 law enforcement agencies of all sizes and types that reported audio- and videotaping interrogations and confessions and generally found the practice to be popular.<sup>148</sup> At least six states and the District of Columbia have ruled, by statute or court decision, on the electronic recording of interrogations or confessions and either require recording for the investigations of all or some crimes or allow cautionary instructions where interrogation is not preserved.<sup>149</sup> Given the extent to which this reform has expanded,

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*Electronic Recording of Criminal Interrogations*, 40 U. RICH. L. REV. 463 (2006) (reviewing recent state cases concerning videotaping); G. Daniel Lassiter et al., *Videotaped Confessions: Panacea or Pandora's Box?*, 28 LAW & POL'Y 192, 193-94 (2006) (angle and positioning of videotaping confession can influence judgments of voluntariness); Jessica Silbey, *Videotaped Confessions and the Genre of Documentary*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 789 (2006) (raising caveats about the reliability of videotapes as representations of reality).

<sup>146</sup> Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—And from Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497, 553-56 (1998) (“conservative”); Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois' Problem of False Confessions*, 32 LOYOLA U. CHI. L.J. 337 (2001) (“liberal”).

<sup>147</sup> Drizin & Colgan, *supra* note 146, at 339-40 (citing William A. Geller, *Videotaping Interrogations and Confessions*, in NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, RESEARCH IN BRIEF (Mar. 1993)).

<sup>148</sup> THOMAS P. SULLIVAN, CTR. ON WRONGFUL CONVICTIONS, NORTHWESTERN UNIV. SCH. OF LAW, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS (2004), available at <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/SullivanReport.pdf> [hereinafter SULLIVAN, POLICE EXPERIENCES]; see Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, 88 JUDICATURE 132 (2005) [hereinafter Sullivan, *Custodial Interrogations*]; Thomas P. Sullivan, *Recent Developments: Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1129-30 (2005) [hereinafter Sullivan, *Recent Developments*].

<sup>149</sup> Alaska requires the electronic recording of custodial interrogation as a matter of state due process. *Stephen v. State*, 711 P.2d 1156 (Alaska 1985). The District of Columbia requires the electronic recording of interrogations of persons suspected of committing crimes of violence that occur “in Metropolitan Police Department interview rooms equipped with electronic recording equipment” in their entirety; police may record interrogations occurring in other places, and any violations raise the rebuttable presumption that a resulting admission is involuntary. D.C. CODE § 5-116.01-116.03 (2006). Illinois requires the electronic recording of custodial interrogations in the investigation of all homicide crimes and provides for a number of exceptions. 20 ILL. COMP. STAT. 3930/7.2 (2006). Maine requires law enforcement agencies to adopt written policies with regard to “[d]igital, electronic, audio, video or other recording of law enforcement interviews of suspects in serious crimes and the preservation of investigative notes and records in such cases.” ME. REV. STAT. ANN. tit. 25 § 2803-B(1)(K) (2006). Massachusetts allows a defendant to request a cautionary

knowledge about attitudes of police officials is important for policy development.

#### E. LEGAL AND ADMINISTRATIVE CONTROLS ON POLICE INTERROGATION

From the earliest post-*Miranda* surveys to recent studies, questions about the impact of *Miranda* on interrogation practices have focused on the effect of the *Miranda* exclusionary rule. Unlike Fourth Amendment arrest and search and seizure practices in which civil lawsuits play a role as control mechanisms, civil lawsuits for *Miranda* violations are virtually unknown.<sup>150</sup> Indeed, nearly all courts that have heard the issue have concluded that no cause of action existed.<sup>151</sup> Any abuses occurring during

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instruction from the trial judge in a case where “the prosecution introduces evidence of a defendant’s confession or statement that is the product of a custodial interrogation or an interrogation conducted at a place of detention” and where “interrogating officers have chosen not to preserve an accurate and complete recording of the interrogation.” *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533 (Mass. 2004). Minnesota mandates “a recording requirement for all custodial interrogations” under the supervisory powers of its Supreme Court. *State v. Scales*, 518 N.W.2d 587 (Minn. 1994). Texas requires the electronic recording of a defendant’s voluntary statements in order for these statements to be admissible, but does not require the recording of entire interrogations; furthermore, a “person who swears falsely to facts” that “if true, would render the statement admissible under this article is presumed to have acted with intent to deceive and with knowledge of the statement’s meaning for the purpose of prosecution for aggravated perjury” and is not “eligible for probation.” TEX. CODE CRIM. PROC. ANN. art. 38.22(3)(4) (Vernon 2005). *Commonwealth v. DiGiambattista*, 813 N.E. 2d at 530, identified appellate opinions in Colorado, Connecticut, Hawaii, Indiana, Michigan, Mississippi, Tennessee, and Utah that, although

reluctant to articulate a taping requirement as a matter of State constitutional law, have acknowledged that recording of interrogations would act as a deterrent to police misconduct, reduce the number and length of contested motions to suppress, allow for more accurate resolution of the issues raised in motions to suppress, and at trial on the merits, provide the fact finder a complete version of precisely what the defendant did (or did not) say in any statement or confession.

*See also* *United States v. Thornton*, 177 F. Supp. 2d 625 (E.D. Mich. 2001) (The court noted, in dictum, that several jurisdictions videotape interrogations and that in the instant case “neither the interrogation nor confession were audio or video taped. While electronic recording is not a constitutional requirement, there is a ‘heavy burden’ on the government to show a suspect’s waiver of rights was knowing and intelligent. . . . It certainly harms the prosecution in a close case when the court cannot evaluate the actual confession. The Court recommends that the DEA electronically record future interrogations and confessions so a reviewing court can fully evaluate whether a confession violates Fifth or Fourteenth Amendment.”).

<sup>150</sup> Zalman, *Paradigm Shift*, *supra* note 56, at 337.

<sup>151</sup> *See, e.g., Jones v. Cannon*, 174 F.3d 1271, 1291 (11th Cir. 1999); *Deshawn E. by Charlotte E. v. Safir*, 156 F.3d 340 (2d Cir. 1998); *Riley v. Dorton*, 115 F.3d 1159, 1165 (4th

interrogation have been treated as non-violations of the privilege against self-incrimination, which was deemed to operate as an exclusionary rule rather than as a rule that also prohibits compulsion.<sup>152</sup> The sole exception arose in the Ninth Circuit, which has held in multiple cases that confessions obtained by duress, even if not admitted into evidence, form the basis of federal civil rights claims.<sup>153</sup> As noted in Section II.B above, however, the general availability of civil lawsuits as a method of controlling egregious interrogation practices under self-incrimination grounds has been eliminated by *Chavez v. Martinez*.<sup>154</sup> Any such claim is limited to a facts and circumstances, substantive due process, “shocks the conscience” test.<sup>155</sup> Although the question of controlling violations of *Miranda* during interrogation by means of lawsuits or internal disciplinary sanctions is not as high on the public agenda as the other issues discussed in this Article, it raises significant policy questions and is explored in our research.

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Cir. 1997) (en banc); *Mahan v. Plymouth County House of Corr.*, 64 F.3d 14, 17 (1st Cir. 1995); *Giuffre v. Bissell*, 31 F.3d 1241, 1255-57 (3d Cir. 1994); *Mahoney v. Kesery*, 976 F.2d 1054, 1061-62 (7th Cir. 1992); *Warren v. City of Lincoln*, 864 F.2d 1436, 1442 (8th Cir. 1989) (en banc); *Davis v. City of Charleston*, 827 F.2d 317, 322 (8th Cir. 1987); *Bennett v. Passic*, 545 F.2d 1260, 1263 (10th Cir. 1976). *But see* *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992) (en banc).

<sup>152</sup> Steven D. Clymer, *Are Police Free to Disregard Miranda?* 112 YALE L.J. 447, 488 (2002).

<sup>153</sup> *Martinez v. City of Oxnard*, 270 F.3d 852 (9th Cir. 2001); *Cal. Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999); *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992) (en banc).

<sup>154</sup> 538 U.S. 760, 766-67 (2003) (Thomas, J., plurality opinion). *Chavez* was a complex decision in which the court rendered multiple opinions as to whether an abusive interrogation that yielded no confession violated the self-incrimination clause. The Justices in the plurality, Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas, held that even torture is not actionable under the privilege against self-incrimination, which is deemed to be only an exclusionary rule. *Id.* (Thomas, J., plurality opinion). Justices Souter and Breyer disagreed with Thomas' reasoning, but agreed that in this case no claim for violation of the privilege of self-incrimination existed. *Id.* at 778-79 (Souter, J., writing separately, joined by Breyer, J.). Three dissenters, in an opinion by Justice Kennedy, joined by Justices Stevens and Ginsburg, found that the privilege against self-incrimination is violated by the use of “severe compulsion or extraordinary pressure” during interrogation even if no confession is sought to be admitted into evidence. *Id.* at 789 (Kennedy, J., dissenting).

<sup>155</sup> *Id.* at 779-80 (Souter, J., in an opinion for the Court). Various opinions of the majority of justices who remanded on the due process question leaned toward a finding that the interrogation violated Martinez's due process rights. *See* Zalman, *Paradigm Shift*, *supra* note 56, at 349-50.

## III. METHODOLOGY

## A. SAMPLE AND SURVEY INSTRUMENT

A questionnaire (see Appendix) was sent to all municipal police departments in cities or municipal areas with populations greater than 150,000 persons according to the census of state and local law enforcement agencies.<sup>156</sup> Sheriffs' departments and state police agencies were excluded, yielding a universe of 144 municipal police departments. The survey was administered in the summer of 2004, about one year after *Chavez* was decided and shortly after *Seibert* and *Patane* were announced.<sup>157</sup> Our questionnaire was a modified version of one developed by Time and Payne, which they administered to police chiefs in Virginia.<sup>158</sup> We replicated several questions.<sup>159</sup>

We employed methods outlined by Dillman to maximize the response rate.<sup>160</sup> Respondents were given the option of declining to participate. Of the 144 surveys mailed out, 99 were returned completed (response rate of 68.75%); 20 were returned uncompleted (refusal rate of 13.88%), and 25 ultimately did not respond (non-response rate of 17.36%). The 69% response rate compares most favorably with other studies of police agencies.<sup>161</sup>

The introductory letter accompanying each survey was addressed to the chief administrator of each department (chief, commissioner). We assumed that surveys sent to large departments were likely to be filled out by an officer to whom the task was delegated. We therefore asked for the title of the person completing the survey.<sup>162</sup> Our surmise was correct. Only thirteen surveys were completed by chiefs. Forty-four were completed by high-level officials (such as assistant chief); four by police legal advisors; twenty-five by lieutenants; ten by sergeants; and three by police officers. The responders' ranks immediately raise questions about the interpretation

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<sup>156</sup> U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES (CSLLEA), 2000 (2003).

<sup>157</sup> *Chavez*, 538 U.S. 760 (2003), was decided on May 27, 2003; *Missouri v. Seibert*, 542 U.S. 600 (2004), and *United States v. Patane*, 542 U.S. 630 (2004), were decided on June 28, 2004.

<sup>158</sup> Time & Payne, *Chiefs' Perceptions*, *supra* note 110.

<sup>159</sup> The replicated questions (numbers 1-3, 5-6, and 9-10) are identified in the Appendix with the question found in Time & Payne, *Chiefs' Perceptions*, *supra* note 110.

<sup>160</sup> DON. M. DILLMAN, MAIL AND INTERNET SURVEYS: THE TAILORED DESIGN METHOD (2d ed. 2000).

<sup>161</sup> Time and Payne report "a respectable response rate of 55 percent." Time & Payne, *Chiefs' Perceptions*, *supra* note 110, at 79.

<sup>162</sup> See Appendix, Question 37.

of our results. We cannot, for example, use responses to classify “types” of chiefs, as was done in the qualitative analysis in Payne and Time.<sup>163</sup> As discussed below, attitudinal questions may reflect the personal views of the actual responders. On the other hand, questions about actual practices can be taken to reflect the official understanding of departmental practices. Our confidence in this assertion is bolstered by the fact that sixty-one of ninety-nine responders were chiefs, high-ranking officials, or legal advisors, and that in the smaller departments within our sample, lieutenants or sergeants are likely to be administrative officers with high responsibilities and access to the chief. Confidence in the quality of the responses may also be derived from the high educational attainment of the survey’s responders: eighty-three had at least a bachelor’s degree and thirteen of the remaining fourteen respondents had associates’ degrees.<sup>164</sup>

Ninety-six respondents provided their race or ethnicity: seven African American (7.3%), seventy-seven White (80.2%), eight Hispanic/Latino (8.3%), and four Other (4.2%). Eighty-nine respondents were male (91.8%), and eight (8.2%) were female; three did not respond.

Our study suffers from several well-known limitations of survey research. Respondents must be willing and competent to answer questions.<sup>165</sup> We believe that the high response rate (68.75%) and the opportunity to refuse to participate (13.88%) resolved and illuminated the willingness issue. We anticipated the competence issue by asking for the rank of the respondent. The large number of respondents who were chiefs (13), high-level officials (44), and police legal advisors (4) indicates that two-thirds of the surveys were completed by executive level personnel. Another twenty-five were completed by lieutenants. We assume that the lieutenants, sergeants (10), and police officers (3) who responded were in staff positions and that their views reflected the practices of their agencies. The fact that one-third of the respondents are not unambiguously police executives raises validity questions. However, police lieutenants have managerial responsibilities, and, in many police departments, they may be

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<sup>163</sup> Payne & Time, *Support for Miranda*, *supra* note 110.

<sup>164</sup> Five respondents had a law and a graduate degree; four had a law degree; twenty-eight had a graduate degree; twelve had some graduate work; thirty-four had a bachelor’s degree; thirteen had an associate’s degree or some college work; one had a high school degree; and three did not respond. The educational level in this national sample of large police departments is higher than that reported for the Virginia chiefs by Time & Payne, *Chiefs’ Perceptions*, *supra* note 110, at 80 tbl.1 (reporting that sixteen respondents had a graduate degree; twelve had some graduate work; seventeen had a bachelor’s degree; forty-two had some college work; and eight had a high school degree). For example, 38.1% of the national sample had graduate or law degrees compared to 16.8% of the Virginia chiefs. *Id.*

<sup>165</sup> See EARL BABBIE, *THE BASICS OF SOCIAL RESEARCH* 255-57 (3d ed. 2005) (1999).

executive-level officers. Furthermore, the respondents' high level of education encourages us in our assumption that they carefully and competently conveyed information about their departments.

Fixed survey questions have the added limitations of not allowing respondents to provide context and nuance, of generating biased responses, of not correcting misunderstood questions, and of being superficial in capturing the complex reality of a process like interrogation.<sup>166</sup> We agree that such limits exist and do not disagree with a respondent who wrote, "the answers are a little simplistic for a subject that is so complex."<sup>167</sup> This constraint is why triangulation of different research methods (observational, interview, survey) is important. In defense of our method of gathering data on the impact of confessions law on police agencies, "surveys are a useful and inexpensive method of obtaining widespread geographical responses about acceptance decisions and behavioral responses. . . . [T]hey can do much to enhance our knowledge of decisional impacts."<sup>168</sup>

## B. RESEARCH ISSUES

The questions relating to the five areas explored in this Article are not entirely contiguous in the survey instrument.

(1) The extent to which *Miranda* is followed in practice, opinions about *Miranda*, and knowledge about recent Supreme Court confessions decisions.<sup>169</sup> The "law in the books" regarding police practices is put into effect, modified, or subverted by police officers who have substantial discretion.<sup>170</sup> An important factor that may mediate compliance with legal rules is the police chief's attitude.<sup>171</sup> Attitudes of administrators cannot be separated from their knowledge. A cluster of questions inquired into the attitudes and knowledge of the respondents and the practices in their

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<sup>166</sup> *Id.* at 285; see also ROYCE A. SINGLETON, JR., BRUCE C. STRAITS & MARGARET MILLER STRAITS, *APPROACHES TO SOCIAL RESEARCH* 254-65 (2d ed. 1993) (1988).

<sup>167</sup> Respondent "I." Only nine respondents of the ninety-nine who completed surveys offered written comments. We have designated them by letter from "A" to "I."

<sup>168</sup> Canon, *supra* note 6, at 445-46.

<sup>169</sup> See *infra* Appendix, Questions 1-3, 5-6, 9-10, 12-13, 14, 21, 25-26.

<sup>170</sup> JEANINE BELL, *POLICING HATRED: LAW ENFORCEMENT, CIVIL RIGHTS, AND HATE CRIME* 48-83 (2002); Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 *YALE L.J.* 543, 552-54 (1960).

<sup>171</sup> See WILLIAM BRATTON WITH PETER KNOBLER, *TURNAROUND* 242-44 (1998); Bradley C. Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels: The Case of the Exclusionary Rule*, 5 *AM. POL. Q.* 57 (1977) [hereinafter Canon, *Testing the Effectiveness*].

departments. In this section, we compare the responses of our national sample to that of police chiefs in Virginia.<sup>172</sup>

(2) Interrogation “outside *Miranda*” and methods of interrogation designed to minimize the effect of *Miranda* warnings.<sup>173</sup> Interrogation “outside *Miranda*” is a contentious issue. A study of published appellate cases downplays its significance,<sup>174</sup> although *Missouri v. Seibert*<sup>175</sup> offers some evidence that it may be prevalent. Our survey provides a timely source of information on the national scope of the practice and whether it is a regional or a national practice.

(3) Knowledge about false confessions and practices that might encourage false confessions.<sup>176</sup> Concerns with actual innocence and false confessions have become high priority issues in legal and criminal justice scholarship.<sup>177</sup> The sensitivity of police officials to these issues is an important mediating factor in estimating whether police departments will respond with reform efforts.

(4) Electronic recording of interrogations and confessions.<sup>178</sup> The videotaping of full interrogation sessions is an issue on the action agenda of many police departments.<sup>179</sup> A national survey explores in detail the practices of departments that already audio- or videotape interrogations or confessions.<sup>180</sup> The present survey adds valuable data by indicating what proportion of large police departments across the nation utilize these methods.

(5) Controls on interrogation practices, including lawsuits, department discipline and court-ordered injunctions.<sup>181</sup> There is very little national

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<sup>172</sup> Time & Payne, *Chiefs' Perceptions*, *supra* note 110.

<sup>173</sup> See *infra* Appendix, Questions: 4, 15, 19-20, 22-24, 27-30.

<sup>174</sup> Thomas, III, *supra* note 73, at 1998.

<sup>175</sup> 542 U.S. 600 (2004).

<sup>176</sup> See *infra* Appendix, Questions: 11, 17-18, 33.

<sup>177</sup> E.g., Symposium, *Innocence in Capital Sentencing*, 95 J. CRIM. L. & CRIMINOLOGY 371-651 (2005); Symposium, *No Longer “An Unreal Dream”: Wrongful Convictions After the DNA Revolution*, 41 CRIM. L. BULL. 109-94 (2005); *Special Issue on Wrongful Conviction*, 88 JUDICATURE 67-121 (2003).

<sup>178</sup> See *infra* Appendix, Questions 7-8, 35-36.

<sup>179</sup> See, e.g., Noah Schaffer, *Legacy of Supreme Judicial Court's Decision about Confessions to Police That Are Not Tape-Recorded*, MASS. LAWYERS WEEKLY, Apr. 2, 2007 (Lexis news library); Bob Gardinier, *Police to Get Video Cameras; \$50,000 Grant Will Help Four Departments Record Questioning of Suspects*, TIMES UNION (Albany, New York), Mar. 23, 2007; Adam Liptak, *Relying on the Notepad in the Electronic Age*, N.Y. TIMES, Feb. 12, 2007 (noting that “[m]ore than 500 police departments in all 50 states now make electronic recordings of at least some interrogations, often videotaping them”).

<sup>180</sup> Sullivan, *Custodial Interrogations*, *supra* note 148.

<sup>181</sup> See *infra* Appendix, Questions 16, 31-32, 34.



information on civil liability and internal sanctioning and controls in regard to interrogation practices. This survey provides baseline data that can be helpful in fostering national standards.

These issue areas are not entirely distinct. Thus, the kinds of practices involved in interrogating “outside *Miranda*” may be similar to the kinds of aggressive questioning associated with false confessions, and the issue of videotaping interrogations cannot be divorced from the underlying concern with false confessions. Knowledge and attitudes about confessions law may have an influence on the four other issue clusters and may be positively related to a department’s mechanisms for internal sanctioning. Although readers may find the issue-by-issue approach in the following sections somewhat tedious, all of the questions relate in one way or another to overarching concerns about the effectiveness of law as a mode of controlling illegal or unconstitutional government behavior.<sup>182</sup>

#### IV. RESULTS AND DISCUSSIONS

##### A. ATTITUDES AND PRACTICES CONCERNING *MIRANDA*

We begin with the bottom line question: should *Miranda* be abolished?<sup>183</sup> There is a large percentage difference between the responses of the sample of Virginia’s chiefs and the respondents representing the largest police departments in the nation. Over two-fifths of Virginia’s chiefs support (agree and strongly agree) eliminating *Miranda*, compared with only 12.4% of the national respondents—a 30% difference. Whether opposition to *Miranda* is the result of a chief’s ideological position or frustration with the impact of *Miranda* on interrogation in practice,<sup>184</sup> it is

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<sup>182</sup> The discussion of results in Section IV proceeds section by section and question by question, in accordance with the conventions of writing in social scientific journals. However, much of the text does not simply restate the information found in the tables with analysis left to the conclusion, but adheres to the freer conventions of legal discourse, offers comments, and even speculates about the results.

<sup>183</sup> Question 12 (Table 1) was modified from that used by Time & Payne, *Chiefs’ Perceptions*, *supra* note 110, at 81 tbl.2 Question 6, because their question was geared to the impending *Dickerson* decision. As in the Time & Payne study, we ignore missing data in reporting the results of Likert-type questions. See Time & Payne, *Chiefs’ Perceptions*, *supra* note 110, at 81 tbl.2 (number (n) of responses to questions in Table 2 vary, missing data not reported).

<sup>184</sup> Time and Payne found significant relationships between experience with *Miranda* measured by cases “thrown out as a result of *Miranda*” and positive answers to the following statements: “the Courts are too cautious with regard to interpretations of *Miranda*”; “too many get off easy as a result of the *Miranda* warnings”; “*Miranda* is useful in principle but not in practice”; “*Miranda* makes it difficult for officers to do their jobs”; “*Miranda* hinders voluntary confessions”; and “prosecutors have a hard time prosecuting *cases* when offenders

clear that respondents administering larger departments across the nation are far more comfortable with *Miranda* and, reflecting Chief Justice Burger's "accommodation" statement in *Rhode Island v. Innis*,<sup>185</sup> have learned to coexist with *Miranda*. This large degree of acceptance, compared to the degree of acceptance of the Virginia police chiefs, suggests that different cultures of policing exist, which may be a function of departmental size or of region. It may also be a reflection of the higher reported educational level of the national respondents compared to the Virginia police chiefs as well as potential unmeasured differences in the experiential backgrounds between the two samples.

The similar proportion of national and Virginia police executives (about 10% in each study) who strongly disagree with abolition suggests that a small proportion of police officials in departments of all sizes are strongly committed to the values of the original vision of *Miranda*, which contemplated real changes in the behavior of police officers conducting interrogations in the direction of providing greater constitutional protections to suspects.<sup>186</sup> The larger proportion in the national sample that only disagrees with dismantling *Miranda* (77.3%) suggests a more pragmatic and less ideological opposition to that ruling. Nevertheless, the responses in Time and Payne,<sup>187</sup> which may reflect responses in smaller police departments across the nation or may just reflect responses in Virginia, suggest that there is a reservoir of wariness about *Miranda*, which may be used to justify such oppositional techniques as interrogation "outside *Miranda*." Only nine respondents submitted written comments in this study, and one included a passionate dissent to *Miranda*: "The criminal justice system should be concerned with seeking the truth. If an officer is acting in good faith, evidence obtained should not be excluded. Read 'Guilty: The collapse of criminal justice' [sic] by Judge Harold Rothwax."<sup>188</sup> As the data in Table 1 show, however, this opinion is a

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exercise their rights to remain silent." Time & Payne, *Chiefs' Perceptions*, *supra* note 110, at 82-83. In contrast, there was a non-significant relation between a negative experience with *Miranda* and positive answers to the statement "the Court should overturn the *Miranda* warnings once and for all." *Id.* These responses suggest that a fully comprehensive study of the impact of *Miranda* in practice should combine observations with a survey and interviews of the detectives who conduct interrogations and their supervisors.

<sup>185</sup> "The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda*, disparage it, nor extend it at this late date." *Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring).

<sup>186</sup> Weisselberg, *Saving Miranda*, *supra* note 3, at 117-25.

<sup>187</sup> Time & Payne, *Chiefs' Perceptions*, *supra* note 110 at 81, tbl 2.

<sup>188</sup> Respondent "C" (citing HAROLD J. ROTHWAX, *GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE* (1997)).

distinct minority view among national police executives. Further research exploring views about *Miranda* in different types and sizes of agencies could shed light on the level of global support for or opposition to *Miranda*.

Respondents' general views about *Miranda* can also be gauged from their responses to opinion Questions 13 and 14, which recite simplified factual scenarios in *United States v. Patane*<sup>189</sup> and *Missouri v. Seibert*,<sup>190</sup> decided shortly before the survey was mailed. These cases were so recent that we could not be sure that respondents were familiar with them, and so we provided capsule fact patterns that did not capture the nuances of the Court's opinions, especially for *Seibert*.

**Table 1**  
*Abolish Miranda? Attitudes Concerning Miranda Exceptions*

	Strongly Disagree n (%)	Disagree n (%)	Agree n (%)	Strongly Agree n (%)
Time & Payne: The Supreme Court should overturn the <i>Miranda</i> decision once and for all. (Q 6) <sup>191</sup>	11 (11.8)	43 (46.2)	18 (19.4)	21 (22.6)
12. In <i>Dickerson</i> (2000) the Supreme Court ruled that <i>Miranda</i> is constitutional. The Supreme Court <u>should have</u> abolished mandatory <i>Miranda</i> warnings.	10 (10.3)	75 (77.3)	10 (10.3)	2 (2.1)
13. In June 2004 the Supreme Court ruled that a gun is <u>admissible</u> in evidence if taken after an admission to an officer who did not complete giving <i>Miranda</i> warnings. There was no public safety issue. What is your opinion of this decision in <i>U.S. v. Patane</i> ?	1 (1.1)	1 (1.1)	72 (75.8)	21 (22.1)
14. In June 2004 the Supreme Court ruled a confession <u>inadmissible</u> if obtained in a two-stage station house interrogation, where no <i>Miranda</i> warnings are given in the first interrogation, but are given in the second interrogation. What is your opinion of this decision in <i>Missouri v. Siebert</i> ?	7 (7.5)	27 (29.0)	54 (58.1)	5 (5.4)

<sup>189</sup> 542 U.S. 630 (2004).

<sup>190</sup> 542 U.S. 600 (2004).

<sup>191</sup> The numbers of the questions appearing in this Table and the following Tables correspond to the numbering in the survey instrument found in the Appendix. The number of the question in Time & Payne's *Chiefs' Perceptions* survey, *supra* note 110, is added parenthetically.

It is notable that the majority of respondents agreed with the majority decision in each case. A more detailed exploration geared to developing and testing theories of the impact of law could have asked whether they were already aware of the decisions, and whether they were aware of the ostensibly inadvertent nature of the *Miranda* violation in *Patane* and the deliberate trap set for the suspect in *Seibert*. In any event, the agreement<sup>192</sup> among almost two-thirds of the respondents with the decision in *Seibert*, holding the confession to be inadmissible, shows that police executives do not reflexively favor any method that allows the introduction of confessions.<sup>193</sup> It is also worth noting that virtually all respondents agreed with the admissibility of the gun in *Patane*, compared to a sizeable minority of respondents (over one-third) who felt that the “cured” statement in *Seibert* should have been admissible. These results reflect the less problematic nature of the facts in *Patane* and some dissatisfaction with the “game-playing” with *Miranda* in *Seibert*.

*United States v. Patane* and *Missouri v. Seibert* are the latest in a long train of *Miranda* decisions.<sup>194</sup> The overwhelming agreement of respondents with the *Patane* decision may reflect a pragmatic approach to *Miranda* by police executives who largely accept *Miranda* as part of the landscape in their work environment. The officer in *Patane* made a bumbling attempt to comply with *Miranda* by not completing the sequence of questions, so the Court excused this error to allow the introduction of physical evidence of a crime. Our conclusion—that the responses of the national sample of police executives reflected a pragmatic rather than a cynical stance toward *Miranda*—is further supported by the majority agreement with the *Seibert* decision, although 36.5% would have allowed this end-run around *Miranda* (Question 14).

Table 2 compares the responses of the Virginia chiefs to our sample of national police executives.<sup>195</sup> Except for Question 1, where there is close

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<sup>192</sup> Hereinafter, unless it is otherwise indicated, the term “agreement” used in the text to describe the responses to Likert-type questions means the sum of the “agree” + “strongly agree” responses, and disagreement means the sum of the “disagree” + “strongly disagree” responses.

<sup>193</sup> Two respondents (Respondents “A” and “H”), one of whom stated that he or she did not answer these questions, said that the opinions of any police officer about a Supreme Court decision is “totally irrelevant” and that “this is not for us as police officers to say. Our role is to ensure that the rulings are followed, not to complain because they may be inconvenient to the police function.”

<sup>194</sup> See *supra* Part I.B.

<sup>195</sup> The wording of the questions in Table 2 was identical in our survey and in Time and Payne’s survey, from which the questions were derived. Time & Payne, *Chiefs’ Perceptions*, *supra* note 110, at 81 tbl.2.

agreement between the Virginia and national samples,<sup>196</sup> the other six questions reveal interesting differences. In Question 1, a large minority of respondents in the national sample (approximately 40%) answered that *Miranda* warnings need not be routinely read.<sup>197</sup> Their disagreement could mean that (1) obtaining a confession is not essential in all prosecutions; (2) defense attorneys or courts are not scrupulous in guarding against *Miranda* abuses; or (3) reading *Miranda* warnings is not a component of a lawful arrest. The last interpretation of Question 1 (and Question 2) best fits its wording, although some respondents might have applied their conclusion to stationhouse questioning as well.

**Table 2**

*Opinion Questions About Miranda—Comparing Answers of Virginia and National Samples*

	Strongly Disagree n (%)	Disagree n (%)	Agree n (%)	Strongly Agree n (%)
1. In order to prevent the dismissal of a case, arresting officers must routinely read offenders their <i>Miranda</i> rights.				
Virginia sample (T&P Q1)	15 (16.1)	26 (28.0)	31 (33.3)	21 (22.6)
National sample	16 (16.5)	23 (23.7)	33 (34.0)	25 (25.8)
2. Police officers in my department routinely read offenders the <i>Miranda</i> warnings.				
Virginia sample (T&P Q2)	0 (0.0)	5 (5.3)	49 (51.6)	41 (43.2)
National sample	5 (5.1)	22 (22.4)	37 (37.8)	34 (34.7)
3. Courts are too cautious with regard to the <i>Miranda</i> warnings.				
Virginia sample (T&P Q4)	3 (3.2)	33 (35.1)	35 (37.2)	23 (24.5)
National sample	2 (2.0)	70 (70.7)	23 (23.2)	4 (4.0)

<sup>196</sup> Question 1 reports that almost 56% of the Virginia chiefs and almost 60% of the national sample of police administrators support the view that *Miranda* warnings must be routinely read to prevent dismissal of the case. Time & Payne, *Chiefs' Perceptions*, *supra* note 110, at 81 tbl.2.

<sup>197</sup> See *supra* note 196.

	Strongly Disagree n (%)	Disagree n (%)	Agree n (%)	Strongly Agree n (%)
5. Too many offenders get off easy as a result of <i>Miranda</i> warnings.				
Virginia sample (T&P Q5)	8 (8.5)	45 (47.9)	19 (20.2)	22 (23.4)
National sample	12 (12.2)	77 (78.6)	8 (8.2)	1 (1.0)
6. The <i>Miranda</i> warnings are useful in principle but ineffective in practice.				
Virginia sample (T&P Q7) <sup>198</sup>	9 (9.6)	46 (48.9)	23 (24.5)	16 (17.0)
National sample	9 (9.4)	73 (76.0)	13 (13.5)	1 (1.0)
9. The requirement to read suspects the <i>Miranda</i> warnings makes it difficult for people to do their jobs.				
Virginia sample (T&P Q12)	10 (10.5)	51 (53.7)	23 (24.2)	11 (11.6)
National sample	18 (18.2)	68 (68.7)	11 (11.1)	2 (2.0)
10. <i>Miranda</i> warnings hinder voluntary confessions.				
Virginia sample (T&P Q13)	9 (9.5)	36 (37.9)	31 (32.6)	19 (20.0)
National sample	7 (7.1)	66 (66.7)	25 (25.3)	1 (1.0)

This straightforward interpretation of Questions 1 and 2 is supported by a written comment: "Regarding Q 1 & 2: *Miranda* is routinely read to suspects if being questioned regarding the crime. If not being questioned—then *Miranda* is not read. Most patrol officers do not question offender—just obtains information for booking. Detectives routinely read *Miranda* during investigation process."<sup>199</sup> Another respondent, however, indicated that the law of the respondent's state "requires the advising of *Miranda* Rights and the notification of intended charges to all arrested subjects. No direct instructions apply to non-arrests, interviews, and the like. This is the 'gray-area' where *Miranda* vs. Non-*Miranda* rears its head."<sup>200</sup> In any event, Question 2 shows that Virginia departments (94.8% agreement)

<sup>198</sup> We report the n's from Time & Payne, *Chiefs' Perceptions*, *supra* note 110, at 81, but alter the percentage figures.

<sup>199</sup> Respondent "D."

<sup>200</sup> Respondent "E."

adhere more closely to the letter of *Miranda* than large police departments in the national sample (72.5% agreement). Whether *Miranda* warnings are given routinely in felony arrests and whether such a practice influences the obtaining of admissions at the time of arrest and subsequent interrogation practices are issues for further research.

The other questions in Table 2 deal with *attitudes* toward *Miranda*. Although a majority of the national and Virginia respondents in Questions 5 (“Get off easy as a result of *Miranda* warnings”) and 9 (“Difficult to do their jobs”) believe that *Miranda* does not undermine the police function, the two samples differ sharply. Almost half of the Virginia respondents felt that because of *Miranda* too many offenders get off easy, and over a third of the Virginia respondents felt that *Miranda* made it difficult for police to do their jobs. Less than 10% of the national respondents, a negligible minority, felt that *Miranda* created such impediments.<sup>201</sup> This may be a result of the higher compliance rate reported for Virginia departments compared to the national sample (Questions 1 & 2). Because Virginia departments are smaller and handle fewer cases, we speculate that the effect of rulings that led to lost cases may be more psychologically salient for the Virginia chiefs than for executives in the largest police departments.<sup>202</sup>

The national and Virginia respondents disagreed over Question 10 (“*Miranda* warnings hinder voluntary confessions”), with a slim majority of the Virginia chiefs agreeing (52.6%) but only one-quarter (26.3%) of the national respondents agreeing. Further research could explore the basis for this difference, and whether detectives in large police departments are more adept at obtaining confessions.

Responses to Questions 25 and 26 (Table 3) concern general written policies on *Miranda* law.<sup>203</sup> In Question 25, eighty-four departments

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<sup>201</sup> A similar pattern is displayed in the responses to Question 6, in which over 40% of the Virginia chiefs felt that *Miranda* was ineffective in practice, compared to only 14% of the executives and high-ranking officers responding in the national sample. A similar result is found in Question 3 (“Courts too cautious”): 62% of the Virginia chiefs agreed, compared to only 27% of the national respondents. These responses suggest that police executives in large departments accommodate the *Miranda* requirements more easily than the chiefs of Virginia police departments, who represent a spectrum of departments that include smaller agencies.

<sup>202</sup> We speculate that national police executives may be less bothered by *Miranda* requirements than the Virginia chiefs in part because their spans of responsibility are broader and they have a less parochial interest in or memory of specific cases.

<sup>203</sup> Questions in Tables 3 through 9 were designed to probe the policy issues raised in the present study and were administered to the national sample of executives of large police agencies. Further research that compares our results with those in smaller police departments might yield interesting information as to whether police procedures vary by agency size.

indicated that they had written policies, and fourteen replied that they had none. Only sixty-eight respondents replied to Question 26: three replied that the policies are too legalistic and not helpful; forty-two replied that the policies include helpful examples; and twenty-three provided responses under "other." For the most part, the "other" responses indicated that the departmental policies followed state law or nationally-accepted standards, and that they encourage the reading of *Miranda* warnings. Only one response suggested that more targeted guidelines exist ("specifics for homicide and child abuse/sex crimes"). It may be surprising that as many as fourteen departments among the largest in the United States do not have written *Miranda* policies. Practices in these fourteen departments, however, may not differ significantly from departments with written policies, especially if written policies simply track the law in an effort to avoid complications in civil suits.

**Table 3**  
*Questions About Written Policies and the Influence of the Chief*

	Strongly Disagree n (%)	Disagree n (%)	Agree n (%)	Strongly Agree n (%)
21. The police chief's views of <i>Miranda</i> law have a major impact on law compliance in his/her police department.	7 (7.2)	25 (25.8)	31 (32.0)	34 (35.1)
25. Does your department have <u>general written policies</u> concerning interrogation and <i>Miranda</i> warnings?	<u>Yes</u> 84 (84.8)	<u>No</u> 14 (14.1)		<u>Missing</u> 1 (1.0)
26. If "Yes,"				
Policies are too legalistic and not useful	3 (3.0)			
Policies have helpful examples	42 (42.4)			
Other	23 (23.2)			
Missing	31 (31.3)			



Responses in Tables 2 and 3 raise interesting questions about *Miranda* compliance by suggesting that written guidelines are only moderately helpful in structuring officers' behaviors during interrogation and in helping to ensure compliance with the law. A positive written response stated:

About *Miranda* in general, we have specific policy that reflects current case law, written with the help of specialist attorney [sic], who also trains every one of our officers. I feel very good about our understanding and application of *Miranda* in our daily operations, and we have had no problems in this area.<sup>204</sup>

Written policies may be useful in some departments, but only about half of the departments with policies rated them as having helpful examples. This disparity suggests that training programs and on-the-job learning may be as or even more important in guiding interrogation practices than written policies per se. Further research into the influence of policies and training on interrogation practices in different departments may prove useful in developing policies that are of greater utility to the police.

Finally, in response to Question 21 in Table 3, two-thirds of respondents (67.1%) agreed that the police chief's views of *Miranda* have an impact on compliance. This high agreement rate supports the limited research and anecdotal evidence indicating that the police chief is an important mediating factor in compliance with constitutional standards.<sup>205</sup> Negative replies are ambiguous; they could either mean that officers in the department disregard a chief's leadership on complying with constitutional rules, or that officers would comply with constitutional mandates despite a chief's indifference. Evidence suggests that the leadership of police chiefs can be an important variable in influencing the styles of policing utilized in municipalities.<sup>206</sup> Further research comparing leadership styles and law compliance in different police departments could shed light on this important issue.

#### B. INTERROGATION OUTSIDE *MIRANDA* AND *MIRANDA*-MINIMIZATION

In Table 4, we report on *Miranda*-minimization (Question 4) and attitudes about interrogation "outside *Miranda*" (Questions 15, 19, and 20); that is, delivering *Miranda* warnings in a manner that makes them seem inconsequential. There is almost universal disagreement with *Miranda*-minimization. However, a lesser majority disapproves of the various forms of interrogation "outside *Miranda*." Question 4 puts the matter starkly and

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<sup>204</sup> Respondent "H."

<sup>205</sup> BRATTON WITH KNOBLER, *supra* note 171; Canon, *Testing the Effectiveness*, *supra* note 171.

<sup>206</sup> BRATTON WITH KNOBLER, *supra* note 171; JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* 172-92 (1993).

seems to be at odds with the scholarly and journalistic writing that implies that *Miranda*-minimization is prevalent.<sup>207</sup> There may be no way to assess its prevalence, as what constitutes minimization lies in the eye of the beholder. That no respondents strongly agreed with Question 4 implies that police officials do not condone the outright flouting of *Miranda*'s warnings requirement. The disagreement with *Miranda* minimization (93.7%) indirectly supports the empirical findings of Leo and of Cassel and Hayman, indicating high levels of success in obtaining admissions and confessions through routine interrogation.<sup>208</sup>

**Table 4**

*Opinion Questions About Interrogation Outside Miranda and Miranda Minimization Practices*

	Strongly Disagree n (%)	Disagree n (%)	Agree n (%)	Strongly Agree n (%)
4. Detectives should read <i>Miranda</i> warnings in a way to make them seem unimportant.	30 (31.6)	59 (62.1)	6 (6.3)	0 (0.0)
15. An officer should be permitted to continue in-custody questioning after an offender says he does not want to talk or asks for a lawyer.	23 (23.5)	58 (59.2)	13 (13.3)	4 (4.1)
19. A statement taken in violation of <i>Miranda</i> should be used to impeach an offender's credibility on the witness stand.	11 (11.6)	45 (47.4)	32 (33.7)	7 (7.4)
20. A statement taken in violation of <i>Miranda</i> should be used to get leads about a case.	8 (8.4)	47 (49.5)	38 (40.0)	2 (2.1)

Focusing on interrogation "outside *Miranda*" (Question 15), only one-sixth of the respondents supported this practice (17.4%). In contrast approximately two-fifths supported the use of illegally obtained statements to impeach an offender's credibility or to get leads about the case

<sup>207</sup> DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* 204-20 (1991); Leo & White, *Adapting to Miranda*, *supra* note 12, at 432-39.

<sup>208</sup> Cassel & Hayman, *supra* note 17, at 891-904; Leo, *Interrogation Room*, *supra* note 70.

(Questions 19 and 20).<sup>209</sup> A curious feature about the Table 4 responses is that the police executives reacted more negatively toward minimization (Question 4),<sup>210</sup> which does not violate of the letter of *Miranda*. In contrast, they reacted less negatively to the more questionable practice of flouting the *Miranda* requirement of immediately ceasing to interrogate when a suspect invokes his rights (i.e., interrogation “outside *Miranda*”) (Question 15), which does violate the letter as well as the spirit of *Miranda*.<sup>211</sup> The difference may be due in part to the wording of the questions, with “detectives” identified as the subject of Question 4 compared to “an officer” as the subject of Question 15.

Questions in Table 5 inquired into respondents’ knowledge about the then recently decided case of *Chavez v. Martinez*,<sup>212</sup> knowledge about interrogation “outside *Miranda*,” and the existence of written or unwritten policies regarding the practice. Slightly over half of the respondents had heard of the *Chavez* case, decided about a year before the survey was mailed (Question 22). *Chavez* was not a criminal case involving the admissibility of a statement, but a civil suit dealing with an officer’s and a department’s liability. Such an issue should be of greater interest to high-ranking police officials than to detectives. It may be that knowledge of recent Supreme Court rulings in large police departments is a mid-level concern among police executives with wide ranges of responsibility, and that it is seen as a specialized task. Keeping track of recent court decisions may be delegated to legal-division officers. More specific research into how the personnel of different-sized police departments obtain knowledge of legal trends is needed to update Stephen Wasby’s pioneering work on the subject.<sup>213</sup>

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<sup>209</sup> Question 19: 41.1% agreed that a statement taken in violation of *Miranda* should be used to impeach an offender’s credibility on the stand (the *Harris v. New York*, 401 U.S. 222, 225-26 (1971), and *Oregon v. Hass*, 420 U.S. 714, 722-24 (1975), exception); Question 20: 42.1% agreed that a statement taken in violation of *Miranda* should be used to get leads about a case (the *Michigan v. Tucker*, 417 U.S. 433, 451-52 (1974), and *United States v. Patane*, 542 U.S. 630, 644 (2004), exception). Responses to Question 20 are in tension with responses to Question 14 in Table 1. See text at notes 251 to 253 *infra*.

<sup>210</sup> Concerning minimization, one of the authors has proposed a “quixotic” reform (among others) that would have a pre-recorded video of *Miranda* questions read by a chief judge to a suspect prior to stationhouse interrogation. Zalman, *Tea Leaves*, *supra* note 56, at 366-68.

<sup>211</sup> Re-interrogation is allowable under a variety of circumstances. See *Michigan v. Mosley*, 423 U.S. 96, 102-03 (1975).

<sup>212</sup> 538 U.S. 760 (2003).

<sup>213</sup> WASBY, SMALL TOWN POLICE, *supra* note 81.

**Table 5**  
*Questions About Knowledge of Recent Case and Interrogation “Outside Miranda”*

	Yes n (%)	No n (%)	Missing n (%)
22. <i>Chavez v. Martinez</i> (2003) held that an officer cannot be held civilly liable for failure to give <i>Miranda</i> warnings. Have you heard about <i>Chavez v. Martinez</i> prior to this survey?	51 (51.5)	48 (48.5)	0 (0.0)
23. Have you heard of a practice known as interrogation “outside <i>Miranda</i> ” prior to this survey?	55 (55.6)	43 (43.4)	1 (1.0)
27. In the past decade has your Department had a <u>written</u> policy allowing interrogation “outside <i>Miranda</i> ”?	5 (5.1)	91 (91.9)	3 (3.0)
28. If “Yes,” was the policy terminated?	2 (2.0)	7 (7.1)	90 (90.9)
29. In the past decade has your Department had an <u>unwritten</u> policy allowing interrogation “outside <i>Miranda</i> ”?	7 (7.1)	90 (90.9)	2 (2.0)
30. If “Yes,” is the practice discouraged?	9 (9.1)	2 (2.0)	88 (88.9)

Knowledge of the prevalence and distribution of interrogation “outside *Miranda*” is undoubtedly important policy information, impelling Weisselberg to survey California police departments about such practices.<sup>214</sup> It was apparently on Justice Souter’s mind in his majority opinion in *Missouri v. Seibert*: “The technique of interrogating in successive, unwarned and warned phases raises a new challenge to *Miranda*. Although we have no statistics on the frequency of this practice, it is not confined to Rolla, Missouri.”<sup>215</sup> Slightly more than half of the respondents had heard about the practice phrased as interrogation “outside *Miranda*” (Question 23).

<sup>214</sup> Weisselberg, *In the Stationhouse*, *supra* note 95; Weisselberg, *Saving Miranda*, *supra* note 3.

<sup>215</sup> 542 U.S. 600, 609 (2004).

Questions 27 and 28 ask about written policies concerning interrogation “outside *Miranda*,” while Questions 29 and 30 ask about *unwritten* policies. A very small number of departments—only twelve—claim to have had written or unwritten policies concerning interrogation “outside *Miranda*.” Recall that eighty-four departments (84.8%) had general written policies concerning interrogation.<sup>216</sup> Because Ninth Circuit cases prior to *Chavez v. Martinez* upheld potential civil rights lawsuits against police,<sup>217</sup> we asked whether written policies were terminated after *Chavez* or whether unwritten policies were discouraged (Questions 27-30). Two out of five departments that had written interrogation “outside *Miranda*” policies had cancelled them, while a paradoxical result of Questions 29 and 30 indicates that more departments discouraged interrogation “outside *Miranda*” than had unwritten policies allowing such interrogation. The paradox may be explained by speculating that a few departments that did not have unwritten policies discouraged the practice nonetheless when its existence became known. The survey results support a hypothesis that interrogation “outside *Miranda*” was formerly a California practice, as three departments with written policies and six departments with unwritten policies concerning interrogation “outside *Miranda*” were in California and five California departments reported discouraging the practice.

Based on Weisselberg’s articles, we speculated that knowledge about *Chavez* and interrogation “outside *Miranda*” would be highest in California and higher in the Western states than in other regions, even though Weisselberg did cite cases from a number of states identifying the practice. The data in Table 6, however, do not support this hypothesis, as knowledge of *Chavez* was comparable in all of the regions and a majority of the respondents had heard about interrogation “outside *Miranda*.” The data do show greater awareness of *Chavez* in California, the state in which the case originated,<sup>218</sup> and greater awareness there of interrogation “outside *Miranda*,” where formal training in the practice seems to have originated. This point is supported by a respondent who surmised: “In California we have had many debates on the practice of questioning outside ‘*Miranda*.’ Many agencies and instructors actively condone this practice, some making

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<sup>216</sup> See *supra* Table 3, Question 25.

<sup>217</sup> See discussion *supra* Part II.B.

<sup>218</sup> We speculate that because police chiefs typically belong to a statewide Chiefs’ Association, they may become informed of cases of local interest or provenance through the mailings or electronic messages of the association or at annual meetings. By this and other means, it is likely that police chiefs within a state will be aware of legal developments affecting a sister department, especially where the result of the case may impact their own departments.

it 'pattern and practice.' This resulted in several abuses and has caused the court to take action against these abuses."<sup>219</sup>

**Table 6**

*Knowledge of Chavez and Interrogation "Outside Miranda" by Region*

	Yes n (%)	No n (%)
22. Have you heard about <i>Chavez v. Martinez</i> prior to this survey?		
<u>Region</u>		
East	2 (50.0)	2 (50.0)
Midwest	7 (38.8)	11 (61.1)
South	24 (54.5)	20 (45.5)
West	18 (54.5)	15 (45.5)
California	12 (66.7)	6 (33.3)
Other States	39 (48.1)	42 (51.9)
23. Have you heard of a practice known as interrogation "outside <i>Miranda</i> " prior to this survey?		
<u>Region</u>		
East	0 (0.0)	4 (100.0)
Midwest	11 (64.7)	6 (35.3)
South	25 (56.8)	19 (43.2)
West	19 (57.6)	14 (42.4)
California	15 (83.3)	3 (16.7)
Other States	40 (50.0)	40 (50.0)

Question 24 (not reported in a table) asked the year in which the respondent first heard of the practice, eliciting forty-seven responses. Eleven (23.4%) indicated "unknown," "do not remember," or a similar response. Fourteen (29.8%) indicated 1990 and earlier, with two in the 1970s. The older dates may suggest that the respondents are confusing interrogation "outside *Miranda*" with another practice. It may also be, however, that while the label and the deliberate practice derived from the teachings of police legal trainers in the mid-1990s, the actual practice may be older. Seven (14.9%) gave dates between 1994 and 1999, and fifteen (31.9%) gave dates of 2000 and later (or written statements indicating "recent" or "new" awareness). The fact that twice as many respondents learned about interrogation "outside *Miranda*" after 1999 than those who

<sup>219</sup> Respondent "I."

learned about it in the 1990s shows that knowledge of this policy innovation has increased since its debut.

### C. FALSE CONFESSIONS: ATTITUDES AND PRACTICES

A comparison of the responses to Question 11 (“Interrogation may produce wrongful conviction”: strongly disagree and disagree = 73.7%) and to Question 17 (“Officers should be persistent”: agree and strongly agree = 70.9%) in Table 7 is a measure of the distance between the wrongful conviction scholarship and the working beliefs of executives in large police departments.<sup>220</sup> False confessions figure prominently in studies of actual innocence but are probably not a top agenda item for police executives.<sup>221</sup> The existence of wrongful convictions has been undeniable for well over a decade, but the extent of the problem is subject to question. Gross et al. have established the existence of 340 *official* exonerations between 1989 and 2003 and have additionally identified several hundred mass-exonerations.<sup>222</sup> They reasonably speculate that several thousand wrongful convictions occur each year.<sup>223</sup> The fact that only a tiny percent of convictions leads to known exonerations and that even these are often vigorously challenged by prosecutors<sup>224</sup> indicates that law enforcement agencies will tend to be wary about adopting proposed reforms.

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<sup>220</sup> See Drizin & Leo, *supra* note 4 (demonstrating the existence of false confessions and implying that false confessions are not rare).

<sup>221</sup> See INNOCENCE COMM’N FOR VA., A VISION FOR JUSTICE: REPORT AND RECOMMENDATIONS REGARDING WRONGFUL CONVICTIONS IN THE COMMONWEALTH OF VIRGINIA 9-10, 42-59 (2005), available at <http://www.thejusticeproject.org/press/reports/pdfs/17241.pdf> (last visited May 9, 2007).

<sup>222</sup> Gross et al., *supra* note 137, at 527-28. Of these 340 official exonerations, 144 were based on DNA, and 195 on other evidence of innocence. *Id.* The mass exonerations include those released in the aftermath of the Ramparts police corruption episode in Los Angeles and the exonerations and gubernatorial pardons in the aftermath of the Tulia, Texas police misfeasance episode. *Id.* at 533-35. Also not included in official exonerations are those that resulted from a number of bizarre, ritual sex abuse prosecutions and convictions. See, e.g., EDWARD HUMES, MEAN JUSTICE: A TOWN’S TERROR, A PROSECUTOR’S POWER, A BETRAYAL OF INNOCENCE 449-53 (1999); DOROTHY RABINOWITZ, NO CRUELER TYRANNIES: ACCUSATION, FALSE WITNESS AND OTHER TERRORS OF OUR TIMES (2003).

<sup>223</sup> Gross et al., *supra* note 137, at 529-33.

<sup>224</sup> Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence*, 38 CAL. W. L. REV. 389, 394-5, 412 (2002) (prosecutors’ reaction to prisoners’ requests for DNA testing range from support to resistance); Seth Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547 (2002) (examples of prosecutorial support of and resistance to post-conviction DNA testing detailed); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B. U. L. REV. 125 (2004) (explores reasons for prosecutorial resistance and proposes reforms); Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*,

Our data suggest that proposed changes in interrogation practices are likely to face sustained resistance from police officials, interrogating officers, and perhaps also from the police training industry. The responses to these questions are hardly surprising. Interrogating officers are in the business of obtaining confessions for the purpose of securing convictions, and as the observational studies show, they do so with a high degree of success.<sup>225</sup> Challenges to the mode of taking confessions will likely be interpreted by police officials as an attack on the entire enterprise of criminal investigation and may meet with a reflexive anti-reform stance. Reforms that seek to avoid some of the egregious examples of false confessions, especially those obtained from the vulnerable populations of youths and the mentally defective,<sup>226</sup> however, ought not to result in the wholesale undermining of interrogation. It is not insignificant that in Question 11, slightly over a quarter of the respondents were willing to concede that interrogation techniques sometimes help to produce false confessions.

**Table 7**  
*Opinions About False Confessions*

	Strongly Disagree n (%)	Disagree n (%)	Agree n (%)	Strongly Agree n (%)
11. Interrogation techniques sometimes help to produce false confessions.	12 (12.1)	61 (61.6)	25 (25.3)	1 (1.0)
17. Officers conducting interrogations should be encouraged to be verbally persistent in order to obtain admissions.	1 (1.1)	26 (28.0)	59 (63.4)	7 (7.5)
18. The Reid interrogation training method is the best available.	1 (1.5)	29 (43.9)	34 (51.5)	2 (3.0)

We also asked about the training provided by John E. Reid & Associates, Inc., which we believe is the largest and best-known training program for police interrogations. The portion of the company's website

58 VAND. L. REV. 171 (2005) (prosecutors ill-equipped to analyze post-trial obligations to serve justice because law on issues is limited, incentives are negative, and issues are complex).

<sup>225</sup> Cassell & Hayman, *supra* note 17, at 892-904; Leo, *Interrogation Room*, *supra* note 70, at 280.

<sup>226</sup> Blair, *supra* note 141, at 136.



devoted to its interviewing and interrogation training program claims that “[m]ore than 300,000 professionals in the law enforcement and security fields have attended this three day program since it was first offered in 1974.”<sup>227</sup> The so-called “Reid method” was developed by the late Fred Inbau and John Reid and is explained in great detail in their book.<sup>228</sup> It is based on nine steps listed on the web page: theme development; handling denials; overcoming objections; procuring and retaining the suspect’s attention; handling the suspect’s passive mood; presenting an alternative question; detailing the offense; and elements of oral and written statements.<sup>229</sup> It is precisely this method that has been the subject of criticism by scholars who have explored and decried false confessions.<sup>230</sup>

Sixty-six respondents answered Question 18, which asks whether the “Reid training method is the best available.” This suggests that a third of the respondents had not heard of or were not familiar with this particular technique.<sup>231</sup> The response rate to Question 33 (not reported in a table) supports this assertion: about two-thirds of the departments reported that “most” or “some” officers had training in the “Reid method.” Three respondents noted in writing that their departments used only Reid training, making a comparison with other methods impossible or unlikely.<sup>232</sup> Nevertheless, slightly over half the respondents agreed that the “Reid” method was the best available, attesting to the prominence of that approach in police interrogation circles. Because much of police training is proprietary, it is unlikely that evaluative research by detached social scientists will be possible.<sup>233</sup> Further research at the police department level in relating the styles of interrogation to the modes of training may be useful to police administrators.

#### D. ELECTRONIC RECORDING OF INTERROGATIONS AND CONFESSIONS

The videotaping of confessions and of entire interrogation sessions has been initiated in many police departments and appears to be a practice that

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<sup>227</sup> John E. Reid & Associates, Inc., [http://www.reid.com/training\\_programs/r\\_interview.html](http://www.reid.com/training_programs/r_interview.html) (last visited May 7, 2007).

<sup>228</sup> INBAU ET AL., *supra* note 144, at 5 *passim*.

<sup>229</sup> *Id.* at 209-397 (discussing the nine steps in greater depth).

<sup>230</sup> GUDJONSSON, *supra* note 140, at 7-37; Richard Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC'Y REV. 259, at 269 *passim* (1996).

<sup>231</sup> The response “do not know” was not provided as a choice. See Table 7.

<sup>232</sup> Respondents “A,” “E,” and “H.”

<sup>233</sup> A similar situation exists as to the unverifiable claims of jury consultants who do not allow external researchers to evaluate the data upon which some claims of success are made. See NEIL J. KRESSEL & DORIT F. KRESSEL, *STACK AND SWAY: THE NEW SCIENCE OF JURY CONSULTING* 75-78 (2002).

is being adopted by a progressively larger number of departments.<sup>234</sup> It is a reform that has a chance of succeeding in substantially modifying police interrogation practices. As the discussion above noted, several states mandate the recording of interrogations. Videotaping is favored by those concerned with reducing false confessions and it appears to have benefited police in gaining the admission of confessions where adopted.<sup>235</sup> The views of the largest police agencies in regard to the taping of confessions are, therefore, policy-relevant.

**Table 8**  
*Opinion and Practice About Taping Confessions*

	Strongly Disagree n (%)	Disagree n (%)	Agree n (%)	Strongly Agree n (%)
7. Station-house interrogation of adult offenders should be videotaped.	8 (8.1)	32 (32.3)	43 (43.4)	16 (16.2)
8. Station-house interrogation of juvenile offenders should be videotaped.	8 (8.2)	32 (33.0)	39 (40.2)	18 (18.6)
	Always n (%)	In Serious Cases n (%)	Occasionally n (%)	Never n (%)
35. In my Department, station house interrogation is videotaped.	11 (11.7)	39 (41.5)	27 (28.7)	17 (18.1)
36. In my Department, station house interrogation is audiotaped.	27 (29.0)	37 (39.8)	21 (22.6)	8 (8.6)

Table 8 shows that while there is majority support for videotaping among the largest police agencies, this support is far from overwhelming. Two-fifths of the top administrators of large police departments (40.4%) oppose stationhouse videotaping, and these levels of support and resistance are the same for the questioning of both adult and juvenile offenders. As

<sup>234</sup> See discussion *supra* Part II.D.

<sup>235</sup> SULLIVAN, POLICE EXPERIENCES, *supra* note 148, at 6-19.

for practices, Questions 35 and 36 show that audiotaping stationhouse interrogation is more frequent than videotaping and that both practices occur with some frequency. On its face, these results are encouraging to taping supporters, but, as studies such as Sullivan's show, the devil is in the details.<sup>236</sup> Further research on videotaping at the departmental level could shed light on whether the entire interrogation is taped (or whether only the confession is taped), whether taping is mandatory or used only in selected cases, precisely how the taping and interrogation of juveniles is conducted, and whether taping is closely monitored by a department's administrators.

#### E. CIVIL AND ADMINISTRATIVE CONTROLS ON INTERROGATION

Four questions in Table 9 (Questions 16, 31, 32, 34) asked about a variety of controls on interrogation practices, including lawsuits, department discipline, and court-ordered injunctions. The high level of agreement with Question 16 (most lawsuits are frivolous) was anticipated. That 15.5% disagreed indicates that a number of police executives believe that there are real problems in policing, suggesting that reform-minded chiefs are not opposed to the *goals* of civil lawsuits against police. The virtual non-existence of reported cases on civil lawsuits based on *Miranda* violations has been previously discussed by one of the authors.<sup>237</sup> In this light, the response to Question 31 (that 6% of large departments have faced such suits) shows that such lawsuits do occur but are rare. Although the percentage of departments that have faced such lawsuits is low, the number of such suits may be larger if the departments that reported them were confronted with multiple suits. It also may be the case that *Chavez v. Martinez*<sup>238</sup> has put an end to any such civil lawsuits. The large percentage of "don't know" answers to Question 31 suggests that more detailed qualitative research could shed light on this kind of civil suit. Any empirical study into civil suits should inquire into the infrequent matter of suits stemming from interrogation practices. Such a study should also examine the legal culture of the city or region being studied, as well as the culture of the police department.

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<sup>236</sup> *Id.*

<sup>237</sup> Zalman, *Paradigm Shift*, *supra* note 56, at 337.

<sup>238</sup> 538 U.S. 760 (2003).

**Table 9**  
*Controls on Police Interrogation Practices*

	Strongly Disagree n (%)	Disagree n (%)	Agree n (%)	Strongly Agree n (%)
16. Most civil lawsuits against police officers are frivolous.	2 (2.1)	13 (13.4)	66 (68.0)	16 (16.5)
	Yes n (%)	No n (%)	Don't Know n (%)	
31. Has an officer in your department ever been <u>sued</u> for failing to give <i>Miranda</i> warnings or for irregularities during the conduct of an interrogation?	6 (6.2)	51 (52.6)	40 (41.2)	
32. Has an officer in your department ever been <u>disciplined</u> for failing to give <i>Miranda</i> warnings or for irregularities during the conduct of an interrogation?	11 (11.2)	46 (46.9)	41 (41.8)	
34. Interrogation practice in my department is limited to some degree by a court injunction, state or municipal oversight, or a U.S. Department of Justice consent decree.	9 (9.4)	87 (90.6)	—	

Similarly, further inquiry may be more fruitful in regard to internal discipline. Respondents in half of the departments (46.9%) reported that no officer has ever been disciplined for *Miranda* irregularities, and only 11.2% reported that such discipline was ever imposed (Question 32). The large proportion of respondents who did not know (42%) suggests that this information is not usually at the fingertips of police executives.<sup>239</sup>

We also inquired into whether the department was operating under a consent decree into its practices (Question 34). A surprisingly large number—nine—reported that they were. Research into pattern and practice lawsuits are silent on whether such suits, and the consent decrees that result,

<sup>239</sup> Research into police discipline could compare the frequency of discipline for interrogation issues to other issues, compare the discipline of detectives and uniformed officers, and explore whether the anticipated infrequency of discipline for interrogation issues is due to a lack of concern or because interrogations are generally conducted in a proper manner. The latter conclusion may be a result of the frequency and level of oversight of interrogations by managerial officers who monitor confessions as they occur.

involve the issue of interrogation practices.<sup>240</sup> Further research into interrogation practices should take the existence of departmental monitoring into account as well as other contextual matters. It is possible that the existence of a consent decree and the presence of a federally appointed monitor may positively affect a department's law compliance in general.

## V. CONCLUSIONS

### A. CONTRIBUTIONS OF THIS STUDY

This study provides baseline opinion data of big city police administrators concerning important contemporary issues having to do with interrogation and confessions. It sheds light on the level of information held by police administrators about confessions law and provides first-time data on lawsuits and administrative controls surrounding interrogation methods. The survey provides information about three controversial issues: interrogation practices that can subvert *Miranda*, methods that may induce false confessions, and videotaping interrogations.

Survey research provides only one approach to gaining knowledge of the complex subject of our research. The results of this study should be read in light of observational research and the research based on interrogation transcripts and reported cases discussed above in Section II. An ideal study with greater resources would supplement surveys with observations of interrogation practices and with in-depth interviews of respondents. Our research, nevertheless, points the way toward further research.

The general level of compliance with *Miranda* shown by our survey supports earlier research.<sup>241</sup> Comparison of the national sample with the Virginia chiefs,<sup>242</sup> most of whose departments are smaller than those in the national sample, suggests that support for *Miranda* is positively correlated with the size of police departments. Responses suggest that most support for *Miranda* is pragmatic, with a small percentage of respondents appearing to have ideological views in opposition to or in support of *Miranda*.<sup>243</sup> The pragmatic agreement with *Miranda* is in accord with the well-supported

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<sup>240</sup> See Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3 (2003) [hereinafter Walker, *Pattern*].

<sup>241</sup> See Cassell & Hayman, *supra* note 17; Leo, *Interrogation Room*, *supra* note 70; Thomas, III, *supra* note 73.

<sup>242</sup> Compare *supra* Tables 1 and 2, with Time & Payne, *Chiefs' Perceptions*, *supra* note 110, at 81.

<sup>243</sup> See *supra* Table 1, Question 12.

conclusion that the police have adapted to *Miranda*.<sup>244</sup> Viewing adaptation and compliance through a broad lens, we conclude that the relationship between the Supreme Court and the police is one of mutual effects. Looking only at police interrogation behaviors, the conclusion can be drawn that police have complied more with the letter than with the spirit of *Miranda*, and that to a small degree non-compliant behavior exists. A wider focus includes four decades of the Supreme Court reworking the *Miranda* doctrine, especially through *Miranda* exceptionalism.<sup>245</sup> It also includes such responsive police policies and practices as interrogation “outside *Miranda*” and the “Missouri two-step” procedure explored in *Missouri v. Seibert*,<sup>246</sup> the implementation of which tends to undermine *Miranda*’s integrity. This suggests that a complex kind of signaling game exists, perhaps one that operates on an unconscious level, but one in which the Supreme Court also responds *sub silencio* in its formally magisterial rulings to what it believes the police actually do.<sup>247</sup>

That a majority of big city police executives agreed with the Supreme Court majorities in *Patane* and *Seibert*, and that police support was stronger for the less controversial decision of *Patane*,<sup>248</sup> supports the conclusion that support for *Miranda* is largely pragmatic, bolstered by an underlying sense of legality. We call this mood pragmatic legalism. This result also tends to show that the pragmatism that has marked the decisions of the centrist justices in the late Rehnquist Court seems to have correctly gauged the mood of police executives, an important group of law implementers. This mood of pragmatic legalism is further supported by the respondents’ rejection of *Miranda*-minimization and interrogation “outside *Miranda*.”<sup>249</sup> These responses tap into an ethical behavior dimension in which the responses on the whole show disapproval of openly flouting the law. In partial contrast, the respondents show a lesser level of disapproval for reaping the benefits of interrogation “outside *Miranda*.”<sup>250</sup> These contrasting responses suggest tension between a desire to cleanly follow the Supreme Court’s rules and a temptation to reap the benefits of shortcutting those rules.

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<sup>244</sup> Leo & White, *Adapting to Miranda*, *supra* note 12.

<sup>245</sup> See *supra* Part I.B; Schulhofer, *supra* note 40; Standen, *supra* note 34.

<sup>246</sup> 542 U.S. 600 (2004).

<sup>247</sup> WASBY, IMPACT, *supra* note 79, at 30; see also William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994) (signaling between Congress and the Supreme Court).

<sup>248</sup> See *supra* Table 1, Questions 13 and 14.

<sup>249</sup> See *supra* Table 4, Question 15.

<sup>250</sup> See *supra* Table 4, Questions 19 and 20.

Only half of the respondents had heard about *Chavez v. Martinez*<sup>251</sup> a year after it was decided.<sup>252</sup> We surmise that the reactions of most big city police executives to the Supreme Court are based on a generalized understanding of its cases, with a focus on the practical effects of rulings. It is unlikely that more than a few high level executives, other than police legal advisors, carefully study recent cases and their doctrinal underpinnings. Such study is the business of law professors and some practicing lawyers and judges, and, within police departments, it tends to be relegated to specialists. Additional research focusing on the implementation of Supreme Court decisions should explore the speed and level of transmission of information about case decisions.<sup>253</sup>

The present research explores the general impact of the *Miranda* doctrine as a foundation for studying the policy questions about interrogation that are currently on the agendas of courts and police agencies: the prevalence and legitimacy of interrogation “outside *Miranda*,” the prevalence and concern about false confessions, the extent to which police utilize and favor the electronic recording of interrogations, and the degree to which interrogation practices are subject to legal and administrative sanctions and controls.

We have seen in response to attitude questions that a majority of police executives are not in favor of interrogation “outside *Miranda*.” When asked about their knowledge in 2004, slightly more than half had heard of the practice, at least by the label that we used to identify it.<sup>254</sup> This knowledge was not more prevalent in the western part of the United States, as we had expected, but knowledge of this practice was higher than average in California, the state that generated the most prominent judicial cases.<sup>255</sup> Only a tiny proportion of departments had written or unwritten policies concerning the practice, and, as suggested by Weisselberg,<sup>256</sup> a number had

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<sup>251</sup> 538 U.S. 760 (2003).

<sup>252</sup> See *supra* Table 5, Question 22.

<sup>253</sup> In this regard, Wasby’s study on the communication of Supreme Court decisions to small town police is valuable, but probably made obsolete by police administrators’ higher educational levels today and by the ready availability of Supreme Court opinions and case commentaries on the internet. WASBY, SMALL TOWN POLICE, *supra* note 81. Weisselberg’s study comprehensively examined California police training materials regarding interrogation “outside *Miranda*” following the *Dickerson* decision, underscoring an implicit point in court impact communications theories: decisions can influence officers’ conduct only if they are transmitted to them. Weisselberg, *In the Stationhouse*, *supra* note 95, at 1148-51. Weisselberg, however, did not conduct an empirical study of individual officers’ knowledge. *Id.*

<sup>254</sup> See *supra* Table 5, Questions 23, and 27-30.

<sup>255</sup> See *supra* Table 6.

<sup>256</sup> Weisselberg, *In the Stationhouse*, *supra* note 95, at 1148-51.

terminated or discouraged it.<sup>257</sup> These data, when examined as a whole, show that information about practices that deliberately flout *Miranda* was far from universally known, that such practices were not wildly popular, and that only a small number of departments were extremely concerned with them. We expressed reservations about Professor Thomas's characterization of the Supreme Court's prophylactic theory or collateral use cases as mere "Burger and Rehnquist Court 'wrinkles' in the *Miranda* doctrine."<sup>258</sup> We also expressed reservations about the interrogation methods disclosed in *Seibert* because they may be the tip of an iceberg of widespread police evasion of *Miranda*'s requirements. Still, our results tend to support Professor Thomas's finding that interrogation "outside *Miranda*" does not occupy the bulk of appellate cases.<sup>259</sup> We conclude that interrogation "outside *Miranda*" is not a top priority among police executives.

The issue of false confessions is a major concern among those studying wrongful convictions. Three-quarters of police executives deny that "interrogation techniques sometimes help to produce false confessions," and a majority support the kind of questioning and the training method that experts claim are the basis of some false confessions.<sup>260</sup> These data suggest that reforms aimed at changing the nature of interrogation techniques at the departmental level will meet with dogged resistance. Recent research suggests that reforms may be most needed in regard to the interrogation of juvenile and mentally challenged suspects.<sup>261</sup> Clearly, more research should be conducted—perhaps combining survey, interview, and observational methods—to get a better picture of attitudes and practices concerning these issues. A strategy to educate police leaders about such research findings has been suggested,<sup>262</sup> as well as more fine-grained thinking about how to modify the so-called "Reid method" without undermining the effectiveness of interrogations.<sup>263</sup>

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<sup>257</sup> See *supra* Table 5, Questions 27-30.

<sup>258</sup> Thomas, III, *supra* note 73, at 1998.

<sup>259</sup> *Id.*

<sup>260</sup> See *supra* Table 7, Question 11.

<sup>261</sup> Blair, *supra* note 141, at 138.

<sup>262</sup> Drizin & Leo, *supra* note 4, at 1001-05.

<sup>263</sup> Such questions may be a subset of the issues of police pressures, organizational structure, and tunnel vision that combine to cause a number of wrongful convictions. See William S. Lofquist, *Whodunit? An Examination of the Production of Wrongful Convictions*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 174 (Saundra D. Westervelt & John A. Humphrey, eds., 2001); Dianne L. Martin, *The Police Role in Wrongful Convictions: An International Comparative Study*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 77 (Saundra D. Westervelt & John A. Humphrey, eds., 2001); Dianne L. Martin, *Lessons About Justice from the "Laboratory" of Wrongful*



Proponents of videotaping interrogations claim that the police become strong supporters once they use this method.<sup>264</sup> If so, this message has not entirely penetrated the consciousness of big city police executives. A majority of the respondents (three-fifths) gave support to videotaping, but of the total, only one-sixth strongly supported videotaping.<sup>265</sup> Contrary to expectations, the respondents were not more strongly in favor of videotaping the interrogation of juveniles. One-sixth reported that stationhouse interrogations are never videotaped in their departments, while slightly more than 10% of the departments always videotape.<sup>266</sup> Our results suggest that for whatever reason—cost, storage issues, inertia, or a desire to avoid exposure in occasional cases of false confessions—support for videotaping exists but is not overwhelming. This outcome suggests that the uniform and universal videotaping of interrogations may not be achieved in the very near future, and that achieving this reform will require substantial efforts by its proponents.

Finally, our research into policy issues surrounding interrogation led to questions about lawsuits and other controls. As expected, most administrators felt that most civil lawsuits against police are frivolous, and only six reported that an officer in their department was ever sued for interrogation issues.<sup>267</sup> We also discovered that a higher proportion of departments than expected (9%) were under court order.<sup>268</sup> This matter was not explored with follow-up questions, but we suspect that interrogation issues were not the basis of any of the court orders. If there are problems with interrogation practices, legal remedies are, in our estimation, an unpromising avenue of redress. Eleven percent of the respondents indicated that at least one officer had at least once been disciplined “for failing to give *Miranda* warnings or for irregularities during the conduct of an interrogation.”<sup>269</sup> Thus, internal monitoring and discipline are likely to be more fruitful avenues for ensuring proper standards. Recall that two-thirds of the respondents agreed that the views of the chief “have a major impact on law compliance” in the department.<sup>270</sup> It appears that the administrators

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*Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847 (2002). Zalman has proposed that prior to conducting a full interrogation, police should document the basis of their suspicion against the suspect in writing. Zalman, *Tea Leaves*, *supra* note 56, at 264-66.

<sup>264</sup> SULLIVAN, POLICE EXPERIENCES, *supra* note 148, at 6-7.

<sup>265</sup> See *supra* Table 8, Question 7.

<sup>266</sup> See *supra* Table 8.

<sup>267</sup> See *supra* Table 9, Questions 16, 31.

<sup>268</sup> See *supra* Table 9, Question 34.

<sup>269</sup> See *supra* Table 9, Question 32.

<sup>270</sup> See *supra* Table 3, Question 21.

of large police departments support the idea that leadership and internal administrative mechanisms are instrumental to *Miranda* compliance. Further research could compare the views of police administrators and managers with those of line officers and detectives in regard to whether the policies of the chief are critical to ensuring compliance with legal norms in general and with interrogation practices in particular.

## B. THE "GAP PROBLEM" AND THE RULE OF LAW

Gaps between the law as written and the law as applied, especially in criminal procedure, go to the heart of constitutional government, based as it is on the "rule of law," a complex of values and institutions that include practices by which law and regularized procedures limit the government and allow it to operate.<sup>271</sup> In criminal law and its administration, where issues of legality<sup>272</sup> are of greatest importance to state security and individual liberties, the rule of law primarily and unambiguously means "a definite limitation on the power of the State."<sup>273</sup> Achieving this desideratum, however, is not a simple matter. As Lon Fuller explains in his classic exposition of the eight elements of legality (or what he calls the "inner morality of law"), the "utopia" of perfection in legality ought to be seen more in aspirational terms than in a set of absolutely measurable criteria.<sup>274</sup> The failures of some elements of legality do not indicate a complete breakdown in the rule of law. Indeed, any empirical impact study is likely to show some level of non-compliance with legal and constitutional restrictions by the police. Therefore, a mature understanding of the rule of law should distinguish between, on the one hand, the inevitable and possibly useful exercises of discretion,<sup>275</sup> as well as unavoidable lapses by the police, and on the other, regimes in which the police ignore the courts

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<sup>271</sup> The scope of rule of law scholarship is vast. See, e.g., THE RULE OF LAW: NOMOS XXXVI (Ian Shapiro ed., 1994); ALLEN, *supra* note 105.

<sup>272</sup> The principal of legality is, strictly speaking, a component of the rule of law, which is centered on the idea that penal laws must be written and non-retroactive and must be interpreted as placing definite limits on the power of the state to penalize individuals. See ALLEN, *supra* note 105 (the rule of law in criminal justice can be undermined by institutional and structural factors); JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 27-69 (2d ed. 1960) (1947).

<sup>273</sup> HALL, *supra* note 272, at 27.

<sup>274</sup> LON FULLER, THE MORALITY OF LAW 44-46 (rev. ed. 1969) (1964). The eight criteria are the existence of law, its publication, non-retroactivity, understandable rules, non-contradictory rules, rules that can be followed, stability in the law, and "congruence between the rules as announced and their actual administration." *Id.* at 39.

<sup>275</sup> Goldstein, *supra* note 170, at 554-62.

with impunity.<sup>276</sup> The level of “slippage” in officials’ obedience to legal and constitutional norms is, however, a matter for concern, even if the reasons for the “gap” are mundane.

The “gap problem” as an indicator of a potential failure of the rule of law is not simply a practical failure to reach a complex and hard-to-measure, universally agreed-upon goal. The gap between *Miranda*’s strictures and police behavior as a measure of legitimacy is interpreted differently by different groups; it may carry different overtones for conservatives and liberals, lawyers and police, or different demographic segments of the population. Such variations reflect the different weights placed on the necessary categories of order and liberty by adherents to the due process model and crime control model.<sup>277</sup> Lon Fuller, explaining why law has some substantive and ethical grip and is not simply a verbal conduit for state power, describes law as “the enterprise of subjecting human conduct to the governance of rules.”<sup>278</sup> However, to assess whether police and judges are speaking the same language when talking about law and rules, to say nothing of the rule of law, we should consider Shklar’s insight that for lawyers, law is not simply a tool, but the foundation of their ideology: legalism. Legalism “is the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules.”<sup>279</sup>

Law, at least in Western societies, is a universally shared and well-understood (if contested) underlying element of government, social interaction, and political thought. But viewing law as “legalism,” the special political ideology of the legal profession, helps to explain societal reactions to police behavior that does not always adhere to rules announced by the Supreme Court to guide their behavior. For, as Shklar notes, “the spirit of legalism is not now, and never has been, the only morality among

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<sup>276</sup> The latter is a hallmark of the complete absence of the rule of law associated with despotic regimes. For a specific example, see, e.g., INGO MÜLLER, *HITLER’S JUSTICE: THE COURTS OF THE THIRD REICH 174-76* (Deborah Lucas Schneider trans., 1991).

<sup>277</sup> PACKER, *supra* note 29, at 154-73. A succinct example of the different political and legal views that may be encompassed under the “rule of law” is nicely phrased by Judith Shklar, who placed the highest value on democratic politics and toleration in her “barebones liberalism.” She noted,

My view of legalism is overtly liberal, but it is not the liberalism of the “rule of law” ideal promulgated by Friedrich von Hayek and his followers, because it does not suggest that the only function of a legal system is to provide a secure framework for the spontaneous order of the free market.

JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* xi (1986).

<sup>278</sup> FULLER, *supra* note 274, at 96.

<sup>279</sup> SHKLAR, *supra* note 277, at 1.

men even in generally legalistic societies.”<sup>280</sup> The theme of her book, a defense of the legitimacy of the Nuremberg war trial, is relevant to our conclusion. The prosecution of crimes against humanity by the Allies was challenged by the legalistic objection that there was no preexisting statute, treaty, or super-national law-making body that did or could positively outlaw the factually-established past horrors of the Nazi regime: “For a lawyer this circumstance creates a great difficulty, given his tendency to think in either-or terms of law or non-law.”<sup>281</sup> Shklar’s defense of the trial rested on a more complex vision: “The main point here is to show that it is practically of great importance to see legalism as a *matter of degree*, to recognize that there are lawlike political institutions and legalistic politics which are not just ‘illegal,’ but rather form a *continuum* consisting of *degrees of legalism*.”<sup>282</sup>

To a person who holds to a “fundamentalist” vision of law, such an interpretation of law is risky business, a slippery slope to totalitarianism. A more realistic view is that a mature and ethical legal system in an advanced society operates through the casuistic interpretation of texts and that a slavish adherence to the letter of the law or to each element of legality does not necessarily mean the end of constitutional government. Again, this view intends not to excuse “gaps” or to suggest that they be ignored but to attempt to put them in a proper context.

The apparent agreement of Fuller and Shklar, therefore, does not mean that lapses by criminal justice personnel in following the dictates of the Supreme Court are a matter of no consequence, as “infringements of legal morality tend to become cumulative.”<sup>283</sup> Therefore, practical efforts to achieve the rule of law to the greatest extent feasible, if not to attain it in some absolute sense, may be viewed as a requirement of legality. Under this view, policymakers, judges, and administrators who perceive apparent shortfalls in compliance with law (or “congruence,” in Fuller’s terms) have an obligation to monitor, to evaluate, and to act on lapses.<sup>284</sup> With this said, we conclude by examining two aspects of the relationship between the Supreme Court and the police regarding compliance with the *Miranda* doctrine.

Some lapses on the part of the police may, with some justice, be attributable to failures by the law-maker; that is, the Supreme Court.

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<sup>280</sup> *Id.* at 2.

<sup>281</sup> *Id.* at 157.

<sup>282</sup> *Id.* at 156 (emphasis added).

<sup>283</sup> FULLER, *supra* note 274, at 92.

<sup>284</sup> Action, in a policy sense, includes the failure to act, which may be justified depending upon the circumstances.

Several elements of Fuller's analysis of legality are especially pertinent to the communications theory of legal compliance: that law be clear, be non-contradictory, and be relatively unchanging.<sup>285</sup> With some justification, it can be seen that well-meaning police officers do not have an easy task in following all of the Court's doctrinal gyrations and may, because of this difficulty, fail to comply with the Court's norms.<sup>286</sup> Indeed, as Professor Albert Alschuler noted in commenting on the work of the Supreme Court, "No one really knows what *Miranda* means."<sup>287</sup> The *Miranda* warnings themselves are clear enough, and the data from this and other studies show that formal compliance with reading *Miranda* warnings is high. However, in other respects, some of the Court's decisions have injected levels of uncertainty into the law. The prophylactic cases, allowing the collateral use of statements obtained in violation of *Miranda* rules, virtually invited the police to expand these categories by intentional violations.<sup>288</sup> It is worth noting, however, that there appeared to be no wholesale rush by police in the 1970s and 1980s to push the limits of interrogation practices to what is now called interrogation "outside *Miranda*." It took the work of legal advisors, carefully distilling the implications of the prophylactic cases, to begin to teach in the 1990s that interrogation "outside *Miranda*" was proper. The California training materials reproduced by Weisselberg<sup>289</sup> have a defensive tone, and one can infer the unease of police who were being told that they were on solid footing by continuing to question a suspect after the invocation of rights, when the *Miranda* decision itself said that questioning must cease.

The Supreme Court's process of incremental doctrinal development, however essential to its legitimacy and the legitimacy of its products, has produced some inconsistent if not incoherent results. As the composition of the Supreme Court has shifted away from persons who previously played major and varied roles in law practice and public life into a sort of legal

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<sup>285</sup> FULLER, *supra* note 274, at 63-70, 79-81.

<sup>286</sup> The late Richard Uviller, with great care, revealed the views of police officers that he followed in their work for a year. On the basis of common sense they sharply opposed, but would follow, state law that barred the use of a "cured" statement that would be admissible under *Oregon v. Elstad*, but at least one officer could not fathom the legality of a rule that allowed police to lie to suspects during interrogation. H. RICHARD UVILLER, *TEMPERED ZEAL: A COLUMBIA LAW PROFESSOR'S YEAR ON THE STREETS WITH THE NEW YORK CITY POLICE* 198-212 (1988).

<sup>287</sup> Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2629 (1996).

<sup>288</sup> See Note, *Laws That Are Meant To Be Broken: Adjusting for Anticipated Noncompliance*, 75 MICH. L. REV. 687, at 687-88 *passim* (1977) (arguing that legislatures expect levels of noncompliance with some laws).

<sup>289</sup> Weisselberg, *Saving Miranda*, *supra* note 3, at 189-92.

mandarinate, the justices spend considerable energy on smaller numbers of cases than in past years by searching for the most precise expressions of the reasons for their decisions. This method results in finely honed decisions that can leave scholars in confusion and, perversely, are often of little assistance to implementers.<sup>290</sup> In *Chavez v. Martinez*,<sup>291</sup> for example, the Court promulgated three divergent views about the meaning of the Fifth Amendment's privilege against self-incrimination, with the plurality saying quite bluntly that torture does not violate the privilege, a position that no police department would follow. As the case was ultimately to be decided on due process grounds, the police will have to exercise judgment in an uncertain milieu when interrogating a person under the kind of stressful circumstances that existed in *Chavez*.

In *Seibert*, the police in Rolla, Missouri who applied the two-step procedure were following the advice of lawyers hired to guide them in the proper understanding of the Supreme Court's rulings.<sup>292</sup> Even the dissenters in *Seibert* distanced themselves from the actions taken by the police in that case by noting that Ms. Seibert's statement should be suppressed if involuntary, a matter to be determined on remand by the Missouri courts.<sup>293</sup> Justice O'Connor, like a schoolmarm gently castigating a wayward pupil, noted that "unlike the officers in *Elstad*, Officer Hanrahan referred to Seibert's unwarned statement during the second part of the interrogation when she made a statement at odds with her unwarned confession."<sup>294</sup> Poor Officer Hanrahan: having been told how to do his job, he did it very well indeed, only to be called out, by name, by the highest court in the land for not having precisely assimilated the facts of one of the more than sixty post-*Miranda* opinions issued by the United States Supreme Court. Thus, threats to the rule of law may originate with a lack of clarity in *Miranda* rules as announced by the Court or in the rapid shifts in its *Miranda* doctrine cases and not with the actions of the police who follow their lead.

Another major threat to the rule of law, according to Fuller, is a lack of congruence between the law as written and the law as applied.<sup>295</sup> In keeping with Fuller's caution not to see the demise of the rule of law in every divergence from strict legality, consider the various reasons for

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<sup>290</sup> Stuart Taylor, Jr., *Comment: Remote Control*, ATLANTIC MONTHLY, Sept. 2005, at 37; Benjamin Wittes, *Comment: Without Precedent*, ATLANTIC MONTHLY, Sept. 2005, at 39.

<sup>291</sup> 538 U.S. 760 (2003).

<sup>292</sup> *Missouri v. Seibert*, 542 U.S. 600, 609-10 (2004).

<sup>293</sup> *Id.* at 628 (O'Connor, J., dissenting).

<sup>294</sup> *Id.* at 628-29.

<sup>295</sup> FULLER, *supra* note 274, at 81-91.

failures of congruence. It “may be destroyed or impaired in a great variety of ways: mistaken interpretation, inaccessibility of the law, lack of insight into what is required to maintain the integrity of a legal system, bribery, prejudice, indifference, stupidity, and the drive toward personal power.”<sup>296</sup> These are the kinds of failings that a robust constitutional system can absorb, so long as courts and other political leaders do not become complacent but instead act to correct failures of justice arising from such mundane reasons. It is police administrators who should be at the forefront of such efforts. Placing them in this role is not fanciful. Our study and others suggest that while modern, educated police administrators are not ideologues of legalism (in Shklar’s terms), they exhibit a kind of “pragmatic legalism” that is a hallmark of professional policing in the era of educated, managerial police executives implementing up-to-date programs of problem-oriented policing, community policing, and many other complex tasks.<sup>297</sup> Since it can be assumed that mundane reasons for the failure of law compliance are a constant in police departments, the existence of such factors calls for more detailed knowledge about how the law is applied in practice. This application should not be the concern only of sporadic academic research endeavors; it ought to be institutionalized in departmental practice audits by police managers. Armed with knowledge of the gap between the law as written and the law as practiced in their own departments, police leaders who view fidelity to law as a component of professional police leadership will have the information base with which to ensure greater compliance with law.<sup>298</sup>

How comfortable should citizens be with the results of our survey with regard to the rule of law? It may be useful to think of legality in terms of the wholesale and the retail dispensation of policing and justice. At the wholesale level, the survey results show that the practical and well-educated men and women who are in charge of the largest police departments in the country support the continuation of *Miranda* and are not comfortable with flagrant deviations from its most prominent rules. These results reflect the pragmatic legalism of present-day big city police administrators. About half of the respondents knew of a Supreme Court ruling on confessions (*Chavez*, decided a year before the survey). This finding suggests that executives in charge of major police departments are not on top of every

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<sup>296</sup> *Id.* at 81.

<sup>297</sup> See, e.g., RONALD GLENSOR, KENNETH J. PEAK & LARRY K. GAINES, *POLICE SUPERVISION* (1999); ELI B. SILVERMAN, *NYPD BATTLES CRIME: INNOVATIVE STRATEGIES IN POLICING* (1999).

<sup>298</sup> Law-abiding policing has become a global concern, along with recognition of human rights. See *DEMOCRATIC POLICING AND ACCOUNTABILITY: GLOBAL PERSPECTIVES* (Errol P. Mendes et al. eds., 1999).

new wrinkle in *Miranda* law, a matter that is hardly a threat to the rule of law. We surmise that knowledge of Supreme Court rulings is one of many things a busy chief must be aware of, lest the implications of a ruling come to impinge on the department's functioning.

The police executives were skeptical about interrogation methods being a cause of false confessions, but over half supported videotaping. A small percentage indicated that their departments had some level of internal discipline devoted to sanctioning improper interrogation methods. A strict legalist may be alarmed by these findings and see in the large minority who oppose videotaping, for example, a desire to hide potentially illegal or unconstitutional police work from the scrutiny of the public. At the wholesale level, we believe that such a critical reading of the results of this study would be alarmist and uncalled for. As Jerome Hall, the noted twentieth-century legal philosopher, observed, legalism depends not only on strict compliance with rules but also on "supporting institutions, procedures, and values."<sup>299</sup> Francis Allen elaborated the point:

The rule of law is only one of the devices to direct and contain the powers of public officials, available to a political society valuing individual autonomy. The mores and morals of the community, widely held and often unarticulated, are, of course, fundamental. The ballot box in a democratic society may represent the ultimate remedy for widespread official disregard of legal norms. The ethics of professionalism may, on occasion, prevent or moderate excesses of public officers.<sup>300</sup>

Big city police executives are better educated than ever before, are recognized as prominent civic leaders, have moved beyond the rigid separation from politics of the "professional" era, and have learned that an understanding of community views is necessary to successful policing.<sup>301</sup> The United States Department of Justice has imposed "practice and pattern" decrees on a growing number of departments, as national standards have developed and as inter-agency cooperation has grown.<sup>302</sup> Police executives are increasingly trained in managerial sciences and have come to view law-abidingness by officers as necessary to run an efficient and effective organization. All of these factors, combined with our research results, suggest that habits of legality are well established—at the wholesale level.

At the retail level, however, a disturbing number of case studies and surveys offer highly detailed accounts of psychological interrogation

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<sup>299</sup> HALL, *supra* note 272, at 27.

<sup>300</sup> ALLEN, *supra* note 105, at 19.

<sup>301</sup> SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* 131-34, 170-74, 197-201, 232-39 (2d ed. 1998) (1980).

<sup>302</sup> Walker, *Pattern*, *supra* note 240.



methods pushing innocent people to confess.<sup>303</sup> At the retail level, at least one “two-step interrogation” in Rolla, Missouri has been closely scrutinized by the Supreme Court, and it is anyone’s guess as to how often suspects are manipulated to the extent that Patrice Seibert was.<sup>304</sup> Without systematic monitoring and universal videotaping, it is very hard to know in how many interrogations veiled threats or lavish promises are implied; how many continue for too many hours; how many create fabrications that exceed the line of suggestibility; how many are conducted vigorously against vulnerable populations of teenaged and mentally challenged suspects; or how many are based on weak facts and tunnel vision. Our data suggest that a small fraction of large police departments, perhaps 10%, has actively considered interrogation “outside *Miranda*” to the point of having explicit policies.<sup>305</sup> This wholesale finding, again, does not provide data on the actual cases of abuse of the interrogation process. The kind of wholesale violations of legality that define despotic governments are rare in democratic regimes, typically occurring in times of crisis and social panics.<sup>306</sup> In routine law enforcement in democratic regimes, behavior that degrades the habits of legality tends to occur in the retail dispensation of

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<sup>303</sup> It is useful to compare our findings to empirical studies of jury selection and criminal sentencing that show that race has an effect at the individual level but that the race effect is cancelled out at the institutional level. See, e.g., David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 53 (2001); Travis C. Pratt, *Race and Sentencing: A Meta-Analysis of Conflicting Empirical Research Results*, 26 J. CRIM. JUST. 513, 519 (1998) (“At the individual level of analysis, evidence of racial discrimination in sentencing is more likely to be found, yet at the institutional level, anti-African American, pro-African American and nondiscriminatory judicial decisions may cancel each other out resulting in a statistical finding of no discrimination.”); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695, 698-99 (1999); Billy M. Turner et al., *Race and Peremptory Challenges During Voir Dire: Do Prosecution and Defense Agree?*, 14 J. CRIM. JUST. 61, 64-67 (1986).

Such studies can only be suggestive of the retail and wholesale effects suggested herein. They do, however, alert us to the possibility that a number, and perhaps a fairly large number, of legal violations that occur in such criminal justice processes as interrogation become “invisible” because they are not recorded and because they are not so widespread as to come to public attention through the news media.

<sup>304</sup> *Missouri v. Seibert*, 542 U.S. 600 (2004).

<sup>305</sup> See *supra* Table 7.

<sup>306</sup> See NAT’L ADVISORY COMM’N ON CIVIL DISORDERS (KERNER COMM’N), REPORT (1968). An egregious example of a continuous pattern of gross abuses in interrogation amounting to torture has been documented in one Chicago precinct. JOHN CONROY, UNSPEAKABLE ACTS, ORDINARY PEOPLE: THE DYNAMICS OF TORTURE 21-26, 60-87, 158-68, 225-41 (2000) (systematic torture of criminal suspects in the Area 2 precinct in Chicago for thirteen years from the late 1970s to the early 1990s); Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFFALO L. REV. 1275 (1999) (same).

criminal justice. A society that values the rule of law in practice, not just with lip service, ought to take pains to ensure practices to the degree practicable to avoid violations of legality. In the context of interrogation, the external evidence suggests that sufficient problems exist in interrogation practices to warrant some greater levels of checking.<sup>307</sup>

The results of our survey also indicate that police administrators are sufficiently attuned to the concerns of proper and lawful procedures to want to follow the law. Our survey supports the understanding that legal controls are an inefficient and less-than-effective way of ensuring that police comply with constitutional rulings. Despite their skepticism about the link between interrogation methods and false confessions, the majority of large city police administrators support the videotaping of confessions. The environment of legality in regard to interrogations would be improved at least by the introduction of the routine videotaping of interrogations in departments that do not currently employ the practice. It would be immeasurably strengthened if police executives devoted greater attention to the conditions of legality within their own departments, although the Supreme Court could assist well-meaning police chiefs by taking the constitutional rights of citizens more seriously.

### C. WHITHER *MIRANDA*?

After forty years of existence, the *Miranda* doctrine has reached middle age. It was conceived by Justices who were young lawyers in the heyday of police third-degree practices. Appalled by these practices, the Supreme Court began to challenge coercive interrogation practices in the mid-1930s by excluding confessions under the due process voluntariness test. Three decades of voluntariness test decisions left the Court frustrated by the continuation of coercive police interrogations. Although the level of brutality in the back rooms of police stations was abating by the mid-1960s, social tolerance for police brutality was simultaneously declining and the Supreme Court was demanding more refined police behavior in its voluntariness cases.

*Miranda* was born to great liberal hope of ending coercive interrogations and strident conservative protest that its warnings approach would drastically undermine public safety. The liberal Court that created *Miranda* did not last long enough to develop supporting rules that might have resulted in less psychologically pressuring interrogations. The conservative Court holding sway since 1972 has not been able to eliminate

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<sup>307</sup> KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969) (finding unwarranted discretion in agencies controlled by the methods of confining, structuring, and checking).

*Miranda*, although it has doctrinally weakened it in many respects. Several ironies surround the *Miranda* doctrine's life course.<sup>308</sup> The very Court that created the loopholes in and exceptions to *Miranda*, which seemingly set it up for being overruled, was the Court that rescued it in *Dickerson*.<sup>309</sup> Even while the *Miranda* doctrine is filled with exceptions that allow the use of tainted confessions for a number of purposes, the Court nevertheless insists on mandatory warnings in every police custodial interrogation.

A greater irony exists. On the one hand, *Miranda* is so doctrinally confused that legal scholars have difficulty seeing how it can continue to exist with any semblance of coherence. Yet on the other hand, as our survey results bear out, many police administrators have come to embrace it as a standard of professionalism and right conduct, and are scrupulous in applying the letter of *Miranda*. Nevertheless, in practice, police often administer *Miranda* in ways that do not convey to suspects the full meaning of their constitutional privilege to remain silent. Making sense of these seemingly incompatible perspectives requires that we look at *Miranda* in a different way.

When Richard Leo "revisited" the impact of *Miranda*, he speculated that *Miranda* accelerated the trend toward less physically violent police interrogation, forced police to develop more professional postures during interrogation, and made legality an essential measure of police work.<sup>310</sup> The challenge of *Miranda* forced or "inspired police to develop more specialized, more sophisticated, and seemingly more effective interrogation techniques with which to elicit inculpatory statements from custodial suspects."<sup>311</sup> On a broader social tableau, *Miranda*'s notoriety "increased public awareness of constitutional rights,"<sup>312</sup> an insight that was echoed in Chief Justice Rehnquist's majority opinion in *Dickerson*<sup>313</sup> and that played a role in keeping the Court from overruling *Miranda*.

At the present time, exciting questions about interrogations, driven by the actual-innocence movement,<sup>314</sup> have more to do with research on

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<sup>308</sup> In Anglo-American law, legal doctrines, whether they are common law doctrines or doctrines of statutory or constitutional interpretation, may go through cycles of birth, growth, application, decline, and even death. See LEVI, *supra* note 75, at 8-9 *passim*.

<sup>309</sup> *Dickerson v. United States*, 530 U.S. 428 (2000).

<sup>310</sup> Richard A. Leo, *The Impact of Miranda Revisited*, 86. J. CRIM. L. & CRIMINOLOGY 621, 668-71 (1996).

<sup>311</sup> *Id.* at 672.

<sup>312</sup> *Id.* at 671.

<sup>313</sup> "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture." *Dickerson*, 530 U.S. at 443.

<sup>314</sup> See, e.g., Marvin Zalman, *Cautionary Notes on Commission Recommendations: A Public Policy Approach to Wrongful Convictions*, 41 CRIM. L. BULL. 169 (2005).

interrogation practices than with refinements of *Miranda* doctrine. The movement to videotape interrogations,<sup>315</sup> to take the age and mental status of suspects into account,<sup>316</sup> to establish a factual foundation of suspicion before interrogating a suspect,<sup>317</sup> and similar procedures offer the hope of reducing false confessions while allowing interrogation practice to continue more or less in its present mode. This appreciation led Richard Leo to suggest that “*Miranda*’s impact in the twenty-first century appears rather limited,” and to imply that *Miranda* has outlived its usefulness.<sup>318</sup> It seems to us that the *Miranda* doctrine still plays a necessary role in law enforcement. The acceptance of *Miranda* by police, supported by the results of our survey, shows that although it may not have led police to behave in accord with the original vision of the case,<sup>319</sup> it continues to be the legal standard on which a law-abiding and restrained approach to interrogation rests. As we have emphasized earlier in this Conclusion, the larger purpose of constitutional criminal procedure is to uphold the rule of law. To be viable, a doctrine must guide practice in fact and hold the allegiance of those who apply the law. The *Miranda* doctrine, as presently structured, appears to be an important value for many of our respondents, continues to shape interrogation practices, and continues to perform its vital constitutional function.

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<sup>315</sup> Sullivan, *Recent Developments*, *supra* note 148.

<sup>316</sup> Blair, *supra* note 141.

<sup>317</sup> Zalman, *Tea Leaves*, *supra* note 56, at 363-66.

<sup>318</sup> Leo, *Questioning the Relevance*, *supra* note 89, at 1026.

<sup>319</sup> Weisselberg, *Saving Miranda*, *supra* note 3, at 117-25.

**Appendix**

The format of the survey instrument appearing in this Appendix has been modified by adding question numbers, which did not appear on the questionnaire that was mailed to respondents, and by indicating in bold which questions have been taken directly from Time and Payne (2002).

WAYNE STATE UNIVERSITY  
DEPARTMENT OF CRIMINAL JUSTICE

July 2004

LAW ENFORCEMENT EXECUTIVES' SURVEY  
OF INTERROGATION LAW AND PRACTICES

Thank you for completing this survey. It should take you about 30 minutes.  
If you have any questions about this survey feel free to contact Marvin Zalman: (313) 577-6087;  
aa1887@wayne.edu.

OPINION QUESTIONS

	Strongly disagree ▼	Disagree ▼	Agree ▼	Strongly agree ▼
1. In order to prevent the dismissal of a case, arresting officers must routinely read offenders their <i>Miranda</i> rights. <b>T&amp;P-1</b> . . . . .	_____	_____	_____	_____
2. Police officers in my department routinely read offenders the <i>Miranda</i> warnings. <b>T&amp;P-2</b> . . . . .	_____	_____	_____	_____
3. Courts are too cautious with regard to the <i>Miranda</i> warnings. <b>T&amp;P-4</b> . . . . .	_____	_____	_____	_____
4. Detectives should read <i>Miranda</i> warnings in a way to make them seem unimportant. . . . .	_____	_____	_____	_____
5. Too many offenders get off easy as a result of <i>Miranda</i> warnings. <b>T&amp;P-5</b> . . . . .	_____	_____	_____	_____
6. The <i>Miranda</i> warnings are useful in principle but ineffective in practice. <b>T&amp;P-7</b> . . . . .	_____	_____	_____	_____
7. Station-house interrogation of adult offenders should be videotaped. . . . .	_____	_____	_____	_____
8. Station-house interrogation of juvenile offenders should be videotaped. . . . .	_____	_____	_____	_____
9. The requirement to read suspects the <i>Miranda</i> warnings makes it difficult for police to do their jobs. <b>T&amp;P-12</b> . . . . .	_____	_____	_____	_____
10. <i>Miranda</i> warnings hinder voluntary confessions. <b>T&amp;P-13</b> . . . . .	_____	_____	_____	_____
11. Interrogation techniques sometimes help to produce false confessions. . . . .	_____	_____	_____	_____
12. In <i>Dickerson</i> (2000) the Supreme Court ruled that <i>Miranda</i> is constitutional. The Supreme Court <u>should have</u> abolished mandatory <i>Miranda</i> warnings. . . . .	_____	_____	_____	_____
13. In June 2004 the Supreme Court ruled that a gun is <u>admissible</u> in evidence if taken after an admission to an officer who did not complete giving <i>Miranda</i> warnings. There was no public safety issue. What is your opinion of this decision in <i>U.S. v. Patane</i> ? . . . . .	_____	_____	_____	_____



29. In the past decade has your Department had an unwritten policy allowing interrogation "outside *Miranda*"?  Yes  No
30. If "Yes," is the practice discouraged?  Yes  No
31. Has an officer in your department ever been sued for failing to give *Miranda* warnings or for irregularities during the conduct of an interrogation?  Yes  No  Don't know
32. Has an officer in your department ever been disciplined for failing to give *Miranda* warnings or for irregularities during the conduct of an interrogation?  Yes  No  Don't know
33. Investigators/detectives in my department have had interrogation training in the "Reid method."  Most  Some  A few  
 None  Don't know
34. Interrogation practice in my department is limited to some degree by a court injunction, state or municipal oversight, or a U.S. Department of Justice consent decree.  Yes  No
35. In my Department, station house interrogation is  Always videotaped  
 Videotaped in serious cases  
 Occasionally videotaped  
 Never videotaped
36. In my Department, station house interrogation is  Always audio taped  
 Audio taped in serious cases  
 Occasionally audio taped  
 Never audio taped

QUESTIONS ABOUT PERSON COMPLETING SURVEY

37. Title: \_\_\_\_\_
38. Gender:  Male  Female
39. Race/Ethnicity:  African American  White  
 Hispanic/Latino  Other: \_\_\_\_\_
40. Educational Level:  High School  Some graduate work  
 A.A. or Some College  Law degree  
 Bachelor's degree  Graduate degree  
 Law and Graduate degree

If you have additional comments that you wish to add, please use reverse side.  
 THANK YOU