Rethinking *Miranda*: Truth, Lies, and Videotape

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I. INTRODUCTION

In 1966, the United States Supreme Court shaped the landscape of constitutional confession law in *Miranda v. Arizona.*1 The Court directed that interrogating police officers advise suspects of their constitutional right to silence and assistance of counsel in order to dispel the inherent pressure in the “police dominated atmosphere” of custodial interrogation.2 The *Miranda* Court set forth the familiar warnings3 to the

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3. See *id.* at 467-73 (commonly recited as follows: You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have a right to talk to a lawyer before questioning and have a lawyer present during questioning. If you cannot afford to hire
suspect that he or she has the right to silence and assistance of counsel. Absent a voluntary and knowing waiver of 
Miranda rights, resulting statements or confessions violate the Fifth Amendment privilege against self incrimination and are inadmissible in the government’s case in chief.

This article sets forth the argument that the best way to ensure that custodial confessions include adequate Miranda warnings, are free from coercion, and are preceded by a knowing and intelligent waiver of rights, is for the police/suspect contact to be videotaped starting with initial contact in the police vehicle. In order to protect the suspect’s due process right to a fair determination of the voluntariness of the statement before it is admitted at trial, the judge must have a complete record of the interaction between the police and suspect.

The time to consider the scope and boundaries of a videotaping requirement is now. Currently no uniform recording requirement exists. By 2005, twenty-five states enacted or proposed statutes that require electronic recording of custodial interrogations. However, the statutes do not extend the recording mandate beyond the interrogation room. In addition, the current recording statutes and proposals limit recording of custodial interrogations to suspects accused of specific crimes.

For more than three decades, legal scholars and the courts have touted the benefits and necessity of electronic video recording of custodial interrogations. Numerous articles have been written about the police practice of questioning outside Miranda, police violations of Miranda, and the benefits to law enforcement of violating Miranda. However, no scholar has argued that the videotaping requirement should be extended to non-custodial interactions within the police vehicle.

4. Id.
5. Id. at 444-45.
7. See infra notes 219-249.
8. See infra notes 244-249.
9. See infra notes 224, 226, 244-245.
Since *Miranda* was decided, the Supreme Court has established a number of exceptions to the seemingly bright-line standard.\(^{12}\) Police officers have become increasingly sophisticated interrogators with a broad understanding of how to manipulate the myriad *Miranda* exceptions to convince almost any suspect to waive his or her *Miranda* rights and confess.\(^{13}\) In light of these techniques, some questions about the current state of the *Miranda* doctrine arise. Does the current *Miranda* doctrine achieve the goals it originally set out to achieve? Do the current videotaping proposals adequately address police manipulation of the *Miranda* exceptions?

In attempting to answer these questions, this article will proceed in six sections. Part II will provide a brief overview of the due process voluntariness test that requires judges to assess factors that cannot be fairly and accurately done without a complete record.\(^{14}\)

In Part III, the constitutional evolution of *Miranda v. Arizona* is addressed including the application of *Miranda* in *Dickerson v. United States* in which the Supreme Court upheld the constitutional requirement for the reading of the *Miranda* warnings. While *Dickerson* reaffirmed the warnings requirement as stemming from a constitutional Fifth Amendment right, it did not undo the prior decisions limiting the reach of *Miranda*.

Part IV will address the post-*Miranda* decisions in the last four decades that have weakened or eroded the strength of the *Miranda* doctrine. The Supreme Court’s confession decisions since 1966 have steadily chipped away at both the letter and the spirit of *Miranda*.\(^{15}\) Police have adapted the interrogation process to manipulate the warnings to increase the likelihood that suspects will waive their *Miranda* rights and make a statement and have also adopted a practice commonly known as “going outside *Miranda*”\(^ {16}\) that intentionally violates the suspect’s *Miranda* rights to achieve

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12. See, e.g., cases discussed infra Part III.


14. Briefly stated, the due process voluntariness test evaluates the admissibility of a confession using a “totality of the circumstances” analysis requiring courts to consider the specific facts of each case, the “personal characteristics and background of the suspect” (including the suspect’s intelligence, mental condition, education and prior police contact), the nature of the questioning (including the length, time and place) and the “conduct of the police officers during the interrogation.” Leo, *supra* note 1, at 624-25 (1995); see Brown v. Mississippi, 297 U.S. 278, 285-87 (1936); Tennessee v. Ashcraft, 322 U.S. 143, 152-55 (1944). See generally Yale Kamisar, *What is an “Involuntary” Confession?: Some Comments on Inbau and Reid’s Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728, 755-59 (1963).

15. See infra Part III.A.

16. The term “going outside *Miranda*” describes the police officer practice of continuing to question a suspect after an unequivocal invocation of his right to counsel or remain silent, on the theory that the statement will lead to other evidence or may be admissible for impeachment purposes. See Leo & White, *supra* note 13, at 460-61.
a benefit. Adding insult to injury, the Supreme Court has carved out numerous exceptions to the prohibitive exclusionary rule thereby creating incentives for police to deliberately violate Miranda.\(^{17}\)

Additionally, Part IV will discuss the current protections offered by the *Miranda* doctrine in the context of *Missouri v. Seibert*, the Supreme Court's most recent decision regarding the boundaries of police limits in questioning suspects.\(^{18}\) The *Seibert* Court recognized that police officers routinely question suspects outside *Miranda*, but failed to ensure that police are deterred from such practices.\(^{19}\) In *Seibert*, the Court precluded the defendant's statement obtained from the two-step police interrogation practice.\(^{20}\) The plurality in *Seibert* barred all *Miranda* violations that "depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them."\(^{21}\) The Supreme Court's ban on unwarned pre-interrogations could improve the accuracy of pre-trial judicial fact finding in confession cases.

Today, *Miranda* does not effectively prevent rational police officers from being willing to suffer the consequences of *Miranda* violations which result in tangible and immediate benefits.\(^{22}\) The *Seibert* Court's struggle with the arresting officer's conduct in *Seibert* illuminates the difficulty in deterring *Miranda* violations. More innovative efforts to open the interrogation process to public view and judicial scrutiny offers hope for the future. However, the recent proposals to open the custodial interrogation at the precinct merely brushes the surface of police/suspect interactions. Proponents of recording custodial interrogations fail to address the various psychologically abusive tactics police employ prior to the custodial phase—the pre-interrogation interrogation. What rendered modern interrogation inherently compelling/coercive from the *Miranda* Court's perspective was the combination of incommunicado custody in a police-dominated atmosphere with psychological pressures and inducements to confess.\(^{23}\) *Seibert* bears on a growing practice of

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17. The following examples are not exhaustive but merely illustrative of the benefits police may derive from violating *Miranda*. The Court has held that the exclusionary rule does not apply to the evidentiary "fruits" of statements obtained via a good faith violation of *Miranda*. Michigan v. Tucker, 417 U.S. 433, 450-52 (1974). In *New York v. Quarles*, the Court recognized an exception for an intentional *Miranda* violation required to protect the public. 467 U.S. 649, 655-56 (1984). In *United States v. Patane*, the Court held that physical evidence discovered as a direct result of a *Miranda* violation is admissible. 542 U.S. 630, 639-44 (2004).


19. *Id.* at 609-14 (declining to require the police to take additional steps, such as recording the interview, to insure against future *Miranda* violations).

20. *Id.* at 617.


“going outside” Miranda by intentionally violating Miranda to yield admissible statements or other evidence.\textsuperscript{24}

Finally, in Part V, the argument is presented that due process requires that the electronic videotaping of police/suspect interaction begin at the initial point of contact—in the police car. With advanced technology, including DNA testing, evidence of convictions based on false confessions is surfacing at an increasing and alarming rate.\textsuperscript{25} DNA testing is a valuable asset in identifying and rectifying wrongful convictions and other serious miscarriages of justice inasmuch as it presents scientific and irrefutable proof of innocence or guilt.\textsuperscript{26} As a result of DNA testing, hundreds of wrongfully convicted individuals have been exonerated.\textsuperscript{27} It is against this backdrop of wrongful convictions and evidence of false confessions that the argument concerning electronic recording of the conversation between the police and the suspect that occurs inside the police vehicle arises. The existence of a complete record of the conversations and physical interactions between suspects and police officers is crucial in determining the voluntariness of confessions.

Advocates contend that mandatory videotaping of custodial interrogations provides a solution to criticism that Miranda does not adequately check physically and psychologically coercive police practices.\textsuperscript{28} Generally, advocates of mandatory videotaping of custodial interrogations have argued that all custodial interrogations from the point at which police advise the suspect of his or her Miranda rights through the end of the interrogation should be videotaped.\textsuperscript{29} The failure to address the manipulative and coercive practices that occur outside the scope of Miranda is surprising. Thus far, custodial interrogation has been the earliest benchmark of when videotaping must begin. In order to fully understand the context resulting in a

\begin{itemize}
\item \textsuperscript{24} Through this article, “violations of Miranda” mean that the police did not follow the warnings and waiver procedures set out in the Miranda decision.
\item \textsuperscript{25} See infra notes 27, 307-309 and accompanying text.
\item \textsuperscript{26} See infra notes 27, 307-309 and accompanying text.
\item \textsuperscript{27} The Innocence Project at the Benjamin N. Cardozo School of Law only handles cases where post-conviction DNA testing of evidence can yield conclusive proof of innocence. As of September 16, 2007, DNA testing has exonerated 207 wrongfully convicted men from the prospect of years behind bars, or given another chance at life to those condemned to death. See Benjamin N. Cardozo School of Law: The Innocence Project, http://www.innocenceproject.org (last visited Oct. 20, 2007). Of the cases the Innocence Project handled, false confessions played a role in 25 percent of the DNA exonerations. Benjamin N. Cardozo School of Law: The Innocence Project, False Confessions, http://www.innocenceproject.org/fix/False-Confessions.php (last visited Oct. 20, 2007).
\item \textsuperscript{28} See Donovan & Rhodes, supra note 10, at 227-29.
\item \textsuperscript{29} Leo, supra note 1, at 688.
\end{itemize}
confession, an earlier window of opportunity is available by using advanced technology. Due process requires that that opportunity must be taken advantage of. As an alternative method to the current custodial interrogation statutes and proposals, videotaping the police encounter beginning at the initial point of contact in the police vehicle will capture police practices that may influence a suspect's decision to waive *Miranda* along with any subsequent statements.

II. PRE-MIRANDA DUE PROCESS VOLUNTARINESS TEST

Prior to the *Miranda* decision, in 1936 the United States Supreme Court unanimously reversed the convictions of three black men after the police had whipped and beaten the men into confessing to the murder of a white man. The Court held that the admission of these confessions at trial violated the Due Process Clause of the Fourteenth Amendment. In so holding, the Court announced a "voluntariness" doctrine rooted in the Due Process Clause of the Fourteenth Amendment as the test for assessing the admissibility of confessions in state cases. Under this standard, the admissibility of a confession was evaluated according to the "totality of the circumstances," which included the facts of the case, the personal characteristics of the suspect including age, intelligence, education, prior contact with law enforcement, and the police conduct during interrogation.

The initial rationale of the Court appeared to be that involuntary confessions are inherently untrustworthy. However, in 1941, the Supreme Court clarified that trustworthiness was not the only issue necessary when making a determination of voluntariness. In *Lisben v. California*, the Supreme Court wrote: "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." In subsequent confession cases, the Supreme Court ruled that confessions obtained by unfair police practices may be involuntary despite the apparent veracity of the statement.

31. Id. at 287.
32. Id.
34. 3 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 822 (James H. Chadbourn ed., 1970).
36. Id.
As the due process voluntariness decisions evolved throughout the twentieth century, the Supreme Court relied on differing and sometimes conflicting rationales. Initially, the Court sought to promote reliability in the trial process by excluding confessions that were likely untrustworthy because they were the product of police coercion or undue influence. 38 In the 1930s and 1940s the Court recognized another rationale—that courts should only admit into evidence confessions that were the product of a free and independent will. 39 A third rationale subsequently emerged—confessions obtained through fundamentally unfair police methods should be excluded in order to deter offensive police conduct, irrespective of the voluntariness or trustworthiness of the statement. 40

Throughout the 1950s and 1960s the Court recognized that an entirely false or unreliable confession could be voluntarily provided. 41 In Rogers v. Richmond, the Court held that the admissibility of a confession must be determined based upon whether the police interrogation methods were such “as to overbear petitioner’s will to resist and bring about confessions not freely self-determined—a questions to be answered with complete disregard of whether or not the petitioner in fact spoke the truth.” 42 Thus, the Court eschewed any concern about the trustworthiness or reliability of the statement in favor of the “overbearing of the will” standard. 43

III. THE CONSTITUTIONAL EVOLUTION OF MIRANDA V. ARIZONA

A. Miranda v. Arizona

In Miranda v. Arizona, the Supreme Court announced a remedy to counteract the effects of psychological tactics during custodial interrogations that can create a coercive atmosphere and overwhelm the free will of the suspect. 44 In attempting to define compulsion, the Miranda Court focused on the fact that each of the defendants were questioned while in police custody. 45 The Court traced the history of interrogations in America noting the police practice of the “third degree” 46 and the

38. Kamisar, supra note 14, at 742 (“[W]hatever the current meaning of the elusive terms ‘voluntary’ and ‘involuntary’ confessions, originally the terminology was a substitute for the ‘trustworthiness’ or ‘reliability’ test.”).
40. Id. at 356-59.
41. Id. at 341-44.
42. 365 U.S. 534, 544 (1961).
43. Penney, supra note 39, at 353-55.
45. Id. at 445.
46. Id. at 445-48.
"dangers of false confessions." The Court described the modern interrogation methods as "psychologically rather than physically oriented." Despite the fact that the officers did not employ any "third-degree" tactics during the subject interrogations, the Court held that the mere act of custodial interrogation constitutes compulsion.

According to the Warren Court in *Miranda*, contemporary police interrogation employed tactics that were manipulative, heavy-handed and oppressive and thus, fundamentally conflicted with the privilege against self-incrimination. The Supreme Court contended that the compelling pressures inherent in modern police interrogations threatened to undermine a suspect's rational decision-making capacity. The Court held that prior to interrogating a suspect in custody a police officer must first take appropriate steps to dispel the inherent coercive atmosphere.

In *Miranda*, the Supreme Court applied the Fifth Amendment privilege against self-incrimination, that no person should "be compelled in any criminal case to be a witness against himself." Thus, the police must advise a criminal suspect of their rights to remain silent and appointed counsel before any custodial questioning can commence. Advising suspects of their constitutional rights prior to interrogation gives the suspect the information needed to make a free choice in deciding whether or not to speak to the police.

The *Miranda* Court sought to assure that suspects are aware of their constitutional rights to silence and the assistance of counsel prior to custodial interrogation, thus empowering suspects to determine whether to waive or invoke those rights. Forty years after the pronouncement of these goals—to dispel coercion and empower suspects to make better choices for themselves during interrogations—it is clear that *Miranda* has failed to deliver. A review of the

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47. *Id.* at 447.
48. *Id.* at 448.
49. *Id.* at 445, 467.
50. *Id.* at 455-58.
51. *Id.* at 455 ("[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.").
52. *Id.* at 467-73.
53. U.S. CONST. amend V.
55. *Id.* at 444.
57. *See* *Miranda*, 384 U.S. at 441, 478-79.
58. *See id.* at 467-74.
Court's post-Miranda decisions reveals that Miranda and its progeny have increased the psychological pressure police exert, creating more confusion regarding how a suspect is able to exercise his or her rights.60

B. Dickerson v. United States

"Two years after Miranda was decided, Congress enacted [18 U.S.C.] § 3501."61 The federal statute was an effort to eliminate the requirement that police officers inform suspects of their Miranda rights and obtain a valid waiver prior to all custodial interrogations.62 Under § 3501, judges use the totality-of-the-circumstances test to determine the voluntariness of custodial statements.63 Although the federal statute was largely ignored, the attack on Miranda had begun.

Further, the Supreme Court began to retreat from its broad pronouncement in Miranda.64 In a series of decisions, the Court held that statements taken in violation of Miranda could be used pretrial: to obtain derivative physical evidence, at a grand jury proceeding, at trial, to impeach the defendant, or whenever the violation could be excused based on public safety concerns.65 Efforts to abolish Miranda were resurrected in Dickerson v. United States, which addressed whether Congress had in fact legislatively overruled Miranda by enacting 18 U.S.C. § 3501.66 The Court further held that Miranda provided greater protection than the totality of the circumstances test Congress had attempted to reinstate in 18 U.S.C. § 3501.67 The Court found that the traditional totality-of-the-circumstances test did not adequately address the "coercion inherent in custodial interrogation [that] blurs the line between voluntary and involuntary statements."68 The Dickerson Court noted that "experience suggests that the totality-of-the-circumstances test which §

60. See infra Part IVA-C.

61. Dickerson v. United States, 530 U.S. 428, 435 (2000); see 18 U.S.C. § 3501 (1968), invalidated by Dickerson, 530 U.S. at 442-44 (holding that because the Miranda Court announced a constitutional rule, Congress could not supersede it legislatively by enacting a statute).


63. 18 U.S.C. § 3501(b).

64. See infra Part IVA-C.

65. See infra Part IVA-C.

66. Dickerson, 530 U.S. at 432.

67. Id. at 444.

68. Id. at 435.
3501 seeks to revive is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner."^{69}

Writing for the majority, Chief Justice Rehnquist noted that over the past forty years, "our subsequent cases have reduced the impact of *Miranda* rule on legitimate law enforcement."^{70} The *Dickerson* Court suggested that after *Miranda*, police officers understand how to violate *Miranda* without suffering complete exclusionary consequences.^{71} The *Dickerson* Court ultimately clarified that Congress could not supersede *Miranda* because the Court had created a "constitutional rule."^{72} The Supreme Court ruled that *Miranda* was rooted in the Constitution, but refused to eliminate the limits upon the "constitutional rule."^{73} In his dissent, Justice Scalia, joined by Justice Thomas, reprimanded the majority for its inability to rationalize *Miranda* as a constitutional rule and the existing exceptions to the rule of *Miranda*.^{74}

In light of the Court's previous position that a *Miranda* violation did not violate the Constitution,^{75} and the current view that 18 U.S.C. § 3501 was unconstitutional,^{76} *Dickerson* was full of contradictions.^{77} *Dickerson* is characterized as confused and incoherent, resulting in two seemingly irreconcilable lines of cases.^{78}

The *Dickerson* decision has been severely criticized for upholding *Miranda* as constitutionally required without overruling the subsequent modifications to the rule. Post-*Dickerson*, the Supreme Court has made clear that *Dickerson's* grant of constitutional legitimacy has no real value as demonstrated in the subsequent *Miranda* exception cases.^{79}

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69. *Id.* at 444. In *Dickerson*, the Court "appreciated the difficulty of judicial enquiry post hoc into the circumstances of a police interrogation … and recognized that … the 'traditional totality-of-the-circumstances' test posed an 'unacceptably great' risk that involuntary custodial interrogations would escape detection." Missouri v. Seibert, 542 U.S. 600, 608 (2004) (citations omitted).

70. *Dickerson*, 530 U.S. at 443.

71. *Id.* at 441-43.

72. *Id.* at 444 ("In sum, we conclude that *Miranda* announced a constitutional rule that Congress may not supersede legislatively.").

73. *Id.* at 441.

74. See *Dickerson*, 530 U.S. at 444-66 (Scalia, J., dissenting).

75. *Id.*

76. *Id.* at 437, 444.

77. See Yale Kamisar, *Miranda* Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in *Dickerson*, 33 Ariz. St. L.J. 387, 391 (2001) (quoting Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 Sup. Ct. Rev. 61, 70 (2000)) (stating that because the Supreme Court Justices of the 1970s and 1980s "themselves undermined the [Miranda] rule, in part by their eagerness to slice pieces off whenever possible, but worse by saying peculiar things like, 'these procedural safeguards were not themselves rights protected by the Constitution,'" the *Dickerson* case has been called "a devil of the Court's own doing.").


79. See infra Part IV.B.
IV. INCENTIVES TO VIOLATE MIRANDA

Unquestionably, confessions have a remarkably potent effect on juries and hold extraordinary power as evidence of guilt.\footnote{See Richard P. Conti, The Psychology of False Confessions, 2 J. OF CREDIBILITY ASSESSMENT & WITNESS PSYCHOL. 14, 14-15 (1999).} People assume only a guilty person will confess to a crime.\footnote{See Saul M. Kassin & Gisli Gudjonsson, True Crimes, False Confessions: Why Do Innocent People Confess to Crimes They Did Not Commit? SCI. AM. MIND, June 2005, at 24, 26, available at http://www.sciammind.com/issues_directory.cfm (follow June 2005 hyperlink; then follow “True Crimes, False Confessions” hyperlink).} However, high profile false confession cases, such as the infamous Central Park Jogger Five, have alerted Americans to the reality of false confessions and the resulting miscarriage of justice and deprivation of liberty.\footnote{See 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, 443-44 (1998).} Exoneration in convictions based on false confessions have identified psychological interrogation techniques as a factor that contributes to the false confession problem.\footnote{See, e.g., Brown v. Mississippi, 297 U.S. 278, 286 (1936) (stating that convictions resting solely upon confessions extorted by means of brutality and violence violate due process).}

While the Supreme Court has declared that the use or threatened use of violence by police is prohibited, the Court has not precluded police from employing various forms of psychological pressure to obtain a confession.\footnote{The Miranda Court detailed the psychological techniques in the Inbau and Reid training manual. While the Court acknowledged the coercive effect of psychological police interrogation techniques the Court declined to ban the use of such tactics. Miranda v. Arizona, 384 U.S. 436, 448-55 (1966); see Charles J. Ogletree, Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda, 100 HARV. L. REV. 1826, 1827, 1833-35 (1987).} The Supreme Court’s case law following Miranda diminished the possibility that the exclusionary rule offered protection to suspects from the coercive atmosphere in the interrogation room. Instead, the Court’s decisions have encouraged the police to circumvent Miranda’s intended protections in three ways: (1) limiting the need to issue warnings; (2) restricting the reach of the exclusionary rule; and (3) failing to alleviate the secrecy of the custodial situation.\footnote{Chavez v. Martinez, 538 U.S. 760, 766, 772-73 (2003) (holding that the police did not violate the constitutional rights of a suspect who was interrogated without being read the Miranda rights. The Constitution would have been violated had a court admitted the statements produced by the interrogation against the individual at trial).}

Moreover, the Court has shielded law enforcement from civil liability for violating Miranda even when such violations are intentional.\footnote{Miranda, 384 U.S. at 468-72.} Miranda only requires that, prior to the custodial interrogations, the police inform suspects of their rights and a subsequent waiver of those rights.\footnote{Miranda}
does nothing to curb the stressful psychological interrogation tactics that concerned the Miranda Court and continue to be promoted in police training manuals. Once the Miranda warnings have been waived, no protection exists for the suspects concerning restrictions on police interrogation methods used in obtaining a statement. Thus, Miranda has become more of a curse than a blessing for suspects.

As the following sections outline, the Supreme Court’s Miranda jurisprudence, even before Seibert and Patane, diminished any possibility that Miranda would be even moderately effective in reducing the coercive atmosphere in the interrogation room. Over the last four decades the post-Miranda decisions have severely undermined Miranda.

A. Reducing the Need to Issue Miranda Warnings

The Miranda rule requires the issuance of warnings for any person in custody prior to interrogation. In Rhode Island v. Innis, the Court narrowed the application of the Miranda rule by finding that a conversation among police officers about the case while in the suspect’s presence did not constitute an interrogation of the suspect. The Court’s holding created an incentive for police to try to obtain statements from suspects without first issuing the required warnings by conversing with each other in a manner that might induce a suspect to talk.

The police arrested Innis for robbery and gave him his warnings. After Innis invoked his right to an attorney, the officers transported him to the police station. During the drive, which was less than a mile, the officers conversed among themselves, knowing that Innis could hear their conversation.

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89. See Charles D. Weisselberg, Saving Miranda, 84 CORNELL L. REV. 109, 112 (1998) (arguing that Miranda was intended as a constitutional rule that should provide a complete rule of exclusion for objectively bad faith violations).


91. See, e.g., Colorado v. Connelly, 479 U.S. 157, 170 (1986) (“Miranda protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment; it goes no further than that.”).

92. See Weisselberg, supra note 89, at 162 (“If [deliberate violations of Miranda] ever pervade[] our system, we inevitably will realize that half a Miranda rule is worse by far than no rule at all.”).

93. See Miranda, 384 U.S. at 444-45.


95. See id.

96. Id. at 294.

97. Id. at 294.

98. Id.
at a nearby school played in the area and that they should search for the gun for the children’s safety. One officer then stated that “it would be too bad if... a [little] girl [picked] up the gun [and accidentally] kill[ed] herself.” At this point, Innis broke into the conversation and offered to show the officers where he had hidden the gun.

The Court defined interrogation as “either express questioning or its functional equivalent” by which the Court meant “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” The definition also encompasses conduct that intended to elicit a response, or that police should have known was reasonably likely to elicit a response.

Applying this definition to the facts of Innis, the Court found that the officers’ conversation amounted to “no more than a few offhand remarks” and that the officers had no reason to know that Innis would be “peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children.” Moreover, the Court concluded that the facts do not suggest that “the officers’ remarks were designed to elicit a response.” Justice Marshall, joined by Justice Brennan, dissented, stating that he was “utterly at a loss” regarding the majority’s conclusion that no interrogation took place. Justice Stevens’ dissenting opinion viewed the Court’s “stinted test” as “creat[ing] an incentive for police to ignore a suspect’s invocation of his rights in order to make continued attempts to extract information from him.”

Further limiting the need for police to issue warnings, Miranda does not apply and the police need not provide any Miranda warnings where the suspect is not “in custody” for the purpose of an interrogation. In these situations, the police are not legally required to issue Miranda warnings. To avoid Miranda’s mandate, some police officers conduct non-custodial interrogations, which, under the Beheler line of cases, do not require Miranda warnings before questioning. In Beheler, the Court held that when a suspect voluntarily goes to the police station for questioning,
any resulting questioning of the suspect does not constitute a custodial interrogation for Miranda purposes.\textsuperscript{12} The Court reaffirmed that the ultimate determination of whether a suspect is in “custody” under Miranda turns on “whether there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.”\textsuperscript{13}

B. Restricting the Reach of the Exclusionary Rule

The Supreme Court has weakened the impact of Miranda by restricting the reach of the exclusionary rule.\textsuperscript{14} In Miranda, the Court held that statements must be excluded when obtained in violation of a suspect’s Miranda rights.\textsuperscript{15} However, the Supreme Court carved out a number of exceptions to the exclusionary rule.\textsuperscript{16} These exceptions have created incentives for police officers to intentionally violate Miranda to obtain statements that can then be used to impeach the defendant or are otherwise admissible.\textsuperscript{17}

Harris v. New York was the first Supreme Court case to allow the use of statements obtained in violation of Miranda.\textsuperscript{18} In Harris, the Court permitted the use of ill-gotten statements to impeach the defendant’s trial testimony.\textsuperscript{19} The Miranda violation in this case stemmed from defective warnings that did not apprise the suspect of his right to counsel.\textsuperscript{20} The Harris Court explicitly asserted a deterrence rationale for excluding evidence obtained by the police in violation of Miranda by stating: “sufficient deterrence [of Miranda violations by the police] flows when the evidence in question is made unavailable to the prosecution in its case in chief.”\textsuperscript{21} The prediction that police are sufficiently deterred from Miranda violations

\textsuperscript{12} Beheler, 463 U.S. at 1125.

\textsuperscript{13} Id.

\textsuperscript{14} See Clymer, supra note 22, at 540 (arguing that Miranda’s mild exclusionary sanction will lead to increased police noncompliance).


\textsuperscript{16} See, e.g., New York v. Quarles, 467 U.S. 649, 651 (1984) (recognizing a public safety exception allowing the admissibility of statements obtained through unwarned custodial interrogation.); Oregon v. Hass, 420 U.S. 420 U.S. 714, 722, (1975) (creating an exception for the use of unwarned statements to impeach the defendant); Oregon v. Elstad, 470 U.S. 298, 306-07 (1985) (refusing to apply the “fruits of the poisonous tree” doctrine and admitting evidence obtained via a Miranda violation). These cases are not exhaustive. For a thorough and informative analysis of the incentives created by Miranda, see generally Clymer, supra note 22.

\textsuperscript{17} For a discussion of the practice of deliberately violating Miranda to gain other evidentiary advantages, see supra note 16; infra notes 183-186 and accompanying text.

\textsuperscript{18} 401 U.S. 222 (1971).

\textsuperscript{19} Id. at 226 ("The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.").

\textsuperscript{20} Id. at 224.

\textsuperscript{21} Id. at 225.
by excluding the resulting statements from the government’s case in chief would become a central theme in the Court’s *Miranda* exclusionary rule cases.\(^{122}\)

The Supreme Court’s decisions in *Michigan v. Tucker* and *Oregon v. Elstad* further restricted the reach of the exclusionary rule.\(^{123}\) In both decisions, the Court explicitly stated that a confession obtained in violation of *Miranda* is not necessarily coerced, and thus, is not necessarily a violation of a person’s Fifth Amendment rights.\(^{124}\) In *Tucker*, the Court held that the *Miranda* exclusionary rule does not apply to the “fruits” of *Miranda* violations, which in this case, was the name of a witness.\(^{125}\) In *Elstad*, the Court concluded that an initial failure to issue warnings prior to obtaining voluntary statements through custodial interrogation does not necessarily “taint” a subsequent confession made after police provide *Miranda* warnings and obtain the suspect’s waiver.\(^{126}\) The Court found that the police in *Elstad* and *Tucker* did not violate the suspects’ constitutional rights, rather the decisions were based on a balancing of the need for reliable evidence against the need to deter police misconduct.\(^{127}\)

The admissibility of the evidence obtained following a *Miranda* violation is determined by examining whether the resulting statements were voluntary or coerced so as to violate the suspect’s constitutional rights.\(^{128}\) The issue in *Seibert* involved a technique police use to intentionally violate *Miranda*, what is commonly known as “going outside” *Miranda*.\(^{129}\) In *Seibert*, the police used the “question-first” tactic: an investigating officer interrogates a suspect without giving *Miranda* warnings, obtains incriminating statements, and then issues the warnings to obtain a second, and presumably admissible, version of the statement.\(^{130}\)

In *Patane*, the Court reconsidered the admissibility of physical fruits of a *Miranda* violation.\(^{131}\) The Court simply ignored the reality that exceptions to

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122. *See, e.g.*, Oregon v. Hass, 420 U.S. 714, 723 (1975) (stating that *Harris* struck a balance between the need for evidence and the deterrence of law enforcement and that “we are not disposed to change it now”).


124. *See Elstad*, 470 U.S. at 308-09 (citing *Tucker*, 417 U.S. at 444-45); *see also* New York v. Quarles, 467 U.S. 649, 654 (1984) (referring to *Miranda* warnings as “not themselves rights protected by the Constitution” and finding that the suspect’s statement was not “actually compelled”).

125. *See Tucker*, 417 U.S. at 436, 450-51 (noting that the violation consisted of issuing defective warnings that did not apprise the suspect that counsel would be provided free of charge if he could not afford to hire one).


128. *Elstad*, 470 U.S. at 318 (holding that “a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled”).

129. *See Weisselberg*, *supra* note 89, at 132-39 (detailing police interrogation tactics promoted by California law enforcement training manuals used to circumvent *Miranda*).


Miranda encourage law enforcement officers to flout Miranda and permit the use of physical evidence discovered as a direct result of Miranda violations.\textsuperscript{132}

The recent Patane and Seibert decisions have reaffirmed that Miranda provides little protection to suspects from coercive police tactics. Post-Miranda, in a string of cases commonly referred to as the “Miranda-exception cases” the Supreme Court gradually undermined the intended protections of Miranda. Just six years after announcing Miranda’s exclusionary rule, the Supreme Court created an exception for the “evidentiary fruit,” of statements obtained through a Miranda violation.\textsuperscript{133} The Court has allowed the use of statements obtained through a direct Miranda violation for impeachment purposes.\textsuperscript{134} In addition, Patane extends the long-standing rule that physical evidence derived from Miranda violations is admissible even as part of the government’s case-in-chief, announcing that even an intentional violation may produce admissible fruit.\textsuperscript{135} The Court also recognized an exception for Miranda violations, presumably including intentional violations, deemed necessary to protect the public or themselves.\textsuperscript{136}

Over the past four decades, the Supreme Court diminished Miranda’s power to deter police violations by carving out a series of significant exceptions, including the exception that statements obtained in violation of Miranda can be presented to a grand jury.\textsuperscript{137} These statements can be used by the prosecutor at trial if the violation are justified by public safety reasons\textsuperscript{138} or if the statements are used to impeach the defendant.\textsuperscript{139} Derivative evidence obtained through Miranda violations is also admissible.\textsuperscript{140} Police officers who disregard Miranda do not face mandatory criminal or civil sanctions.\textsuperscript{141} However, at least four members of the Court have expressed concern that the police are “draining the substance out of Miranda.”\textsuperscript{142}

\begin{itemize}
\item \textsuperscript{132} Id. at 639-40.
\item \textsuperscript{134} See Harris v. New York, 401 U.S. 222, 225-26 (1971).
\item \textsuperscript{135} See United States v. Patane, 542 U.S. 630, 639 (2004).
\item \textsuperscript{137} See United States v. Calandra, 414 U.S. 338, 352-54 (1974).
\item \textsuperscript{138} See Quarles, 467 U.S. at 655-56.
\item \textsuperscript{139} See Oregon v. Hass, 420 U.S. 714, 722 (1975) (providing that the Harris impeachment exception applies to post-invocation statements); Harris, 401 U.S. at 226 (holding that a statement taken in violation of Miranda may be used to impeach).
\item \textsuperscript{140} See Patane, 542 U.S. at 639-40.
\item \textsuperscript{142} Missouri v. Seibert, 542 U.S. 600, 617 (2004) (plurality opinion).
\end{itemize}
C. Maintaining the Cloak of Secrecy Around the Custodial Setting

Despite receiving Miranda warnings, suspects frequently waive their constitutional rights and choose to speak to detectives.\(^{143}\) In 1994, researchers observed 219 police interrogations and found that approximately 80% of the suspects waived their Miranda rights.\(^{144}\) Evidence suggests that the primary explanation for the high rate of Miranda waivers is likely the numerous strategies police have developed to minimize the impact of Miranda warnings.\(^{145}\)

Professors Richard A. Leo and Welsh S. White suggest that police employ Miranda warnings in one of three ways, two which can induce waivers.\(^{146}\) First, police officers may issue the warnings in a neutral way, without trying to induce a waiver,\(^{147}\) which is likely the method most consistent with the Supreme Court’s original intent. Second, police officers may try to de-emphasize the significance of the warnings, treating them as merely a formality, setting the individual at ease, and making it easier to obtain a waiver.\(^{148}\) Such sophisticated techniques successfully extract waivers from suspects and are not outside the limits of Miranda. Third, the police may offer suspects benefits in exchange for waivers.\(^{149}\)

In addition, the Supreme Court has held that police are not required to accurately recite the Miranda warnings.\(^{150}\) In North Carolina v. Butler, the Court found a Miranda waiver valid when the suspect refused to sign a waiver form and did not explicitly waive the right to counsel.\(^{151}\) Even if a suspect does not actually understand the significance of waiving their Miranda rights, such as children, or

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143. See Cassell & Hayman, supra note 111, at 859.
144. Id. at 842, 859-60, see also Leo, supra note 1, at 632-34 (conducting a similar study of police interrogations to determine the impact Miranda has had on police interrogation methods finding similar results).
145. See Leo & White, supra note 13, at 460-62.
146. Id. at 431-32.
147. Id. at 432-33.
148. Id. at 433-39.
149. Id. at 440-47 (stating that the officer may offer the suspect either implicit or explicit benefits. For example, the officer may befriend the suspect, implicitly offering the suspect his or her friendship and support. Example of explicit benefits include: that the suspect will receive psychological or other treatment if he waives his or her rights; that the charges will be dropped or reduced; that a statement will result in more lenient treatment. Generally, when police offer explicit benefits, the police have no authority to grant the benefits.).
150. See Michigan v. Tucker, 417 U.S. 433, 446 (1974) (commenting that where police are charged with issuing Miranda warnings, the law “cannot realistically require that policeman investigating serious crimes make no errors whatsoever.”); see also Duckworth v. Eagan, 492 U.S. 195, 202 (1989) (reaffirming that Miranda was satisfied with reasonable warnings that do not have to match the form as stated in the Miranda decision).
persons who suffer from a mental impairment or low intelligence, the waiver will be considered voluntary unless the police acted improperly.\textsuperscript{152}

In other cases, suspects refuse to waive their rights and instead assert their rights to silence and/or counsel.\textsuperscript{153} Where suspects have invoked their \textit{Miranda} rights, empirical studies have found a significant percentage of police officers ignore the suspect's invocation of rights and continue the interrogation.\textsuperscript{154}

Since \textit{Miranda} does not lift the veil of secrecy surrounding the custodial interrogation, which interrogators exploit, \textit{Miranda} does not truly combat the inherently coercive atmosphere in the interrogation room.\textsuperscript{155} The combination of secrecy and increased police sophistication in circumventing a suspect's \textit{Miranda} rights\textsuperscript{156} has severely compromised \textit{Miranda}'s ability to protect the majority of suspects.\textsuperscript{157}

In sum, \textit{Miranda} now serves police interests by shielding a taxing interrogation process from judicial review to determine whether the resulting statement was voluntary.\textsuperscript{158} In cases where the rights are invoked, the police may still ignore \textit{Miranda} and elicit statements for impeachment purposes as well as discovering other admissible derivative evidence.\textsuperscript{159} As a result, the due process voluntariness test continues to be as ineffective in curbing the psychologically coercive practices of custodial interrogation as the \textit{Miranda} Court perceived nearly forty years ago.\textsuperscript{160}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{152} See \textit{Colorado v. Connelly}, 479 U.S. 157, 164-67 (1986) (holding that the suspect voluntarily waived his rights despite the fact that he was in a psychotic state when he confessed).
\item \textsuperscript{153} See Leo, supra note 1, at 653. Leo's study of interrogations in three separate California police departments found that 22% of suspects chose to invoke at least one of their \textit{Miranda} rights at the outset of the interrogation. \textit{Id}.
\item \textsuperscript{154} See Leo & White, supra note 13, at 459-61; see also Weisselberg, supra note 89, at 133. \textit{Id}.
\item \textsuperscript{155} \textit{INBAU ET AL.}, supra note 90, at 24-28 (3d ed. 1986) (asserting that effective interrogations owe their success to the private nature of the custodial process).
\item \textsuperscript{156} Leo and White, supra note 13, at 431-32 (finding that police have numerous sophisticated strategies designed to convince suspects to waive their rights to silence and counsel); see also Leo, supra note 1, at 659-60 (finding that in order to minimize the number of suspects who invoke their \textit{Miranda} rights, that police have devised three different methods: conditioning, de-emphasizing, and persuasive strategies, to induce the suspect to voluntarily waive their rights. Moreover, the success of the method varies with the skills of the officer).
\item \textsuperscript{157} See \textit{Rhode Island v. Innis}, 446 U.S. 291, 299 (1980) (finding that \textit{Miranda} does not protect the majority of suspects who waive their rights to counsel and to be free from self-incrimination against the psychological police interrogation methods deployed by the Court in \textit{Miranda}).
\item \textsuperscript{158} See \textit{Missouri v. Seibert}, 542 U.S. 600, 608-09 (2004).
\item \textsuperscript{159} See supra notes 133-134, 139-140 and accompanying text.
\item \textsuperscript{160} The \textit{Miranda} decision is viewed as the Supreme Court's attempt to provide greater protection for suspect's rights than the Fourteenth Amendment's due process voluntariness test. See \textit{Miranda v. Arizona}, 384 U.S. 436, 455-56 (1966) (noting that incommunicado interrogation of individuals in a "police-dominated atmosphere" and the use of tactics that "trade[ ] on the weakness
\end{itemize}
\end{footnotesize}
D. Missouri v. Seibert: The Two-Step Interrogation

In Missouri v. Seibert, the Court missed the opportunity to condemn the police practice of intentionally evading Miranda. The combined effect of the decisions legitimizes the practice of "going outside" Miranda when the police perceive the benefits of doing so to outweigh the costs.

Pre-interrogation warnings do not impede the government from obtaining custodial confessions and empirical evidence suggests that providing Miranda warnings does not deter suspects from confessing. Empirical studies show that police officers routinely advise custodial suspects of their constitutional rights under Miranda. Still, the majority of criminal suspects routinely waive their constitutional rights and speak to officers. Clearly, Miranda does not provide a deterrent against violations of Miranda. The question remains, how does the court fairly assess the voluntariness of any resulting statement?

Seibert involved a Miranda challenge to the question-first interrogation strategy used by Missouri State Police Officer Richard Hanrahan to interrogate Patrice Seibert, a suspect in a murder investigation. In Seibert, Officer Hanrahan, the interrogating officer, testified that in accordance with police training, he intentionally withheld Miranda warnings from the suspect in order to avoid the risk that she would invoke her rights. Not all police officers will be so forthcoming about their motives when questioning suspects. Seibert implicitly supports the adoption of more effective enforcement mechanisms because the Supreme Court finally acknowledged that Miranda alone is not an effective deterrent.

In Seibert, the Court examined whether, under Miranda, the arresting officer could: withhold warnings at the outset of a custodial interrogation, obtain a...
confession, administer warnings, obtain a waiver, and then persuade Ms. Seibert to repeat her earlier confession. The trial court suppressed Ms. Seibert's initial statement. Thus, the defense focused on excluding the post-Miranda statement.

Defense counsel objected to the admission of Ms. Seibert's statement on two separate legal grounds. Defense counsel argued that the statement should be excluded as the poisoned "fruit" of her first unwarned confession. Second, the defense asserted that the "the police, specifically Hanrahan, purposefully violated [Ms. Seibert's] constitutional rights to due process and her privilege against self-incrimination by not following the procedures outlined in Miranda v. Arizona." The trial court rejected both arguments and admitted the defendant's second statement. The appellate court affirmed the decision.

The Seibert plurality precluded the defendant's second statement, but did not hold that question-first interrogation method necessarily violated Miranda. Instead, the Court instructed that determinations of admissibility should be based on the following criteria:

[T]he completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.

The Seibert Court condemned police practices designed to circumvent Miranda. In deciding the case, the Court expressed a legitimate practical concern that the police deliberately ignore Miranda. Writing for the Seibert plurality, Justice Souter denounced training programs designed to teach police officers to circumvent Miranda. According to Justice Souter, "[s]trategists dedicated to

167. Id. at 604-05.
168. Id. at 606.
169. Id. at 605.
171. Seibert, 542 U.S. at 612 n.4.
173. Id. at *1.
174. Id. at *9.
175. Seibert, 542 U.S. at 615-17.
176. Id. at 615.
177. Id. at 617.
178. See id. at 609-11.
179. Id. at 609-10 (citing efforts throughout the United States to educate law enforcement officers on techniques to circumvent Miranda).
draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* held Congress could not do by statute.\textsuperscript{180} The plurality correctly noted that “the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights.”\textsuperscript{181} The *Seibert* plurality expressed the frustration of the Court being forced to recognize that it has no real power to control police misconduct.\textsuperscript{182} The result in *Seibert* illustrates the need to videotape the interaction between the suspect and police at the initial point of contact. Had such a practice been in place, the result in *Seibert* likely would not have occurred.

In light of the Supreme Court’s recognition of the methods that police use to avoid the suspect’s *Miranda* rights, video recording of interactions between police and suspects prior to custodial interrogation is warranted. However, in the current state of electronic recording, the starting point—in the few jurisdictions that record interrogations—remains limited to in-precinct custodial interrogation.\textsuperscript{183} Recording a suspect’s statement improperly increases the danger to the suspect inasmuch as the recorded statement may be used at trial for impeachment purposes.

*Missouri v. Seibert* illustrates this point.\textsuperscript{184} The Court in *Seibert* excluded a post-*Miranda* confession that had been preceded by unwarned custodial questioning.\textsuperscript{185} In light of the Supreme Court’s acknowledgement that police manipulate *Miranda*’s precepts, a major flaw in the current legislation and proposed bills is that they fail to curb the police incentives to intentionally violate *Miranda* or the suspects’ rights.\textsuperscript{186} *Seibert* supports a more aggressive videotaping requirement than the current proposals. In order to advance the goals of *Miranda*, before enacting a recording statute, a permanent record of the interrogations must be created and police incentives to violate *Miranda* must be addressed.

\textsuperscript{180.} *Id.* at 617.

\textsuperscript{181.} *Id.* at 613.

\textsuperscript{182.} “Officer Hanrahan’s intentional omission of a *Miranda* warning was intended to deprive Seibert of the opportunity knowingly and intelligently to waive her *Miranda* rights.” *Id.* at 606 (quoting State v. Seibert, 93 S.W.3d 700, 706 (Mo. 2002)).

\textsuperscript{183.} *See State v. Soales*, 518 N.W.2d 587, 592 (1994) (citing Stephan v. State, 711 P.2d 1156, 1159-60 (Alaska 1985)) (taking the lead as the first state supreme courts, respectively, to require videotaping of custodial interrogations inside the police station) (limiting the videotaping requirement to a place of detention, including the station house). *See infra* notes 238-241.

\textsuperscript{184.} *See Seibert*, 542 U.S. at 604-06.

\textsuperscript{185.} *Id.* at 617.

\textsuperscript{186.} In a study of California police departments, Weisselberg found that police training manuals advise officers to ignore *Miranda*’s requirements. Weisselberg, *supra* note 89, at 133. In *Seibert*, the Supreme Court was forced to acknowledge that the Court has little control over police conduct. *Seibert*, 542 U.S. at 616-17.
V. VIDEOCAMERAS IN THE POLICE CAR

A. The Benefits of Videotaping Custodial Interrogations

Technological advancements have transformed criminal investigations and prosecutions. Videotape recorders are simple, inexpensive instruments that can facilitate the voluntariness analysis by transporting a judge and jury back in time, allowing them to observe the interrogation procedure as well as the context in which it occurred.\(^\text{187}\) Mandating the videotaping of the entire police/suspect interaction, commencing in the police vehicle will deter police misconduct and enable judges to make more accurate pretrial decisions based upon a review of objective and comprehensive evidence.\(^\text{188}\)

A videotape of the interaction between the police and a suspect in the police vehicle will reduce or eliminate problems of biased testimony, inaccurate or incomplete memories, and influential factors such as voice inflection and body language, which cannot be transcribed.\(^\text{189}\) However, videotaping is pointless if the police are not required to record the entire police/suspect interplay. Seibert can play two critical roles in advancing meaningful efforts to mandate that police record their entire interaction with the suspect. First, the Seibert Court acknowledgement that police frequently ignore Miranda supports the argument that additional enforcement mechanisms are needed.\(^\text{190}\) Second, Seibert's explicit condemnation of police efforts to circumvent Miranda by engaging in pre-warning interrogations supports initiating the recording before the suspect enters the interrogation room.\(^\text{191}\) Police may further be prevented from manipulating the requirements of videotaping statutes by initiating preliminary, unwarned off-camera interrogations. Moreover, the increased number of

\(^{187}\) In Commonwealth v. Diaz, Supreme Judicial Court of Massachusetts stated:

The cost of the [video taping] equipment and its operation is minimal. The machinery is not difficult to use. A recording speaks for itself literally on questions concerning what was said and in what manner. Recording would tend to eliminate certain challenges to the admissibility of defendant's statements and to make easier the resolution of many challenges that are made.

661 N.E.2d 1326, 1328-29 (Mass. 1996); see State v. Godsey, 60 S.W.3d 759, 772 (Tenn. 2001) (stating that "[t]here can be little doubt that electronically recording custodial interrogations would reduce the amount of time spent in court resolving disputes over what occurred during the interrogation"). In fact, according to a study by the Police Executive Research Forum for the United States Department of Justice, more than sixteen percent of the nation's police departments already videotape some interrogations. See William A. Geller, Nat'l Inst. of Just., Videotaping Interrogations and Confessions 9 (1993).

\(^{188}\) See Donovan & Rhodes, supra note 10, at 228-30.

\(^{189}\) Id. at 228.

\(^{190}\) Seibert, 542 U.S. at 609-13.

\(^{191}\) See id. at 617.
wrongful convictions based on false confessions and a concern for fundamental fairness support the current trend towards videotaping suspects' confessions.¹⁹²

Advocates contend that suspects, law enforcement, and the judicial system will benefit from recorded interrogations. Accordingly, the primary benefit of taping custodial interrogations would be an end to the "swearing contest" between the interrogating officer and the defendant at the suppression hearing as to whether Miranda rights were actually waived, or the defendant's confession was coerced.¹⁹³

Such an objective record will undoubtedly help increase the accuracy of convictions at trial.¹⁹⁴ Increased accuracy at the trial level will presumably decrease the number of criminal appeals involving confession issues, thereby lessening the workload of the already overburdened appellate courts. Allowing the court the benefit of watching a videotaped statement is invaluable; indeed, a tape recorded interrogation allows the court to more accurately assess whether a statement was given knowingly, voluntarily, and intelligently.¹⁹⁵ One study revealed that "some of the most detailed assessments of voluntariness have come in cases of recorded interrogations, which permit judges to parse implicit promises and threats made in order to obtain an admission."¹⁹⁶

Videotaping police interaction with the suspect, with or without Miranda warnings, benefits the police as well.¹⁹⁷ A videotape of police/suspect interaction prior to the suspect's statement protects police from false accusations of abuse. Video recording a suspect's statements lends credibility and legitimacy to this aspect of police interrogation in the eyes of the public.¹⁹⁸ A video record also allows police to create an objective, reviewable record of questioning that protects them against false accusations such as improperly citing the Miranda warnings, or eliciting a confession.

¹⁹². See, e.g., Gail Johnson, False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations, 6 B.U. PUB. INT. L.J. 719, 751 (1997) (arguing that unless confessions are electronically recorded, wrongful convictions based upon false confessions will "needlessly continue" because it is difficult to "analyze interrogation and confessions transcripts, and sort them correctly into two piles, true and false").

¹⁹³. See Leo, supra note 1, at 687 (suggesting that such confrontations in court are typically decided in favor of the police); Cassell, supra note 10, at 486 (noting that videotaping is one possible tool for combating police coercion). Indeed, in his interrogation manual, Fred Inbau asserts that the success of effective interrogations is due to the privacy of the custodial situation. INBAU ET AL., supra note 90, at 24-28.

¹⁹⁴. Donovan & Rhodes, supra note 10, at 229-30.

¹⁹⁵. Id. at 228.

¹⁹⁶. Cassell, supra note 10, at 488.

¹⁹⁷. See infra notes 199-201.

¹⁹⁸. See, e.g., Leo supra note 1, at 683 (describing the many police benefits of videotaping); Steven A. Drizin & Marissa J. Reich, Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions, 52 Drake L. Rev. 619, 621, 628 (2004). Where these aforementioned articles extol the benefits of videotaping custodial interrogations, I contend that the benefits will apply equally to non-custodial interrogations outside the police station as well.
through improper inducements. Videotaping interrogations lends credibility to police work by demonstrating to prosecutors, judges, and juries that the statements were legally obtained. Where police officers are exercising their discretion inappropriately, videotaping contributes to increased professional police practices because the videotapes provide a useful training tool.

Videotaping will also help police pursue their traditional function of crime control more efficiently and effectively. Videotaping interrogations likely will improve the quality of police work because detectives may review the interrogation multiple times, looking for new details or evidence that was missed during the initial interview. By creating a record of the entire encounter, videotaping improves the ability of police to assess the guilt or innocence of the suspect. Police can review the entire encounter with the suspect as the case unfolds, preserving details that may not have been relevant at first but may become significant later.

Prosecutors and defense attorneys receive an additional benefit of recorded police encounters because the recording would facilitate their assessment of the strengths and weaknesses of the case. Such knowledge would assist both prosecutors and defense attorneys in deciding whether to engage in plea negotiations.

The expense of setting up and maintaining video equipment is more than repaid by the benefits conferred to police officers and the courts.

Videotaped interrogations help prevent unnecessary litigation of false claims of improprieties and unnecessary pretrial litigation by providing an independent record.

Legal scholars are not alone in recognizing the benefits and safeguards offered by requiring electronic recordings of custodial interrogations. Courts, as well as legislators, have also acknowledged the benefits of electronic recording. Recently, nineteen states have enacted or introduced laws that mandate the electronic recording of custodial confessions. However, the statutes provide no formidable sanctions for what has been shown to be the inevitable Miranda violation. For example, the District of Columbia limits electronic recording to "custodial interrogations of persons suspected of committing a crime of violence."

The recording requirement is further limited in that, while police are required to capture the Miranda warnings

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199. Id.; Donovan & Rhodes, supra note 10, at 229 (noting that a videotape of the custodial interrogation will affect the defendant's decision to plead guilty).


201. See id. at 362-63.

202. See, e.g., Stephan v. State, 711 P.2d 1156, 1159-60 (Alaska 1985) (requiring electronic recording of custodial interrogations, the Alaska Supreme Court wrote that it was "convinced that recording, in such circumstances, is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self-incrimination and, ultimately, his right to a fair trial.").

203. See supra notes 204-241.

and the suspect’s response, no sanction is imposed for failing to do so.\textsuperscript{205} Indeed, the statute permits police officers to “cure” the absence of the warnings by having the suspect state on tape that the warnings were previously given and waived.\textsuperscript{206}

The \textit{Seibert} decision reminds us that police continue to violate \textit{Miranda}. Fashioning a state-mandated videotaping requirement requires the drafter to carefully consider the issues and concerns highlighted by the Court in \textit{Seibert}. Poorly constructed taping statutes create more opportunities for \textit{Miranda} violations instead of increasing \textit{Miranda} safeguards. The time is ripe for the courts and the legislatures to transform the \textit{Seibert} ruling into a movement that honors and advances \textit{Miranda}’s essential purpose by encouraging legislative reforms that will reduce police misconduct and improve interrogation practices. In creating a videotaping requirement, state courts and legislatures must be mindful of the police methods for circumventing \textit{Miranda}, some of which the Supreme Court acknowledged in the \textit{Seibert} decision.\textsuperscript{207} In order to protect suspects’ rights, legislative bills and proposals must incorporate safeguards to restrict law enforcement’s ability to make a mockery of the requirements, or even worse, increase the dangers of creating a permanent visual record of a suspect providing a false statement. Thus, even as states move toward taping confessions, the question of whether the laws treat suspects fairly remains.

\textbf{B. The Current State of Video Recording in the United States}

\textbf{1. Judicial Mandates}

To date, no state or federal court has found that the Due Process Clause of the Fourteenth Amendment requires police officers to electronically record interrogations. Alaska is the only state that has found that the recording requirement is necessary to protect the due process rights of suspects under its state constitution.\textsuperscript{208} In \textit{Stephan v. State}, the Alaska Supreme Court mandated that police officers record all custodial interrogations conducted in places of detention.\textsuperscript{209} In adopting a flexible approach to the due process requirement, the Alaska Supreme Court compared the preservation of breathalyzer samples and videotaping suspects’ statements:

The concept of due process is not static; among other things, it must change to keep pace with new technological developments. For example, the gathering and preservation of breath samples was previously impractical. Now that this

\begin{itemize}
\item \textsuperscript{205} See \textit{id.} § 5-116.01 (containing no reference to sanctions for failure to record custodial interrogations).
\item \textsuperscript{206} \textit{id.} § 5-116.01(b).
\item \textsuperscript{207} Missouri \textit{v. Seibert}, 542 U.S. 600, 609-11 (2004).
\item \textsuperscript{208} \textit{See Stephan v. State}, 711 P.2d 1156, 1160 (Alaska 1985).
\item \textsuperscript{209} \textit{id.} at 1162.
\end{itemize}
procedure is technologically feasible, many states require it, either as a matter of
due process or by resort to reasoning akin to a due process analysis. The use of
audio and video tapes is even more commonplace in today's society.\footnote{210}

In 1994, the Minnesota Supreme Court found that videotaping “is now a reasonable
and necessary safeguard, essential to the adequate protection of the accused's right to
counsel, his right against self-incrimination and ultimately his right to a fair trial.”\footnote{211}
The court required that: “all custodial interrogation including any information about
rights, any waiver of those rights, and all questioning shall be electronically recorded
where feasible and must be recorded when questioning occurs at a place of
detention.”\footnote{212} The Minnesota Supreme Court declined to follow the due process
approach choosing instead to rely on its “supervisory power to insure the fair
administration of justice.”\footnote{213} The Minnesota recording requirement is broader than
Alaska’s because it covers “all custodial interrogation[s]” not just those conducted in
a place of detention.\footnote{214} However, in Minnesota, only “substantial” violations of the
recording requirement will result in suppression of the statements.\footnote{215} In 2001, the
New Hampshire Supreme Court also used its supervisory power to mandate a
recording requirement.\footnote{216} The New Hampshire Supreme Court expanded the
recording requirement beyond the scope of \textit{Stephan} and \textit{Scales} to include complete
recordings of the interrogation and the subsequent confession.\footnote{217} The Massachusetts
Supreme Judicial Court recently held that defendants whose interrogations were not
at a minimum audiotaped were entitled to a jury instruction that jurors “should weigh
evidence of the defendant’s alleged statement with great caution and care.”\footnote{218}

\footnote{210. Id. at 1161-62.}
\footnote{211. State v. Scales, 518 N.W.2d 587, 592 (1994) (citing \textit{Stephan}, 711 P.2d at 1156-60).}
\footnote{212. Id.}
\footnote{213. Id.}
\footnote{214. Id.}
\footnote{215. Id.}
\footnote{217. Id. at 632 (“We believe both \textit{Stephan} and \textit{Scales}, however, by excluding all statements
made during unrecorded custodial interrogations (absent certain narrow exceptions), go too far. . . .
To avoid the inequity inherent in admitting into evidence the selective recording of a post-\textit{Miranda}
interrogation, we establish the following rule: In order to admit into evidence the taped recording of
an interrogation, which occurs after \textit{Miranda} rights are given, the recording must be complete. . . .
[A] tape recorded interrogation will not be admitted into evidence unless the statement is recorded in
its entirety.”).}
\footnote{218. Commonwealth v. DiGiambattista, 813 N.E.2d 516, 533-34 (Mass. 2004).}
2. Statutory Mandates

Between 2004–2005, new laws requiring the videotaping and/or audio taping of custodial interrogations were introduced in: California, Connecticut, Florida, Georgia, Kentucky, Louisiana, Maryland, Missouri, Nebraska, New Jersey, New Mexico, New York, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Washington, and West Virginia.

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Additionally, Illinois, Maine, Texas, and the District of Columbia have, by legislation, imposed a recording requirement for certain types of interrogations. Under the Texas Code of Criminal Procedure Article 38.22 § 3, police officers are required to electronically record all custodial interrogations and confessions. Most of the bills have adopted the recording rule of Stephan v. State, and confine videotaping to places of detention including station houses, correctional facilities, and courthouses. The Oregon and Washington bills prohibit police officers from thwarting recording requirements by intentionally interrogating suspects off-site.

Similarly, proposed statutory mandates vary widely in detailing when interrogations are videotaped. The Florida, Rhode Island, and New York proposals require that almost all custodial interrogations be videotaped regardless of context. The Illinois and Maine statutes limit custodial interrogation recording requirements to homicide suspects. In Oregon, Missouri, and Louisiana the videotaping requirement applies only to felonies. Most bills create a number of “good cause” exceptions providing when the recording requirement will be excused.

240. TEX. CODE. CRIM. PROC. ANN. art. 38.22, § 3 (Vernon 2007).
242. TEX. CODE CRIM. PROC. ANN. art. 38.22, §3(a)(1) (Vernon 2006).
246. See, e.g., S. 350, 2003 Gen. Assem. § 1(5)(b) (R.I. 2003) (“‘custodial interrogation’ shall be broadly construed in order to effectuate this section’s legislative purpose which is to enhance the quality of the prosecution of those who may be guilty while affording protection to the innocent.”).
247. See supra note 244.
248. See supra notes 224, 226, 245.
249. See, e.g., H.B. 1138, 103d Gen. Assem., Reg. Sess. (Tenn. 2003), available at http://www.legislature.state.tn.us/Info/Leg_Archives/103GA/Bills/BillText/HB1138.pdf (some of these exceptions include: exigent circumstances, eavesdropping, spontaneous statements, equipment failure, the suspect’s refusal to be recorded, or a statement elicited by a state or federal agent).
In this section, the policy consequences of using videotaping during police/suspect encounters within the police vehicle will be evaluated. Drawing on Geller’s extensive, nationwide study of videotaping of police interrogations and confessions and in light of the Supreme Court decision in Seibert, a reasonable argument develops in that custody is not required prior to the electronic recording of police/suspect interaction inside the police vehicle.

Unlike the Fifth Amendment, which regulates all police-civilian interactions, Miranda does not apply to some potentially coercive situations. According to the original understanding of the decision, Miranda warnings are only required prior to custodial interrogations or when the suspect is subjected to significant deprivations of freedom. Courts determining the application of Miranda often focus on whether a particular situation is coercive or likely to compel self-incrimination.

Miranda directly addressed “custodial interrogation[s].” The Court justified its landmark safeguard for the Fifth Amendment by focusing on the inherently coercive environment of the police precinct and the psychological police interrogation methods. In doing so, the Court balanced the likelihood of self-incrimination against the importance of police questioning, singling out only those situations in which the state dominated the isolated detainee to the extent that any series of questions was inherently coercive. Similarly, placing an individual into a police vehicle is subject to the same bright-line demarcation.

Empirical studies demonstrate that police comply with the letter, but not the spirit of the Miranda warnings. For example, police officers often circumvent Miranda by questioning an individual who is not “in custody” for purposes of Miranda. If

251. See U.S. CONST. amend. V; Miranda v. Arizona, 384 U.S. 436, 444-45 (1966) (narrowly limiting the application of Miranda rights to interrogation of suspects who have been taken into custody or deprived of their freedom in a significant way).
252. California v. Beheler, 463 U.S.1121, 1123 (1983) (explaining that the inquiry to determine whether a suspect is “in custody” for Miranda purposes is “whether there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest”); see also Miranda, 384 U.S. at 478.
253. See Beheler, 463 U.S. at 1125 (stating that only “in custody” interrogations demand Miranda warnings).
254. Miranda, 384 U.S. at 444.
255. See id. at 456-58.
256. See id. at 445-58.
258. See United States v. Perdue, 8 F.3d 1455, 1464-65 (10th Cir. 1993); United States v. Smith, 3 F.3d 1088, 1096-97 (7th Cir. 1993).
259. Leo, supra note 1, at 652-53.
260. See Miranda, 384 U.S. at 444.
the person is not in custody and no interrogation has begun, then *Miranda* warnings are not required. However, according to the original understanding of *Miranda*, once a suspect is placed inside an enclosed police vehicle the suspect has been isolated inside a police dominated arena. *Miranda* recognized that the inherently coercive nature of the custodial interrogation derived from the individual’s isolation. Yet, an individual does not have to be “in custody” for *Miranda* purposes for videotaping safeguard to apply. This clear and easily applied standard addresses the problem of “going outside” *Miranda* in a way that some courts and legislators have already adopted inside the police precinct.

In *Brewer v. Williams*, the Court precluded the suspect’s unrecorded confession where the interrogation occurred during transportation. In 1968, a young girl disappeared from a YMCA bathroom in Des Moines, Iowa. Two days later, the attorney for the prime suspect, Robert Williams, contacted the police. The police located Williams in Davenport, Iowa, and arranged to transport him to Des Moines in a police vehicle. Prior to the drive, the detectives agreed not to question Williams until he arrived in Des Moines. During the five-hour, 160 mile drive, one of the detectives sat next to Williams in the rear of the vehicle and began to speak with him. During the conversation between the detective and Williams, the detective delivered the infamous, “Christian burial speech.” The speech had two versions. There was no record of their conversation. As the vehicle approached Des Moines, Williams led the detectives to the victim’s body.

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261. *Id.*
263. *Id.*
265. *Id.* at 390.
266. *Id.*
267. *Id.* at 391.
268. *Id.*
270. Brewer, 430 U.S. at 392.
271. Yale Kamisar, Brewer v. Williams—A Hard Look at a Discomforting Record, in *Police Interrogations & Confessions: Essays in Law & Policy* 113, 118-19 (1980) (discussing the two versions of Detective Leaming’s “Christian Burial Speech.” The first version did not refer to a Christian burial, but the second version did. In the second version, Detective Leaming also indicated to Williams that he knew that the body was buried in the Mitchellville area and that the car would be passing by that area on the way to Des Moines).
272. Brewer, 430 U.S. at 393.
273. *Id.*
After an eight year legal battle, the Supreme Court ultimately held that Williams' confession was involuntary. A small tape recorder would have saved the state a tremendous amount of time and expense. Such a recording would have preserved the actual words spoken between the officer and suspect as well as addressed the court's concern about the voluntariness of Williams' confession.

The Alaska State Supreme Court recognized that limiting the recording requirement to places of "detention" results in police circumventing the recording requirement. The Court acknowledged the incentive it created by restricting the scope of its due process recording requirement:

We recognize that many custodial interrogations must take place in the field, where recording may not be feasible. Because of this, the rule we announce today has limited application; it applies only to custodial interrogations conducted in a place of detention, such as a police station or jail, where it is reasonable to assume that recording equipment is available . . . In a future case, however, we may be persuaded to extend the application of this rule, particularly if it appears that law enforcement officials are engaging in bad faith efforts to circumvent the recording requirement set forth in this opinion.

Despite the Court’s view, custody depends on varying perspectives. From the perspective of the suspect, the issue is police domination, not custody. The Supreme Court has construed the Miranda Court's definition of custody very narrowly. The fact that a person is the focus of an investigation upon police questioning does not turn the interaction into custodial questioning. Further, the fact that the questioning occurred in an inherently coercive environment is not enough for questioning to be

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274. Id. at 400-04.
275. See Kamisar, supra note 271, at 133.
276. Id. at 266 n.103.
277. Stephan v. State, 711 P.2d 1156, 1158 (Alaska 1985) (“Today, we hold that an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process, under the Alaska Constitution, and that any statement thus obtained is generally inadmissible.”).
278. Id. at 1164-65.
279. Id. at 1165 n.33.
280. See Thompson v. Keohane, 516 U.S. 99, 112 (1995) (stating that the determination of whether a person is “in custody” requires a court to consider the circumstances surrounding the interrogation and then determine whether a reasonable person would have felt at liberty to leave).
281. See Beckwith v. United States, 425 U.S. 341, 347 (1976) (asserting that the issue of whether an individual is the “focus” of an investigation is relevant to whether the questioning is custodial, but that Miranda defined “focus” as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way;” and concluding that the threshold inquiry for “custody” is therefore whether a suspect was deprived of his freedom of action).
Police interaction affects the suspect's state of mind and willingness to waive *Miranda* and make a statement prior to legal custody. The suspect's state of mind is crucial to a determination of whether any resulting statement was voluntarily made and due process requires a review of the complete record. Requiring that the entire police/suspect interaction be recorded beginning at the initial point of contact in the police vehicle strikes an appropriate balance between law enforcement's interests and the interests of the suspect.

Furthermore, the word "voluntary" aptly describes the state of mind of the suspect at the time he or she contemplates waiving the *Miranda* warnings and confesses. Voluntariness focuses the inquiry on the suspect's state of mind in light of police influence, and considers the conduct of the interrogators in relation to the effect such conduct has on the state of mind of the suspect.

Minnesota's electronic recording mandate also incorporates a violation incentive in the form of the feasibility and "substantial violation" exceptions, which permit officers to easily subvert the rule. In *State v. Schroeder*, an appellate court denied the defendant's motion to suppress unrecorded custodial statements the defendant made while in the back seat of a police car. Although both officers had tape recorders, they claimed that they did not function. The court held that the failure to record the interrogation was not a "substantial violation" of the recording rule because the police advised the defendant of his *Miranda* rights and the defendant's statements were voluntarily made. In a strange twist of reasoning, the court also held that requiring police officers to have operational tape recorders in the police vehicle was not feasible.

Even if the Minnesota Supreme Court required that police officers videotape all custodial interrogations, police may still circumvent the requirement by interviewing suspects before taking them into custody. In *State v. Conger*, the interrogating police officer testified that he "intentionally did not record Conger's interview, though equipment was available." The officer admitted that he "chose not to record the interview because Conger was not in custody, and because '[s]ometimes people talk more freely when they don't have a little red light on a tape recorder sitting on the table in front of them.'" In *Conger*, the court rejected the defendant's claim that the *Scales* recording requirement should be extended to non-custodial interrogations.

284. Id. at 739-40.
285. Id. at 740-41.
286. Id. at 740.
287. State v. Conger, 652 N.W.2d 704, 706 (Minn. 2002)
288. Id.
289. Id. at 705.
Police routinely employ video recording in a variety of contexts, including documenting crime scenes, recording suspect behavior during sobriety tests, and conducting surveillance and undercover operations. Videotaping police encounters with suspects is not new and indeed, has become part of America’s pop culture. As evidenced by the widely popular television show “COPS,” the ability to mount video cameras within the police car has been feasible for the last twenty years. While mandating videotaping of custodial interrogations is long overdue in terms of protecting the due process rights of criminal suspects, the reluctance of states and legislatures to extend the rule to non-custodial questioning within the confines of the police car effectively undermines the goals of the requirement. Without question, the courts should scrutinize interrogations that are conducted within police stations and jails. In the interrogation room, criminal suspects are isolated and under the complete authority of the police officers. However, the same is also true of the back seat of a police vehicle.

Extending the recording requirement to the police car is a natural and necessary policy to ensure that police officers comply with recording rules. If a distinction is drawn between the police station house and police vehicle officers will subvert the recording requirement by questioning the suspect on the way to the police station. As the facts in the Brewer case demonstrate, police officers can easily replicate the coercive atmosphere of an interrogation room by interrogating suspects within the isolated, police-dominated confines of a police car.

D. Which Statements Should Be Recorded: The Crime Distinction

Numerous articles have been written about the benefits of electronic recording of custodial interrogations. The current legal scholarship and state of videotaping requirements limit recording to custodial interrogations inside the police interrogation room. Non-custodial questioning, even inside the interrogation room is specifically excluded. The Supreme Court acknowledges that police training manuals encourage police officers to question suspects outside Miranda and police

290. GELLER, supra note 187, at 2-3 (finding in a 1990 nationwide survey that approximately 2,400 United States law enforcement agencies videotape at least some of their interrogations).


292. See Wortham v. State, 704 S.W.2d 586, 587, 589 (Tex. Ct. App. 1986) (holding that statements made by a murder suspect in the back of a patrol car constituted “custodial interrogation” and were deemed inadmissible).


294. See supra note 10.

295. See supra notes 10, 219-237.

296. See State v. Conger, 652 N.W.2d 704, 705 (Minn. 2002) (rejecting that Scales recording equipment should be extended to non-custodial interrogations).
frequently follow these precepts. A suspect has no protections prior to the *Miranda* warnings.

The use of videotaping inside the police vehicle creates an objective record of police questioning to which all interested and potentially interested parties benefit from having in the determination of voluntariness and in judgments of reliability and veracity. The use of videotaping is the most viable legal mechanism for resolving many of the antinomies of crime control while preserving the suspect's due process rights during police interrogation.

The current proposals raise additional concerns regarding the selective recording based upon the nature of the alleged crime. Presently, some legislative bills and proposals require electronic recording only in crimes of violence or homicides. For example, the District of Columbia limits electronic recording to "custodial interrogations of persons suspected of committing a crime of violence." However, the law does not address the inevitable case of the police officer discovering the crime involved violence once questioning commenced or that the suspect was involved in a separate crime involving violence. Presumably, the defendant's earlier statements are admissible because the police officer was unaware that violence was involved. Thus, the legislature seems to be carving out exceptions to the recording requirement that permits police officers to manipulate the facts to their advantage. Further, no balancing interest is served by distinguishing between taping interrogations where the alleged crime is a felony or a misdemeanor. The public has an equal interest in ensuring that non-violent perpetrators as well as violent perpetrators are convicted for their crimes. Exceptions to the recording mandate maintain the ability of police officers and prosecutors to extract inadmissible statements all the while knowing that they can later be used for impeachment purposes.

Selective recording of criminal police interrogations also fails to address the wrongful conviction rates in crimes where DNA evidence is unlikely to be recovered. In a national empirical study for the National Institute of Justice, William Geller estimated that approximately one-third of all metropolitan police and sheriffs' departments in the United States videotape at least some interrogations—and that most cases videotaped involve serious crimes such as: homicide, rape, and aggravated assault. Geller found that police departments that videotape

299. *See supra* note 244.
301. *See id.*
302. *See* Harris v. New York, 401 U.S. 222, 225-26 (1971) (holding that a statement made by the defendant was not admissible as evidence because the police had not issued *Miranda* warnings, but that the statement was admissible for impeachment purposes); Oregon v. Hass, 420 U.S. 714, 722 (1975) (creating an exception that allows use of unwarned statements to impeach defendant).
interrogations are more likely to do so in more serious criminal cases: for example, video recording was used in 83% of homicide cases, 77% of rape cases, 61% of armed robbery cases, and 44% of burglary cases.304 Thus, the vast majority of United States' criminal interrogations remain unrecorded.305

A recent study examined 340 exonerations between 1989 and 2003.306 DNA testing exonerated more than half of the approximately 96% of the exonerations that involved rape and/or murder.307 Although defendants are exonerated through evidence other than DNA, the exoneration rate without DNA is significantly lower.308 In fact, the absence of DNA evidence in many cases suggests that wrongful convictions occur in run of the mill cases as well. Moreover, in a recent article, co-authors Leo and Drizin estimated that false confessions occur in approximately 25% of all wrongful convictions.309 If a technique existed for detecting false convictions in these cases comparable to DNA testing, the total number of falsely convicted defendants who were exonerated would likely increase significantly. Similarly, one would expect to find a greater number of false confessions. As studies on exonerations and false confessions demonstrate, false confessions and wrongful convictions are not limited to rapes and homicides. In order to be meaningful, an electronic recording requirement should apply to every case.

E. Sanctions for Failure to Record

The current state and legislative videotaping mandates and proposals apply only to custodial interrogations that take place inside the police station or other law enforcement centers where suspects are questioned.310 However, in this new age of technology, the perception that statements can only be practically recorded at the police station is outdated and presents a serious danger to the suspect. The suspect may display emotions of remorse and confusion that may not be apparent when the recording of the final interrogation occurs thus, appearing cold, calculating, and unsympathetic to the viewer. In addition, an incomplete videotaped statement makes it difficult for the defendant to argue that he or she was intoxicated, distraught or confused during the interrogation. It further limits the suspect’s ability to explain that

304. Id.
307. Id. at 529.
308. Id.
310. See supra notes 10, 219-237.
the statement is unreliable because of the coercive tactics used by police officers during the non-custodial questioning.

The degree of coercion exerted by police interrogators cannot be accurately assessed in the absence of a full record of the police-suspect interaction at all points prior to and through the completion of the confession itself. Unfortunately, it is rare for judges or jurors to have access to the complete record. Currently, it is quite common for interrogators to record only the final segment of the interrogation, after the suspect has admitted guilt, where he or she provides his or her full confession and account of the crime. However, this procedure creates a recap bias in the minds of the jurors. First, if jurors see the final confession without access to the coercive pressures used to obtain it, they may be more likely to view the confession as voluntary. Second, where the suspect may initially have been remorseful and emotional, the pressures of the interrogation itself may wane as a result of repeatedly recounting the crime, the suspect may show less emotion and appear unusually callous—which would sway the jury against the suspect.

A recap of the events prior to the start of the videotape does not eliminate the potential swearing contest. It merely creates a new issue to litigate inasmuch as if the defendant contests the police version of the events during transportation or prior to the video recording. In order to determine whether the police properly administered the suspects Miranda rights, and that the suspect subsequently waived the Miranda rights, a hearing is required. Moreover, the sanctions for failure to record the police/suspect interaction within the police vehicle would be subject to the same sanctions applied to failure to record custodial interrogations at the station house. The non-custodial recording rule should apply to the entire interrogation, including the interaction prior to the reading of the Miranda rights and waiver, so that selective recording does not tarnish the admissibility of the statement. Failure to record the non-custodial interrogation creates an adverse inference for suppression purposes and necessitates a special jury instruction that any unrecorded confessions be viewed with distrust unless the entire interrogation preceding the confession was recorded.

311. See GELLER, supra note 187, at 4-5.
314. See OFFICE OF THE GOVERNOR OF THE STATE OF ILLINOIS, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 133 (2002), available at http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf (recommending that the following jury instruction be used in the event that law enforcement failed to record an interrogation: “You should pay particular attention to whether or not the statement is recorded, and if it is, what method was used to record it. Generally, an electronic recording that contains the defendant’s actual voice or a statement written by the defendant is more reliable than a non-recorded summary.”
315. Daniel Donovan & John Rhodes, The Case For Recording Interrogations, CHAMPION,
The Alaska State Supreme Court persuasively argued that substantive (state) due process requires electronic recording of the entire interrogation session in order to afford custodial suspects the protections of the Fifth, Sixth and Fourteenth Amendments. The Alaska Supreme Court argued that since police interrogation continues to take place largely incommunicado, we do not know what transpires between an officer and suspect during custodial questioning. Nevertheless, courts must establish a factual record of the interrogation in light of the conflicting testimony of police officers and suspects. Emphasizing the fallibility of human memory, the Alaska Supreme Court noted that such testimony may lead to an inaccurate court record. The absence of an accurate record would infringe on the suspect’s constitutional right to silence, counsel, and a fair trial. The Alaska Supreme Court went on to hold that:

"The rule that we adopt today requires that custodial interrogations in a place of detention, including the giving of the accused’s Miranda rights, must be electronically recorded. To satisfy this due process requirement, the recording must clearly indicate that it recounts the entire interview . . . . Any time a full recording is not made, however, the state must persuade the trial court, by a preponderance of the evidence, that recording was not feasible under the circumstances, and in such cases the failure to record should be viewed with distrust."

Juries must be made aware that when police have the capability to record interrogations and chose not to, the confession is an inferior form of evidence—one that should be examined with a more skeptical eye. Moreover, juries should understand that with today’s technological advancements in which police have the ability to record their interaction with the suspect inside the police vehicle and chose not to, any resulting statement must be viewed suspiciously. The current bills and proposals fail to provide adequate sanctions for the failure to record suspects’ statements. An Illinois statute permits the use of statements following an unrecorded custodial interrogation for impeachment purposes. Where the statute prohibits the prosecution from using the unrecorded statement as part of its case-in-chief, any inadmissible information the suspect provided could be used to impeach the credibility of the suspect if he chose to testify at trial.

317. Id. at 1161.
318. Id.
319. Id.
320. Id.
321. Id. at 1162-63.
322. 725 ILL. COMP. STAT. 5/103-2.1(d) (West 2007).
323. Id. at 5/103-2.1(e).
As demonstrated earlier in this article, the preclusion of evidence from the prosecutor's case-in-chief is not a deterrent to police violating a suspect's *Miranda* rights.\(^{324}\) The ability to utilize the ill-gotten statement for impeachment purposes creates an incentive for law enforcement to violate a suspect's *Miranda* rights.\(^{325}\) In order to make the decision to violate a suspect's *Miranda* rights less attractive, the sanction\(^ {326}\) for failure to record the confession must reduce the benefit incurred from the decision not to record. Thus, the sanction for violating the electronic recording requirement should be that the resulting statements are precluded even for impeachment purposes.

While the derivative evidence obtained from such a violation would still be admissible under *Patane*,\(^ {327}\) the remarkably potent effect that confessions have on juries cannot be underestimated. Either of the proposed solutions: special jury instruction,\(^ {328}\) or the preclusion of the confession at trial\(^ {329}\) is a marked improvement over the current system which embroils the trial and appellate courts in a battle to ascertain the truth from speculative swearing contests between officers and suspects. The process of which is heavily weighted in favor of law enforcement and which, as a result, gives officers no incentive to change police practices in this area.

If a state seeks to admit a confession that is not the product of a recorded interrogation, through no fault of its own, the confession must first meet a threshold test. If prosecutors can demonstrate by clear and convincing evidence that it was not feasible to record the confession for reasons that were not the fault of law enforcement, an unrecorded confession may be admitted into evidence against the defendant with a special jury instruction. The jury instruction should explain that confessions are not reliable when the jury cannot observe the interrogation procedure and resulting confession. Such a jury instruction would encourage police officers to use their best efforts to record the entire interrogation. Simultaneously, a special jury instruction may discourage police officers from questioning suspects off-camera. In the event that a video recorder is unavailable, at the minimum, the police should audiotape the questioning. In practice, only a few reasons why the failure to record are justified, including an equipment malfunction, the suspect who refuses to make a recorded statement, and a spontaneous statement by a defendant who was outside the police vehicle or outside the interrogation room. Thus, law enforcement would suffer

324. See supra notes 135-136, 138-139 and accompanying text.
325. See supra note 139.
326. See supra text following note 310 (proposing that the same sanctions should apply to all willful and unintentional violations of the recording requirement, not just those violations that occur in a station house, as proposed in referenced statutes. The author's proposed sanctions mirrors those that apply in the referenced statutes).
328. See supra note 314.
no penalty for circumstances beyond their control that interfere with the recording of the suspect’s statement.

Even in these situations, law enforcement officers should make every reasonable attempt to record either the interrogation process or the suspect’s refusal. Police officers should record a summary of the police questioning and the suspect’s resulting statement. In limited situations where statements or questioning occur off-camera and where the suspect refuses to be recorded, the recorded summary of police questioning becomes essential. If the video equipment breaks down, law enforcement officers should attempt to capture the process on audiotape.

Police investigations often occur in homes or on the street away from the camera lens.\(^3\) In order to allow police officers the freedom to conduct investigations, any statements that suspects make as a result of on-site questioning satisfy the recording requirement when a summary of the conversation is provided. In addition, police officers should not be prevented from questioning a suspect simply because the suspect refuses to speak on camera.

Officers should also seek to have suspects repeat spontaneous statements on recording equipment either inside the police vehicle or inside the interrogation room. If the suspect refuses to allow the statement to be recorded, the refusal should be recorded or otherwise documented. These limited exceptions recognize the fact that recording may not always be possible and that law enforcement officers should not lose potential confessions through no fault of their own. At the same time, the penalties for the failure to record except in these limited circumstances create a disincentive for law enforcement officers to intentionally violate the recording requirement.

Today, *Miranda* does not effectively prevent rational police officers from risking the consequences of *Miranda* violations in favor of tangible benefits.\(^3\)\(^3\)\(^1\) The Court’s struggle with the interrogating officer’s conduct in *Seibert* illuminates the difficulty of deterring *Miranda* violations.\(^3\)\(^3\)\(^2\) The best hope for the future comes from more innovative efforts to open the interrogation room to public view and judicial scrutiny.

VI. CONCLUSION

For twenty years police officers in the television show ‘COPS’ have relied solely upon the video and audiotaped recording of police encounters with criminal suspects.\(^3\)\(^3\)\(^3\) However, the current proposals to open the in-precinct custodial interrogation to the fact finder completely ignores the feasibility of this technology and the necessity of extending the videotaping requirement to the police vehicle. Without a complete record, it is nearly impossible to determine whether police

\(^{330}\) See *Clymer*, supra note 22, at 502-07.

\(^{331}\) See *Clymer*, supra note 22, at 502-07.

\(^{332}\) See *Clymer*, supra note 22, at 502-07.

\(^{333}\) See *Clymer*, supra note 22, at 502-07.
induced psychological pressures that impacted the suspect's decision to make a statement and whether the police officers influenced the content of the suspect's statement.

A review of the current legislation or proposed legislation reveals that time is of the essence in creating a recording scheme that comports with the original intent of *Miranda* and address police *Miranda* violations. As DNA evidence has demonstrated, a defendant's confession is not infallible evidence of guilt.\(^3\) The most reliable way to preserve a confession is to require police officers to electronically record the confession and the entire interrogation that preceded it. The sanction for violating this requirement should be that such statements are precluded even for impeachment purposes. Juries must be made aware that when police can record interactions and chose not to, the confession is an inferior form of evidence—one that should be examined with a more skeptical eye.

The essential reason to record is to honor an individual's due process, or fundamental fairness.\(^3\) "Due process is that which comports with the deepest notions of what is fair and right and just."\(^3\) In order to fairly assess the admissibility of confessions, due process requires that the police/suspect interaction be electronically recorded at the earliest point of contact, consistent with the fair administration of justice. When the suspect enters the police car, the suspect has taken the first step into a world dominated by police officers who have at their disposal a host of manipulative tactics that may violate the suspect's *Miranda* rights.\(^3\) Moreover, police officers will not shy away from violating *Miranda* if the tangible benefits outweigh the negligible legal costs.

The time is ripe for the Supreme Court's decision in *Seibert* to play a role in legislative and judicial efforts to mandate that all police/suspect contact be videotaped once the suspect enters the police vehicle. Since 2004, laws mandating all custodial interrogations be videotaped have been introduced in nineteen states.\(^3\) Videotaping the interaction between the police officers and suspects in the police vehicle is a natural extension of the due process requirement. This common sense modification would aid the criminal justice system in comporting with the spirit of *Miranda* and create a disincentive for police violations of the suspect's *Miranda* rights.

\(^{334}\) See supra note 27 and accompanying text; see generally Drizin & Leo, supra note 309 (for a comprehensive study of DNA testing used to prove wrongful convictions based on false confessions).


\(^{336}\) Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting).

\(^{337}\) *Miranda* v. Arizona, 384 U.S. 436, 447-56 (1966) (acknowledging psychological coercion presents a risk of false confessions). The techniques included trickery, isolation, and relentless questioning. *Id.; see also* supra notes 161-162 and accompanying text.

\(^{338}\) See supra notes 219-237.