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## Lights, Camera, Action: Video Cameras as Tools of Justice, 23 J. Marshall J. Computer & Info. L. 771 (2005)

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# LIGHTS, CAMERA, ACTION: VIDEO CAMERAS AS TOOLS OF JUSTICE

MATTHEW D. THURLOW†

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.<sup>1</sup>

## I. INTRODUCTION

A little over twelve years ago, William Geller wrote an influential paper for the National Institute of Justice advocating the use of video cameras as a means of preventing false confessions.<sup>2</sup> In a national survey,<sup>3</sup> Geller found that nearly every police agency that chose to adopt videotaping found it advantageous.<sup>4</sup> Police departments cited the benefits of recording in preserving critical evidence for trial, defusing allegations of coerced confessions, and monitoring police interrogation practices.<sup>5</sup> Contrary to fears that the presence of a video camera would discourage suspects from confessing, Geller's survey indicated that videotaped suspects actually made *more* incriminating statements than non-

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1. *Spano v. New York*, 360 U.S. 315, 320-21 (1959) (Earl Warren, C.J.).

2. William A. Geller, *Videotaping Interrogations and Confessions*, Natl. Inst. of Just. (1993).

3. *Id.* at 1-3 (noting that over 2,400 police agencies recorded police interrogations in 57,000 cases).

4. *Id.* at 10-11 (Geller found that 97 percent of police agencies found videotaping useful, and 59.4 percent strongly approved continuing videotaping).

5. *Id.* at 6 ("The vast majority of surveyed agencies that videotape interviews believed that videotaping has led to improvements in police interrogations. These include: better preparation for interviews by investigators; . . . [fewer distractions]; supervisors' monitoring of the interrogation on closed-circuit television or by subsequent viewing to assess interrogators' performance; use of old tapes to train both new and experienced detectives in interview techniques; and an ability to show an accomplice's taped confession to an uncooperative suspect . . .").

videotaped suspects.<sup>6</sup> In 2005, hundreds of American police departments routinely recorded station house interrogations and confessions.<sup>7</sup> However, despite the widely perceived need for uniform electronic recording requirements among police officers and prosecutors,<sup>8</sup> few videotaping laws have emerged from American courts or state legislatures.

Criminal justice reformers have pushed for mandatory recording rules for over forty years. In his 1956 book on criminal investigation, Charles O'Hara advocated video recording of all suspect interviews and interrogations.<sup>9</sup> The American Law Institute has lobbied for an electronic recording requirement since publication of the Model Code of Pre-Arrest Procedure in 1975,<sup>10</sup> and the American Bar Association recently adopted a resolution calling for all American police departments to record interrogations.<sup>11</sup> Despite overwhelming evidence that videotaping protects the constitutional rights of suspects and increases police accountability, twenty-four state supreme courts have declined mandatory videotaping rules in the last twenty years.<sup>12</sup> While many of these courts have argued in favor of taping interrogations as a matter of policy,<sup>13</sup> they have been reluctant to read a recording rule into state constitutions. Likewise, no federal or state court has found that the U.S. Constitution gives a suspect the right to a video recorded police interview.<sup>14</sup>

Only the Alaska and Minnesota Supreme Courts have mandated

6. *Id.* (Geller also found that taping provided more exculpatory information).

7. Thomas P. Sullivan, *Police Experiences with Recording Interrogations* (Ctr. on Wrongful Convictions, Northwestern University School of Law)(Summer 2004)(available at <http://www.law.northwestern.edu/depts/clinic/wrongful/FalseConfessions2.htm>).

8. See William Schwabe, Lois M. Davis & Brian A. Jackson, *Challenges and Choices for Crime-Fighting Technology: Federal Support of State and Local Law Enforcement* 105 (Rand 2001) (In a recent survey, 64 percent of police departments serving more than 225,000 people listed technological improvements as a high priority in improving police accountability).

9. Charles E. O'Hara, *Fundamentals of Criminal Procedure* 127-32 (1956) ("The ideal solution [for taping] is the sound motion picture, that combination of sound and sight which most nearly represents to the sense the event itself.")

10. Model Code of Pre-Arrest Proc., § 130.4 (ALI 1975).

11. Susan Saulny, *National Law Group Endorses Videotaping of Interrogations*, N.Y. Times B4 (Feb. 10, 2004).

12. The twenty-four state supreme courts that have found that due process does not mandate electronic recording of station house interrogations include: California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Nevada, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Tennessee, Utah, Vermont, Washington and West Virginia. See *infra* n. 145.

13. See *e.g.* *Commonwealth v. Diaz*, 661 N.E.2d 1326, 1329 (Mass. 1996).

14. See *e.g.* *U.S. v. Huber*, 66 Fed. Appx. 123 (9th Cir. 2003)(unpublished); *U.S. v. Short*, 947 F.2d 1445 (10th Cir. 1991); *U.S. v. Coades*, 549 F.2d 1303 (9th Cir. 1977).

videotaping interrogations at police stations for all criminal suspects.<sup>15</sup> The Wisconsin Supreme Court recently held that all custodial interrogations of juveniles must be electronically recorded where feasible.<sup>16</sup> In addition, New Hampshire requires that all videotaped interviews admitted into evidence must include the entire interrogation,<sup>17</sup> and the Massachusetts Supreme Court grants defendants with unrecorded confessions the right to provide jurors with a cautionary instruction.<sup>18</sup>

On the legislative side, the Illinois, New Mexico, and Maine state legislatures also recently adopted recording requirements,<sup>19</sup> and Texas protects defendants against the admission of uncorroborated, oral confessions.<sup>20</sup> Although at least eighteen state legislatures considered videotaping legislation between 2004-2005, no other state requires the videotaping of interrogations.<sup>21</sup> Where state legislatures and the judiciary are making only limited progress, public pressure has begun to make inroads. As the cost of equipment falls and police officers and prosecutors become more cognizant of the potential pitfalls of unrecorded interrogations, police agencies across the country have begun recording suspect interviews and confessions.

A number of highly publicized exonerations and lost convictions have finally compelled many police agencies to equip interrogation rooms with cameras.<sup>22</sup> In Illinois, the exoneration of dozens of death row inmates, some of which were convicted on the basis of false confessions, helped prompt the passage of a law requiring recording all interrogations of homicide and sex-crimes suspects.<sup>23</sup> Racial profiling on Baltimore

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15. See *State v. Scales*, 518 N.W.2d 587 (Wis. 1994); *Stephan v. State*, 711 P.2d 1156 (Alaska 1985).

16. See *State v. Jerrell*, 699 N.W.2d 110 (Wis. 2005).

17. See *New Hampshire v. Barnett*, 789 A.2d 629 (N.H. 2001).

18. See *Commonwealth v. DiGiambattista*, 813 N.E.2d 516 (Mass. 2004).

19. See *infra* Part IV.

20. See Tex. Code Crim. Proc. § 3 (2004).

21. See *infra* Part IV. The eighteen other states where taping legislation has been introduced include: Arizona, California, Connecticut, Florida, Georgia, Kentucky, Louisiana, Massachusetts, Maryland, Missouri, Nebraska, New Hampshire, New York, Oregon, Rhode Island, Tennessee, Texas, and Washington.

22. See e.g. Michael McGuire, *Taped Interrogations Gain Momentum in Florida*, Chi. Trib. 1C (Mar. 8, 2003) (noting that in Broward County, Florida, after dubious confessions were uncovered in up to 38 cases, all interrogations in serious felony cases will now be recorded. Broward County, Sheriff Ken Jenne claims that electronic recording was necessary because, "[w]e realized that people were calling into scrutiny the . . . confessions." He reasoned, "[i]f you are not doing anything wrong, why aren't you videotaping the process?").

23. Rod Warden, *The Role of False Confessions in Illinois Wrongful Murder Convictions Since 1970*, Ctr. on Wrongful Convictions, Northwestern University School of Law (May 12, 2003) (available at <http://www.law.northwestern.edu/depts/clinic/wrongful/FalseConfessions2.htm>) (Warden notes, "[s]ince 1970, 42 wrongful murder convictions have been documented in Illinois. Twenty-five of the convictions, or 59.5 percent, rested in whole or part on false confessions.").

freeways led to a recent court order mandating video recording of all traffic stops.<sup>24</sup> In late 2003, Broward County, Florida, police agencies buckled under public pressure and voluntarily adopted a video recording requirement after a local newspaper uncovered an astonishing thirty-eight false confession cases.<sup>25</sup> The Dallas, Texas, police department adopted videotaping after a woman claimed that she was raped by officers in an interrogation room and another suspect alleged he had been beaten.<sup>26</sup> The Washington D.C. council passed a recording bill in 2003,<sup>27</sup> the New York city council has considered a recording proposal,<sup>28</sup> and hundreds more police departments have already adopted videotaping policies. Internationally, video recording of interrogations has been required by law in the United Kingdom since adoption of the Police and Criminal Evidence Act of 1984,<sup>29</sup> and videotaped interrogations are also used in Australia, Canada, Ireland, and New Zealand.<sup>30</sup>

This paper is an effort to review the costs and benefits of video recording and the academic literature on videotaping interrogations and confessions. I hope that my findings are useful in identifying the issues and concerns that must be addressed before adopting a formal recording policy or implementing a state-mandated video recording rule. I have divided this paper into eight sections and I will analyze video recording in three different contexts: in interrogation rooms, in patrol cars, and with hand-held cameras. Several scholars have made the case for video recording of interrogations in station houses.<sup>31</sup> I will argue that it is necessary to broaden videotaping rules to cover nearly all "custodial interrogations" for those rules to be meaningful. Although patrol car and

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24. See Laura Barnhardt, *State Police to Distribute Brochures*, Balt. Sun 1B (Nov. 7, 2003).

25. See Wanda DeMarzo & Daniel De Vise, *Zealous Grilling by Police Tainted 38 Murder Cases*, Miami Herald (December 22, 2002) (available at <http://www.miami.com/mld/miamiherald/4791670.htm>); Michael Mayo, *Tim Brown Juror: He Deserves Another Trial*, Sun-Sentinel. 1B (Jan. 21, 2003).

26. See Jason Trahan, *Police to Videotape Confessions*, Dallas Morning News (May 29, 2005).

27. Craig Timberg, *Council Sets Aside D.C. Drug Initiative Calling for Treatment*, Newsbytes 3 (Dec. 18, 2002).

28. *Crime, False Confessions and Videotape*, N.Y. Times A22 (Jan. 10, 2003).

29. Gisli Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony* 39 (2002).

30. See Wayne T. Westling & Vicky Waye, *Videotaping Interrogations: Lessons from Australia*, 25 Am. J. Crim. L. 493 (1998); Anthony Karstaedt, *Videotaping Police Interviews with Suspects*, 4 Murdoch U. Elec. J. L. 1 (Mar. 1997) (available at <http://www.murdoch.edu.au/elaw/issues/v4n1/karst.txt>) (noting that the New Zealand recording requirement went into effect on November 4, 1996); Sullivan, *supra* n. 7, at 19 n. 15.

31. See e.g. Steven A. Drizin & Beth Colgan, *Let the Cameras Roll: Mandatory Videotaping Interrogations is the Solution to Illinois' Problem of False Confession*, 32 Loy. U. Chi. L.J. 337 (Winter 2001) [hereinafter "Drizin & Colgan"].

hand-held cameras introduce some unique policy and technology concerns, the drawbacks and advantages of these cameras are relatively analogous to interrogation room cameras.

In section II, I explore the roles criminal suspects and police officers play in false confessions. In section III, I discuss how courts analyze the behavior of these parties in determining whether a confession is involuntary. I conclude that videotaping is vital to ensure that courts make informed due process determinations. In section IV, I survey judicially mandated, statutory, and locally implemented video recording rules. In section V, I examine the faults within these rules and propose that video recording laws must apply to criminal suspects taken into "custody," rather than merely those detained at station houses. In section VI, I explore the feasibility of video cameras in police cars and hand-held cameras. In section VII, I probe the strengths and weaknesses of challenges to videotaping interrogations and confessions. In section VIII, I note the benefits of a broad recording rule for criminal suspects. Finally, in section IX, I describe the advantages of videotaping for police officers and prosecutors.

## II. FALSE CONFESSIONS

### A. THE INCIDENCE AND PSYCHOLOGY OF FALSE CONFESSION

Some 42-76 percent of criminal suspects confess to the police.<sup>32</sup> Most of these suspects are guilty, but some confess to crimes that they have not committed.<sup>33</sup> Professor Paul Cassell estimates that false confession plays a role in only 1 in 90,000 convictions.<sup>34</sup> However, Professors Richard Leo and Richard Ofshe sharply criticize Cassell's attempt to quantify the incidence of false confession.<sup>35</sup> Leo & Ofshe claim that calculating police-induced or wrongful convictions is impossible because no records are kept on the frequency of interrogation and confession in the U.S., few police agencies record interrogations in their entirety, and many false confessions may go unnoticed by the media and researchers.<sup>36</sup>

It is difficult to calculate the extent of false confessions, but the advent of DNA technology has allowed criminal justice reformers to more

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32. Gudjonsson, *supra* n. 29, at 51.

33. See David Howard, *New Mission: Recording Police Interrogations*, N.Y. Times, 13 CN (May 25, 1997) (stating some Connecticut prosecutors and police official believe that Peter O'Reilly was wrongly exonerated in his mother's death).

34. Paul G. Cassell, *Criminal Law: Protecting the Innocent from False Confessions and Lost Confessions - And From Miranda*, 88 J. Crim. L. & Criminology 497, 520 (1998) [hereinafter "Lost Confessions"].

35. Richard Leo & Richard Ofshe, *Criminal Law: Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell*, 88 J. Crim. L. & Criminology 557, 560 (1998).

36. *Id.*

easily identify these cases.<sup>37</sup> In 1998, Leo and Ofshe found sixty cases of false confession in the post-Miranda era.<sup>38</sup> By late 2003, Leo and Steve Drizin compiled a more inclusive list of 136 cases of false confession.<sup>39</sup> With substantive proof of innocence in many “air-tight” confession cases, reformers contend that false confession may be much more prevalent than previously thought.<sup>40</sup>

False confessors admit to crimes they have not committed for a variety of reasons, many of which remain unclear to psychologists and criminal reformers.<sup>41</sup> Some individuals voluntarily confess to crimes that they have not committed because they seek notoriety.<sup>42</sup> Psychologists note that over 200 individuals falsely confessed to the kidnapping of Charles Lindbergh’s baby son, and over 30 people confessed to the slaying of aspiring, Hollywood actress Elizabeth Short (the “Black Dahlia”).<sup>43</sup> Still other suspects confess because they are delusional, wish to punish themselves, or hope to protect the actual perpetrator.<sup>44</sup> Finally, some suspects may even voluntarily confess to lesser crimes for fear of being implicated in more serious crimes.<sup>45</sup>

Psychologist and false confession-guru, Gisli Gudjonsson found that “the two most relevant enduring psychological characteristics in the assessment of [false confessors], however, were interrogative suggestibility and compliance.”<sup>46</sup> Although some individuals are much more susceptible than others to confessing, he notes that healthy, normal people are

37. See Elizabeth F. Loftus, *The Devil in Confessions*, 5 *Psych. Science in the Pub. Interest* 3 (Nov. 2004) (indicating that 1/5 of the Innocence Project’s DNA-based exonerations were false confession cases).

38. Richard Leo & Richard Ofshe, *Criminal Law: the Consequences of False Confessions, Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 *J. Crim. L. & Criminology* 429, 433-36 (1998) [hereinafter “Leo & Ofshe, *Consequences*”] (noting that in thirty-four of these cases the confessions have been proven false by scientific evidence, capture of the true perpetrator, or discovery that no crime had taken place).

39. See Richard Leo & Steven Drizin, *Proven False Confession Cases*, in *Recording of Custodial Interrogations: A Resource Guide*, 1-3 (Innocence Project, New York, N.Y. June 6, 2003).

40. *Illinois to Require Police to Tape Every Homicide Interrogation*, *Seattle Times*, A2 (July 18, 2003); see also Warden, *supra* n. 23. The Innocence Project further notes that false confessions played a role in 23 percent of convictions overturned by DNA evidence. See *Crime, False Confessions and Videotape*, *N.Y. Times* A22 (Jan. 10, 2003), Ultimately, as many as 48 percent of false confessors are wrongly convicted and imprisoned. Leo & Ofshe, *Consequences*, *supra* n. 38, at 477.

41. Gudjonsson, *supra* n. 29, at 224-26; Richard P. Conti, *The Psychology of False Confessions*, 2 *J. Credibility Assessment & Witness Psychol.* 14, 20 (1999).

42. Conti, *supra* n. 41, at 22.

43. *Id.*

44. Gudjonsson, *supra* n. 29, at 226-27; Conti, *supra* n. 41, at 21.

45. Conti, *supra* n. 41, at 21.

46. Gudjonsson, *supra* n. 29, at 155.

prone to falsely confess.<sup>47</sup> The literature on the psychology of confessions identifies two types of involuntary confessors. "Coerced-compliant" suspects may endure such high levels of stress during police interrogations that they cannot "exercise their powers of judgment and legal rights."<sup>48</sup> These false confessors may feel intimidated by officers and believe that resistance to the officer's questioning is futile.<sup>49</sup> Or, they may reason that they can mitigate their guilt or even escape prison altogether by acceding to the interrogator's demands.<sup>50</sup>

By contrast, a second group of innocent confessors can become convinced that it is possible that they actually committed the offense. These "coerced-internalized" suspects may doubt their own memories and readily agree with an officer's hypothetical account of events.<sup>51</sup> One such false confessor, fourteen-year-old Michael Crowe, admitted to killing his sister only after telling detectives:

Like I said, the only way I even know I did this is that she's dead and that the evidence says I did it. You could find someone else did it, and I pray to God someone else did. I think it's too late for that. I think I did it.<sup>52</sup>

What caused Crowe to accept officers' version of events? Some psychologists argue that intense interrogation of impressionable suspects can induce a hypnotic state in which detectives can implant false memories or, at the very least, inculcate grave uncertainty.<sup>53</sup>

Unsurprisingly, young and mentally handicapped defendants are particularly prone to psychological coercion.<sup>54</sup> Psychologist Peter Conti

47. *Id.* at 259.

48. Gudjonsson, *supra* n. 29, at 227; Conti, *supra* n. 41, at 27.

49. See e.g. Ken Armstrong et al., *Coercive and Illegal Tactics Torpedo some Cook County Murder Cases*, Chi. Trib., Dec. 16, 2001 (available at [www.chicagotribune.com/news/specials/chi-011216confession.story](http://www.chicagotribune.com/news/specials/chi-011216confession.story)) (Sang Kim confessed to the death of his girlfriend's baby after over 30 hours of detention and interrogation in which he alleges that officers deprived him of sleep, yelled at him, and jabbed him).

50. *Id.*

51. Conti, *supra* n. 41, at 22-23 (Until recently, there was no empirical evidence for the concept of coerced-internalized false confessions. However, eyewitness memory researchers have found that misleading post-event information can alter actual or reported memories of observed events).

52. Edwin Dobb, *False Confessions: Scaring Suspects to Death*, [www.amnestyusa.org/amnestynow/false\\_confessions.html](http://www.amnestyusa.org/amnestynow/false_confessions.html) (last visited Jan. 19, 2004).

53. Conti, *supra* n. 41, at 23; Richard J. Ofshe, *Inadvertent Hypnosis During Interrogation*, 40 *Intl. J. Clinical & Experimental Hypnosis* 125 (1992) (available at <http://ijceh.edu.wsw.edu>).

54. Gudjonsson, *supra* n. 29, at 144; Saul M. Kassin & Gisli Gudjonsson, *The Psychology of False Confessions: A Review of Literature and Issues*, 5 *Psych. Sci. in the Pub. Interest* 51-53 (Nov. 2004); see also Welsh White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 *Harv. Civ. Rights-Civ. Libs. L. Rev.* 105, 121-25 (1997) [hereinafter "*Safeguards*"]. (referring to the case of Earl Washington as an example of a false confession based on mental incapacity. Washington, a twenty-three



notes that suspects with poor memories, anxiety, low intelligence, and deflated self-esteem are extremely susceptible to an officer's suggestions.<sup>55</sup> Mentally handicapped suspects may not even comprehend the significance of their confessions.<sup>56</sup> Individuals impaired from drug and alcohol use are similarly prone to confess falsely.<sup>57</sup> In *State v. Rhodes*,<sup>58</sup> the Idaho Supreme Court upheld the death sentence for a suspect even after the arresting officer testified that shortly before his confession:

Paul Rhodes was either acting as if he was high on some kind of narcotic, or . . . narcotics. He had to be helped to walk. He swayed back and forth when he sat down, almost in a drunken stupor. Didn't say too much, and when he did he mumbled, as if, I would take it, he was not in control of his senses.<sup>59</sup>

Although courts consider a suspect's personal characteristics and predisposition to confess falsely as an element in making due process "voluntariness" determinations, the Supreme Court held that confessions made by impaired suspects are admissible in *Colorado v. Connelly*.<sup>60</sup> Absent evidence of police coercion, courts do not consider the mental state or condition of a suspect in judging the admissibility of a confession.<sup>61</sup>

#### B. THE POLICE AND FALSE CONFESSION

Although some suspects are more predisposed to confessing falsely than others, interrogating officers also contribute to the incidence of

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year old suspect with an I.Q. of sixty-nine was arrested for burglary. After confessing to three rapes that he could not have committed, Washington implicated himself in the rape and murder of a local teenager. After ten years on death row, DNA evidence proved that the sperm found on the victim's body did not match his).

55. Conti, *supra* n. 41, at 24.

56. *Id.* (noting the case of Delbert Ward, a 59-year-old farmer with an IQ of 69. A psychologist that interviewed Ward after he confessed to the murder of his brother believed that it was highly probable that Ward would have been so confused during the interrogation that he would have readily agreed with anything the investigators told him). See also Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. Pub. Int. L. J. 719, 721 (noting the case of Richard Lapointe, an individual suffering from a congenital brain disorder that left him impaired. Lapointe confessed to the rape and murder of his wife's grandmother after over nine hours of interrogation).

57. Gudjonsson, *supra* n. 29, at 43 (citing Brighton study); see also Wayne T. Westling, *Something is Rotten in the Interrogation Room: Let's Try Video Oversight*, 34 John Marshall L. Rev. 537, 538 (2001) (noting the case of Mountoun T. Hart. Police dispute Hart's claim that he was drunk and high on marijuana when he confessed to killing a school-teacher. A Manhattan jury discounted the confession after viewing pictures of the suspect on the night of the confession that seemed to indicate that he was "drunk or high.").

58. *State v. Rhodes*, 820 P.2d 665 (Idaho 1991).

59. *Id.* at 801.

60. *Colorado v. Connelly*, 479 U.S. 157 (1986).

61. *Id.* at 164.

false confessions. Indeed, some scholars argue that aggressive officers, rather than amenable suspects, are primarily responsible for sham confessions.<sup>62</sup> Coercive interviewing strategies can be understood in light of the importance of confessions in criminal cases.<sup>63</sup> A study by Baldwin & McConville (1980), found that confession evidence was vital in 30 percent of prosecutions,<sup>64</sup> and other commentators have placed that figure even higher.<sup>65</sup>

Because suspects have different emotional and mental capacities and react differently to police tactics, Leo & Ofshe contend that identifying coercion is often difficult.<sup>66</sup> In one study, however, Leo found that officers employed openly coercive interviewing tactics in approximately 2 percent of the cases he observed.<sup>67</sup> Although police manuals on the art of interrogation discourage officers from inducing confessions through use of illegal threats or promises, they often encourage officers to use tactics that elicit involuntary confessions.<sup>68</sup>

In his oft-revised 1942 tome on police interrogation,<sup>69</sup> Fred Inbau contends that officers should "display an air of confidence in the suspect's guilt" and "call attention to the subject's physiological and psychological 'symptoms' of guilt."<sup>70</sup> He argues that officers should express sympathy with the suspect and even reduce the moral seriousness of an offense or blame the victims of a crime.<sup>71</sup> Inbau admits that many of these tactics are deceptive and "unfair," but claims "it can be stated with the utmost confidence that none of the methods are apt to induce an innocent person to confess a crime he did not commit."<sup>72</sup>

Richard Leo, however, notes that Inbau's "unfair" tactics can in-

62. See Gudjonsson, *supra* n. 29, at 224 ("Kennedy (1986) considers that 'over-zealousness' on the part of police officers is the single most common cause [of false confession].").

63. Conti, *supra* n. 41, at 14-15.

64. Gudjonsson, *supra* n. 29, at 80.

65. Conti, *supra* n. 41, at 15 (estimating that police solved 80 percent of cases by obtaining confessions and Dr. W. Sargent claims that without confessions 70 percent of convictions in Great Britain may be lost).

66. See Leo & Ofshe, *Consequences*, *supra* n. 38.

67. Richard Leo, *Criminal Law: Inside the Interrogation Room*, 86 J. Crim. L. & Criminology, 266, 282-83 (1996) [hereinafter "Leo, *Inside*"].

68. See Fred E. Inbau, John E. Reid & Joseph P. Buckley, *Criminal Interrogations and Confessions* 216 (3d ed., 1986) ("[T]he opportunity to interrogate a suspect must be lawfully obtained . . . there must be an avoidance of force, threat of force, or promise of leniency . . . trickery or deceit must not be of such a nature as to 'shock the conscience' of the court or community.").

69. Fred E. Inbau, *Lie Detection and Criminal Interrogation* (1st ed., Williams & Wilkins Co 1942).

70. *Id.* at 81-96.

71. *Id.* at 115-117.

72. *Id.* at 117.

crease the probability of a false confession.<sup>73</sup> When Inbau's suggestions are combined with isolation from legal counsel, officers' claims of incriminating scientific evidence and lengthy and emotionally intense interrogations, officers can break the will of both guilty *and* innocent suspects.<sup>74</sup> In 1991, Leo Bruce falsely confessed to participating in the murder of nine people at a Buddhist temple near Phoenix, Arizona, after fifteen hours of interrogation.<sup>75</sup> Officers convinced Bruce they had conclusive evidence of his guilt. But Bruce later claimed that he confessed out of sheer exhaustion: "I just wanted it to end right there. I wanted to sleep."<sup>76</sup>

If a suspect appears to be breaking under stress or exhaustion, officers may go so far as to help a suspect explain how and why he/she committed the crime.<sup>77</sup> By providing the false confessor with the details of the crime the officer not only obtains the confession, but he also ensures that the story matches the corroborative evidence needed to make the confession admissible.

As Kassin and Gudjonsson point out, detectives' ability to identify presumptively guilty suspects is no better than chance.<sup>78</sup> Ultimately, an interrogator's erroneous belief that a suspect is guilty may not only make the officer more likely to elicit a false confession, it may also have an anchoring effect, slanting the officer's investigation of the case and interpretation of the evidence.<sup>79</sup> A number of studies in Britain and Australia also note that when detectives are convinced of a suspect's guilt but are unable to obtain a confession, they often engage in the practice of

73. Richard A. Leo, *The Problem of False Confessions, in the Miranda Debate* 273 (3d ed. Richard A. Leo & George C. Thomas (1998)).

74. Gudjonsson, *supra* n. 29, at 231 (Arguing, these coercive tactics are used because they help officers obtain more confessions in general); *see also* Kassin & Gudjonsson, *supra* n. 54 (arguing that three police tactics in particular have a tendency to lead to false confession including: isolation, the presentation of false incriminating evidence, and minimization of the consequences of admitting guilt).

75. White, *supra* n. 54, at 133.

76. *Id.*

77. *See e.g.* Leo & Ofshe, *supra* n. 38, at 463. (stating Gary Gauger confessed to officers' version of his parents murder after 18 hours of interrogation. No physical evidence linked him to the crime and his account was inconsistent with forensic evidence collected at the scene); Leo & Ofshe, *supra* n. 38, at 470 (referring to the confession of Luis Roberto Benavidiz as an example of a "probable false confession." Benavidiz confessed to a Simi Valley, California, murder after police threatened to charge his girlfriend and place his daughter in a foster home). *See also* Ruben Castaneda, *Interrogation Problems Caught on Video in Md.*, Wash. Post (Oct. 27, 2003) (including the videotaped confession of Richard B. Gater which was thrown out by Circuit Court Judge Thomas P. Smith after an officer on camera threatened that if Gater did not reveal the location of the murder weapon, armed officers might storm his mother's house and use force against her); Drizin & Colgan, *supra* n. 31, at 341.

78. Kassin & Gudjonsson, *supra* n. 54, at 37-39.

79. *Id.* at 41.

“verballing” or lying about the details of a suspect’s confession.<sup>80</sup> Several scholars argue that American police officers engage in similar behavior.<sup>81</sup> In one troubling survey, when asked to estimate the incidence of police perjury during evidence suppression hearings, judges, defense attorneys, and prosecutors estimated that police officers lied approximately 20 percent of the time.<sup>82</sup>

### III. DUE PROCESS AND THE TOTALITY OF THE CIRCUMSTANCES TEST

The Supreme Court has ruled that confessions that are involuntarily obtained in violation of the suspect’s Fourteenth Amendment Due Process rights are inadmissible.<sup>83</sup> In considering whether or not a confession is involuntary, the court applies a totality of the circumstances test.<sup>84</sup> In *Green v. Scully*,<sup>85</sup> the Second Circuit held that three factors should be considered in determining the voluntariness of a suspect’s confession: “(1) the characteristics of the accused, (2) the conditions of interrogation, and (3) the conduct of law enforcement officials.”<sup>86</sup> Courts may use their discretion in weighing each factor in making due process determinations.<sup>87</sup> The Supreme Court has held, however, that the defendant

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80. See Westling & Waye, *supra* n. 30, at 526 (“For decades in Australia, Britain, and Ireland, there have been claims of wholesale fabrication of oral confessions. In much of the commentary, these so-called confessions are called ‘verbals’ and the process of producing them is called ‘verballing.’ The term ‘verballing’ refers to the police practice of falsely alleging that an accused has made a verbal confession; this confession is later reduced into a written police record.”).

81. See Drizin & Colgan, *supra* n. 31, at 341 (“In February 1993, the Chicago Police Board fired Commander Jon Burge . . . For years, suspects and defendants claimed that Commander Burge, and other officers under his authority, tortured them during interrogations in order to obtain confessions to unsolved homicides . . . . In 1993 . . . the Chicago Police Board found credible evidence that torture had occurred and relieved Commander Burge of his duties.”); see also Cassell, *supra* n. 34, at 554 (“Videotaping creates the possibility of detecting police coercion in forcing suspects to give ‘confessions.’ . . . A report in the American Lawyer describing three false confessions to involvement in the Buddhist temple murders in Phoenix provides a good example. While tape recorders were running, police obtained several false confessions in apparent compliance with Miranda . . . . The tapes revealed that police had fed information to the suspects, only to have the information fed back to them later, and that the police had been able to ‘tidy up’ details in the suspects ‘confessions.’”); see also Conti, *supra* n. 41, at 20; Christopher Slobogin, *Tesilying: Police Perjury and What To Do About It*, 67 U. Colo. L. Rev. 1037, 1043 (1996).

82. Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. Colo. L. Rev. 75, 107 (1992).

83. See *Mincey v. Arizona*, 437 U.S. 385, 401 (1978); *Schneekloth v. Bustamante*, 412 U.S. 218, 226 (1973).

84. See *Withrow v. Williams*, 507 U.S. 680, 693-94 (1993).

85. *Green v. Scully*, 850 F.2d 894 (2nd Cir. 1988).

86. *Id.* at 901-02.

87. *Id.*

must establish that the police played a role in eliciting the statement before a confession can be found involuntary.<sup>88</sup>

Apart from violating the rights to silence and counsel provided by the Warren Court in *Miranda v. Arizona*,<sup>89</sup> courts have struggled to determine what tactics are sufficiently coercive to render a confession inadmissible. In some cases, determining when police interrogators have coerced a suspect is clear. For instance, in *Brown v. Mississippi*,<sup>90</sup> the Supreme Court held that the confessions of three African-American defendants were obtained in violation of due process because they were elicited through the use of lynching, repeated whippings, and torture.<sup>91</sup> Similarly, in *Ashcraft v. Tennessee*,<sup>92</sup> the Supreme Court held that the interrogation of two suspects for thirty six straight hours rendered their confessions involuntary.<sup>93</sup>

In two less clear-cut cases, the Supreme Court excluded confessions where emotionally unstable and mentally ill suspects were subjected to over eight hours of interrogation without counsel in *Blackburn v. Alabama*<sup>94</sup> and *Spano v. New York*.<sup>95</sup> However, in similar cases, the court has used the same totality of the circumstances test, and found that officers did not violate a suspect's due process rights. For instance, in *Fare v. Michael C.*,<sup>96</sup> the Supreme Court found the confession of an uneducated juvenile admissible even though officers refused his request to have his probation officer present, used a two-on-one interviewing strategy, interrogated him for a prolonged period, and told him that it would be to his benefit to talk.<sup>97</sup>

One important limitation of the current totality of the circumstances test is its lack of predictability. Since it is never clear at what point due process has been violated, the test fails to provide detectives with an incentive to cap their interrogations at eight, twelve or even eighteen hours.<sup>98</sup> Thus, the totality of the circumstances test may not only increase the rate of false confession, but it could also lead to instances in

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88. See *Colorado v. Connelly*, 479 U.S. 157 (1986).

89. *Miranda v. Arizona*, 384 U.S. 436, 455 (1966).

90. *Brown v. Mississippi*, 297 U.S. 278 (1936).

91. *Id.* at 281.

92. *Ashcraft v. Tennessee*, 322 U.S. 143 (1944).

93. *Id.* at 154.

94. *Blackburn v. Alabama*, 361 U.S. 199 (1960).

95. *Spano v. N.Y.*, 360 U.S. 315, 322 (1959).

96. *Fare v. Michael C.*, 442 U.S. 707 (1979).

97. *Id.* at 723-28. Similarly, in *Green v. Scully*, the Second Circuit found that the defendant spoke voluntarily despite detectives' references to the electric chair and their phony claims that bloody palm-prints at the crime scene matched his own. 850 F.2d 894, 903 (2d Cir. 1988).

98. Kassir & Gudjonsson, *supra* n. 54, at 60 (referring to 2004 study which found that the average length of interrogation leading to false confession was 16.3 hours).

which the confessions of guilty suspects are needlessly forfeited. As a potential solution, some legal reformers have called for the creation of new bright line due process rules akin to the procedures established in *Miranda*.

For instance, Rosenberg and Rosenberg argue that all confessions are compelled and violate due process and the right against self-incrimination.<sup>99</sup> Although they make several good points, their call for the exclusion of all out of court statements made by suspects has been criticized as over-broad.<sup>100</sup> While it is necessary to ensure that police officers respect the rights of the accused, it is also important that officers retain the ability to interrogate suspects. Most confessors are guilty and a ban on interviews would place an extremely heavy burden on the already thin resources of police and prosecutors.<sup>101</sup> Moreover, the Supreme Court has repeatedly affirmed the important role "voluntary" confessions serve in the criminal justice system.<sup>102</sup>

Alternatively, Welsh White argues that all statements obtained through the use of coercive interrogation methods should be excluded on due process grounds, regardless of the confession's substance or validity.<sup>103</sup> He suggests a number of measures courts should implement to protect the rights of the accused including: special restrictions on interrogations of young and mentally handicapped suspects, limits on the duration of interviews, bars on officers lying about incriminating evidence, and a ban on false promises to detained suspects.<sup>104</sup>

Finally, White notes that video cameras may be effective tools in preventing false confession and enforcing due process safeguards.<sup>105</sup> Although many of White's suggestions could have an important impact on reducing the incidence of false confession,<sup>106</sup> videotaping may be the only practicable recommendation. Officers and courts may have a diffi-

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99. Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. Rev. 69 (Nov. 1989).

100. See Corey J. Ayling, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 Wis. L. Rev. 1121, 1200 (1984) (arguing that outlawing confessions is too extreme a remedy for the problem of false confession).

101. See Cassell, *supra* n. 34, at 537-38.

102. See e.g. *Colorado v. Connelly*, 479 U.S. 157, 166 (1986) (stating "We have previously cautioned against expanding 'currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries.'").

103. Welsh White, *Miranda's Waning Protections* 134-55 (U. Mich. Press. 2001)

104. *Id.*

105. *Id.*

106. Conti, *supra* n. 41, at 30. (The United Kingdom has adopted some of these proposed reforms. Interrogations are limited to 36 hours, or 96 hours with court approval. Police must also identify "at risk" individuals including the young, mentally ill and handicapped before interrogation. These suspects can only be interviewed if another "appropriate adult" is present to safeguard the "at risk" individual's rights).

cult time determining which suspects must be treated exceptionally because of age or mental illness. Similarly, strict rules limiting the amount of time a suspect can be interviewed and regulating the promises and threats officers employ may unnecessarily interfere with legitimate interviewing strategies. As the Court noted in *Spano*, officers may need more flexibility in questioning suspects in the course of investigating unsolved crimes, than when they are eliciting confessions from indicted suspects.<sup>107</sup> If the totality of the circumstances test is abandoned for more rigid interrogation rules, it is possible that the confessions and convictions of some guilty suspects will be lost.<sup>108</sup>

Unlike White's other recommendations, a mandatory videotaping requirement preserves police discretion and tactical flexibility in the interrogation room. The value of videotape evidence is that it allows courts to properly assess the totality of the circumstances in which a confession has been obtained.<sup>109</sup> It seems implausible that the susceptibility of the criminal suspect, the behavior of officers, and the atmosphere in which an interrogation took place can be accurately determined by judge or jury absent videotape evidence.

#### IV. THE CURRENT STATE OF VIDEO RECORDING IN THE U.S.

##### A. JUDICIAL APPROACHES

No state or federal court has found that the Due Process Clause of the Fourteenth Amendment requires police officers to electronically record interrogations. In *California v. Trombetta*,<sup>110</sup> the Supreme Court held that states do not have a due process obligation to preserve exculpatory evidence unless the suspect can prove both that the exculpatory value of the evidence was apparent before the evidence was destroyed and the suspect has no alternative evidence available.<sup>111</sup> In *Trombetta*, the court argued that although it was feasible to preserve samples of a drunk driver's breath, the destruction of the samples was not constitutionally material because it was unlikely that the samples would have provided exculpatory evidence.<sup>112</sup> Every court that has addressed a mandatory videotaping requirement since has found that the preservation of a recording does not meet the *Trombetta* materiality test.<sup>113</sup> Videotaping of interrogations does not meet the due process materiality test because criminal suspects always have the opportunity to testify at

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107. *Spano v. New York*, 360 U.S. 315, 327 (1959).

108. See Cassell, *supra* n. 34, at 497.

109. See *Withrow v. Williams*, 507 U.S. 680, 693-94 (1993).

110. *California v. Trombetta*, 467 U.S. 479 (1984).

111. *Id.* at 489.

112. *Id.* at 489-90.

113. See *e.g. Stephan v. State*, 711 P.2d 1156, 1160 (Alaska 1985).

trial or present evidence that undermines any statements made to police.<sup>114</sup> The Supreme Court's holding in *Arizona v. Youngblood*,<sup>115</sup> makes the adoption of a recording rule on the basis of the Due Process Clause even more difficult. In *Youngblood*, the Court found that not only must a suspect prove that police failed to preserve material, exculpatory evidence that could not otherwise be presented at trial, but the suspect must also prove that the officers' decision to destroy evidence was made in bad faith.<sup>116</sup> Although no court is likely to find that the federal constitution requires video recording in the near future, courts can still mandate videotaping under state constitutions.

For instance, in *Stephan v. State*<sup>117</sup> the Alaska Supreme Court held that police officers had a duty to record all custodial interrogations when conducted in places of detention.<sup>118</sup> The court arrived at its decision because it understood that *Trombetta* did not preclude Alaska from, "adopt[ing] more rigorous safeguards governing the admissibility of . . . evidence than those imposed by the Federal Constitution."<sup>119</sup> The court noted an Alaska Court of Appeals decision with facts very similar to those of *Trombetta*.<sup>120</sup> In the Alaska case, the court held that police officers had a due process obligation to preserve breathalyzer samples.<sup>121</sup> The court found the parallels between breathalyzer samples and electronic recording compelling and chose to adopt a flexible approach to due process:

The concept of due process is not static; among other things, it must change to keep up with new technological developments. For example the gathering and preservation of breath samples was previously impracticable. Now that this 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 recording is even more commonplace in today's society.<sup>122</sup>

Twenty years later, no other state has found that the due process rights of suspects require a recording rule.<sup>123</sup> Most courts rely on the

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114. For example, in *Gale v. State*, the Wyoming Supreme Court found that the defendant's access to the interviewers notes and opportunity to cross-examine witnesses and victims provided sufficient due process protection. 792 P.2d 570, 588 (Wyo. 1990).

115. *Arizona v. Youngblood*, 488 U.S. 51 (1988).

116. *Id.* at 58.

117. *Stephan v. State*, 711 P.2d 1156 (Alaska 1985).

118. *Id.* at 1160-61, 1164-65.

119. *Id.* at 1160.

120. *Id.* (citing *Municipality of Anchorage v. Serrano*, 649 P.2d 256 (Alaska App. 1982)).

121. *Id.*

122. *Id.* at 1161-162.

123. See *People v. Holt*, 937 P.2d 213, 242 (Cal. 1997); *People v. Raibon*, 843 P.2d 46, 49 (Colo. App. 1992); *State v. James*, 678 A.2d 1338, 1360 (Conn. 1996); *Coleman v. State*, 375 S.E.2d 663 (Ga. App. 1988); *State v. Kekona*, 886 P.2d 740, 746 (Haw. 1994); *State v. Rhoades*, 822 P.2d 960, 969 (Idaho 1991); *People v. Everette*, 543 N.E.2d 1040, 1047 (Ill.



materiality test in *Trombetta* and refuse to extend their own due process clause any further than the federal Constitution.<sup>124</sup> At least one other state, however, has found that videotaping “is now a reasonable and necessary safeguard, essential to the accused’s right to counsel, his right against self-incrimination, and ultimately his right to a fair trial.”<sup>125</sup>

In 1994, the Minnesota Supreme Court considered a recording requirement in *State v. Scales*.<sup>126</sup> The court rejected the due process approach of *Stephan* and chose to mandate recording through its “supervisory power to insure the fair administration of justice.”<sup>127</sup> The Minnesota recording rule is ultimately broader than Alaska’s rule because it covers all “custodial interrogations.”<sup>128</sup> However, failure to record interrogations in Minnesota will only result in suppression of the statements if the violation is deemed “substantial.”<sup>129</sup> In considering whether a substantial violation of the rule has occurred, the court looks to the intent of the officers and the possibility of fabrication.<sup>130</sup> Minnesota’s “supervisory” approach to video recording shows promise. Recently, the New Hampshire and Wisconsin Supreme Courts also used their supervisory powers to implement limited recording requirements in

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App. 1st Dist. 1989); *Stoker v. State*, 692 N.E.2d 1390 (Ind. App. 1998); *Baynor v. State*, 736 A.2d 325, 332 (Md. 1999); *Commonwealth v. Fryar*, 610 N.E.2d 903, 910 (Mass. 1993); *State v. Buzzell*, 617 A.2d 1016, 1018 (Me. 1992); *People v. Fike*, 577 N.W.2d 903 (Mich. App. 1998); *Williams v. State*, 522 So. 2d 201, 208 (Miss. 1988); *Jimenez v. State*, 105 Nev. 337, 341 (1989); *State v. Cook*, 847 A.2d 530 (N.J. 2004); *People v. Owens*, 713 N.Y.S.2d 452 (2000); *State v. Smith*, 684 N.E.2d 668, 686 (Ohio 1997); *Commonwealth v. Craft*, 669 A.2d 394, 397 (Pa. Super. 1995); *State v. Godsey*, 60 S.W.3d 759, 771 (Tenn. 2001); *State v. James*, 858 P.2d 1012, 1017-18 (Utah App. 1993); *State v. Gorton*, 548 A.2d 419, 421 (Vt. 1988); *State v. Spurgeon*, 820 P.2d 960 (Wash. 1991); *State v. Kilmer*, 439 S.E.2d 881, 894 (W. Va. 1993); *Gale v. State*, 792 P.2d 570, 588 (Wyo. 1990).

124. See e.g. *State v. Kilmer*, 439 S.E.2d 881, 894 (W. Va. 1993) (“The Appellant recognizes that the Due Process Clause of the United States Constitution as interpreted by the United States Supreme Court in *California v. Trombetta* . . . would not recognize a denial of due process for the failure of police to record a custodial interrogation. In *Trombetta*, the Supreme Court [found] . . . in order to place a constitutional duty upon police to preserve evidence ‘the standard of constitutional materiality’ must be met.”).

125. See *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (citing *Stephan v. State* 711 P.2d 1156, 1160 (Alaska 1985)).

126. The Minnesota recording requirement entails 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.” *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 593 (“A violation shall in all cases to be deemed substantial if one or more of the following paragraphs is applicable . . . (a) The violation was gross, willful and prejudicial to the accused . . . (b) The violation was of a kind likely to lead accused persons to misunderstand their position or legal rights . . . (c) . . . The violation created a significant risk that an incriminating statement may have been untrue.”).

*State v. Barnett* and *State v. Jerrell*.<sup>131</sup> New Hampshire courts now may only admit into evidence complete recordings of both interrogations and confessions.<sup>132</sup> This effectively prevents officers from coercing suspects and then videotaping a resulting confession.<sup>133</sup> In Wisconsin, following *Jerrell*, all custodial interrogations of juveniles must be videotaped where feasible, and all interrogations must be videotaped at police stations without exception.<sup>134</sup> While no other court has used its supervisory power to mandate video recording, several courts have indicated their willingness to impose taping rules.

For instance, the Massachusetts Supreme Court has cited the cost savings of taping and the need to provide better protections of suspect's due process rights.<sup>135</sup> Although the court refused to impose a mandatory videotaping requirement, the court did find that trial courts may consider the absence of an electronic recording in suppression hearings.<sup>136</sup> More recently, the high court held that juries could be given cautionary instructions regarding the voluntariness of a confession where an electronic recording has not been made by police.<sup>137</sup> Although many more courts have also openly acknowledged their support for videotaping interrogations and confessions,<sup>138</sup> they have not adopted video recording policies. They have argued that creating a new videotaping rule is the responsibility of state legislatures and have refused to "legislate from the

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131. *New Hampshire v. Barnett*, 147 N.H. 334, 337 (N.H. 2001); *State v. Jerrell*, 699 N.W.2d 110 (Wis. 2005).

132. *New Hampshire*, 147 N.H. at 337-38 ("We believe both *Stephan* and *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-Miranda interrogation we establish the following rule: In order to admit into evidence the taped recording of an interrogation, which occurs after 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.").

133. See e.g. *Will Taping Interrogations Fix The System? Law Requires Police To Also Record Questioning, And Some Hope It Prevents False Confessions*, Chi. Trib. (June 21, 2005) (describing the wrongful conviction case of Kevin Fox after fourteen hours of interrogation followed by a 20 minute videotaped confession) (available at [http://www.nacdl.org/sl\\_docs.nsf/freeform/mandatory:008](http://www.nacdl.org/sl_docs.nsf/freeform/mandatory:008)).

134. *State v. Jerrel*, 699 N.W.2d at 123.

135. *Commonwealth v. Diaz*, 422 Mass. 269, 272 (Mass. 1996).

136. *Id.* at 273.

137. See *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 534 (Mass. 2004).

138. See e.g. *State v. Kekona*, 886 P.2d 740, 746 (Haw. 1994) ("Consequently, although we decline to interpret the due process clause of the Hawaii Constitution as requiring that all custodial interrogations be recorded, we nevertheless stress the importance of utilizing tape recordings during custodial interrogations when feasible."); *State v. Buzzell*, 617 A.2d 1016, 1018 (Me. 1992) (holding that the benefits of recording interrogations are "obvious"); *State v. Godsey*, 60 S.W.3d 759, 771 (Tenn. 2001) ("In light of the slight inconvenience and expense associated with electronically recording custodial interrogations, sound policy considerations support its adoption as a law enforcement practice.").

bench."<sup>139</sup>

## B. STATUTORY APPROACHES

Texas has the oldest<sup>140</sup> and perhaps the strictest bar on admission of uncorroborated oral confessions in the country.<sup>141</sup> Since 1981, Texas Code of Criminal Procedure article 38.22 § 3 has required police officers to electronically record all custodial interrogations and confessions before they can be admitted into evidence.<sup>142</sup> The statute holds that all recordings must be intelligible and accurate, operators should be properly trained, prosecutors must send an electronic copy to defense counsel, and all tapes are to be preserved until appeals have been exhausted.<sup>143</sup> In *State v. Lacy*,<sup>144</sup> the court explained the reasoning behind the state's stringent admissibility standards: "An oral confession of guilt or an oral admission against interest made by one in custody is inadmissible evidence as the statement is likely to be misunderstood, easily fabricated, and hard to contradict."<sup>145</sup> Ironically, in nearly every other state, judges and lawmakers have operated under the opposite, default assumption: oral confessions are clear evidence of guilt.

Twenty-one different state legislatures and the city council of Washington D.C. have considered legislation mandating video recording of police confessions in the last two years.<sup>146</sup> Illinois, Maine, New Mexico and Washington D.C. passed recording bills,<sup>147</sup> while Florida (twice), Maryland, and Rhode Island rejected electronic recording requirements, and the New Hampshire legislature deferred to its Supreme Court.<sup>148</sup> Most

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139. See *State v. Gorton*, 548 A.2d 419, 421 (Vt. 1988) ("The most appropriate means of prescribing rules to augment citizens' due process rights is through legislation . . . . In the absence of legislation, we do not believe it appropriate to require, by judicial fiat, that all statements taken of a person in custody be tape-recorded."); *State v. Spurgeon*, 820 P.2d 960 (Wash. 1991).

140. See *Riley v. State*, 4 Tex. Ct. App. 538 (1878); *Gay v. State*, 2 Tex. Ct. App. 127 (1877).

141. But see Tex. Code Crim. Proc. Art 38.22 (2004) (Under § 1 police-officers can obtain signed, written confessions as an alternative to videotaped interrogations and confessions).

142. *Id.* § 3.

143. *Id.*

144. *State v. Lacy*, 80 S.W.3d 207 (Tex. App. 2002).

145. *Id.* at 209.

146. See *Model Legislation*, *supra* n. 19, at 3; see also State Legislative Network, *State Legislation to Require Electronic Recording of Interrogations* (available at [http://www.nacdl.org/sl\\_docs.nsf/freeform/MandatoryStatebyState?OpenDocument](http://www.nacdl.org/sl_docs.nsf/freeform/MandatoryStatebyState?OpenDocument)).

147. Ill. Sen. 15, 93d Gen. Assembly, Reg. Sess. (2003); 15 Me. Rev. Stat. Ann. § 801-A (2004); N.M. Stat. Ann. § 29-14-4.5 (2005); D.C. Code Ann. § 5-133.20 (Lexis 2003).

148. Fla. Sen. 2752, 2003 Leg., Reg. Sess.; Fla. H. 1119, 2005 Leg., Reg. Sess. (available at <http://www.flsenate.gov/data/session/2005/House/bills/billtext/pdf/h111900.pdf>); Md. H. 387, 2003 Leg., 416th Sess (available at <http://mlis.state.md.us/2003rs/billfile/hb0387.htm>); R.I. S. 350, 2003 Gen. Assem. § 1 (5)(b).

of the proposals base their recording rule on *Stephan v. State*<sup>149</sup> and confine videotaping to places of detention including station houses, correctional facilities, and courthouses.<sup>150</sup> The Oregon and Washington bills, however, provide that police officers cannot evade recording requirements by intentionally interrogating criminal suspects offsite.<sup>151</sup>

Most of the bills fail to specify when or how videotaping should be implemented, but a few are very specific. For instance, Illinois, Kentucky, and Maine legislators limited their recording requirements to interrogations of homicide and sex crime suspects,<sup>152</sup> Arizona's bill only considers juvenile suspects,<sup>153</sup> and Connecticut, Georgia, New Mexico, Washington, Missouri, and Louisiana legislators apply their videotaping rule only to felony cases.<sup>154</sup>

Several New York proposals and the Illinois bill recognize that training officers will be a vital part of any recording policy,<sup>155</sup> and the Louisiana bill specifies that all recordings must become a part of the public record.<sup>156</sup> Nearly every bill also creates a number of "good cause" exceptions by which the recording requirement will be excused.<sup>157</sup> The most common good cause exception is an exemption akin to that found in Minnesota's recording rule, which permits officers to dodge recording rules where it would not be "feasible."<sup>158</sup>

Although all the bills seek to protect the rights of criminal suspects to a certain extent, legislators use vastly different arguments to frame

149. *Stephan v. State*, 711 P.2d 1156 (Alaska 1985).

150. The Connecticut, Illinois, Maryland, New York, and Tennessee bills do not require videotaping of interviews outside the confines of the police station.

151. See Or. S. 265, 73d Leg. Assem., Reg. Sess. (2005) (available at <http://landru.leg.state.or.us/05reg/measures/sb0200.dir/sb0265.intro.html>); see also Wash. H. 1932, 58th Leg., Reg. Sess. (2003).

152. Ill. S. 15, 93d Gen. Assem., Reg. Sess. (2003); Ky. H. 242, 2005 Reg. Sess.; Me. L.D. 891, 121st Leg., 2d Reg. Sess. (2004).

153. Ariz. H. 2614, 47th Leg., Reg. Sess. (2005).

154. See e.g. Ct. S. 1281, Gen. Assembly (2005) (available at <http://search.cga.state.ct.us/2005/TOB/s/pdf/2005SB-01281-R00-SB.pdf>).

155. Ill. S. 15, 93d Gen. Assembly, Reg. Sess. (2003); N.Y. A. 6541, 2005 Assembly, Reg. Sess. (2005) (available at <http://assembly.state.ny.us/leg/?bn=A06541>); N.Y. A. 7947, 2005 Assembly, Reg. Sess. (2005) (available at <http://assembly.state.ny.us/leg/?bn=A07947&sh=t>); N.Y. S. 1036, 2005 Assembly, Reg. Sess. (2005) (available at <http://assembly.state.ny.us/leg/?bn=S01036&sh=t>); N.Y. S. 3354, 2005 Assembly, Reg. Sess. (2005) (available at <http://assembly.state.ny.us/leg/?bn=S03354&sh=t>).

156. La. S. 734, 2004 Leg., Reg. Sess., (available at [http://www.legis.state.la.us/leg\\_docs/04RS/CVT9/OUT/0000L6DI.PDF](http://www.legis.state.la.us/leg_docs/04RS/CVT9/OUT/0000L6DI.PDF)).

157. See e.g. Ga. H. 1395, 2003-2004 Sess. (2004); Tenn. S. 108, H. 204, 104th Gen. Assembly, Reg. Sess. (2005) (available at <http://www.legislature.state.tn.us/bills/currentga/BILL/SB0108.pdf>). Some of these exceptions include: exigent circumstances, equipment failure, eavesdropping, voluntary confessions, suspect's refusal to be taped, or a statement elicited out of state or by a federal agent.

158. See Me. L.D. 891, 121st Leg., 2d Reg. Sess. (2004).

their proposals. For instance, the Oregon bill emphasizes that statements made by defendants during custodial interrogations are inadmissible unless they fall into one of the bill's exceptions.<sup>159</sup> By contrast, the 2003 Florida proposal framed the recording requirement as a cost effective solution that will improve the criminal justice system:

[L]ow cost technology is now available in every jurisdiction to record each custodial interrogation of a criminal suspect, eliminating this gross waste of resources and enhancing the reliability and reputation of law enforcement.<sup>160</sup>

Of the fourteen bills that remain in consideration, many appear viable. State representatives reintroduced the Nebraska bill on January 2005.<sup>161</sup> As of late 2005, committees are also reviewing recording bills in Arizona, California, Connecticut, Georgia, Kentucky, Missouri, New York, Oregon, Tennessee, and Texas.<sup>162</sup> These have the greatest potential to become law, but all the bills may need substantial revision to specify how the policies will be funded and implemented

### C. LOCAL APPROACHES

In addition to movement among state legislatures for more uniform recording requirements, hundreds of local and state police agencies have already voluntarily adopted video recording rules for interrogations.<sup>163</sup> As a matter of department policy, officers routinely record station house confessions in Minneapolis, San Antonio, Miami, Denver, Houston, San Diego, Chicago, and St. Louis.<sup>164</sup> Videotaping policies vary considerably

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159. Or. S. 265, 73d Leg. Assembly, Reg. Sess. (2005), (available at <http://landru.leg.state.or.us/05reg/measures/sb0200.dir/sb0265.intro.html>) ("Requires that statement[s] made by defendant during custodial interrogation be recorded electronically to be admissible as evidence against defendant. Provides exceptions.").

160. Fla. S. 2752, 2003 Leg., Reg. Sess.

161. Neb. L.B. 112, 99th Leg., Reg. Sess. (2005) (available at [http://www.unicam.state.ne.us/pdf/INTRO\\_LB112.pdf](http://www.unicam.state.ne.us/pdf/INTRO_LB112.pdf)).

162. See Ct. S. 1281, Gen. Assembly (2005) (available at <http://search.cga.state.ct.us/2005/TOB/s/pdf/2005SB-01281-R00-SB.pdf>); Mo. H. 557, 93rd Gen. Assembly, Reg. Sess. (2005), (available at <http://www.senate.mo.gov/05info/house/billtext/intro/hb0557i.htm>); N.Y. S. 3354, 2005 Assembly, Reg. Sess. (2005), (available at [http://assembly.state.ny.us/leg/?bn=S03354&sh=t](http://assembly.state.ny.us/leg/?bn=S03354&sh=t;).); Tenn. S. 108, H. 204, 104th Gen. Assembly, Reg. Sess. (2005) (available at <http://www.legislature.state.tn.us/bills/currentga/BILL/SB0108.pdf>).

163. N.M. H. Appropriations Comm., Fiscal Impact Report on Custodial Interrogation Recordings, 549, Reg. Sess. (2003) (available at <http://legis.state.nm.us/lisearch.html>).

164. See Thomas P. Sullivan & Laura A. Thomas, *Electronic Recording of Interrogations*, in *Recording of Custodial Interrogations: A Resource Guide*, 1-6 (Innocence Project, New York, N.Y. June 6, 2003) (including a sampling of municipal/county police departments that routinely videotape station-house interrogations include: San Diego (Cal.), Boulder, Colorado Springs, Denver, Fort Collins (Colo.), New Haven (Conn.), Coral Springs (Fla.), DuPage County, Kanakee County, Peoria (Ill.), Portland (Me.), Prince George's County (Md.), Las Cruces (N.M.), Sioux City, Aberdeen (S.D.), Austin (Tex.); see also Geller,

among departments. The Portland, Maine, and Aberdeen, South Dakota, police departments have two of the most stringent recording policies in the country.<sup>165</sup> The Portland police department requires videotaping of all stationhouse interrogations and confessions, while Aberdeen officers routinely audiotape or videotape all suspect statements.<sup>166</sup>

Most municipal police policies are far less strict. In Miami, recordings are only made in serious cases and officers are under no duty to record statements made at the scene or in patrol cars.<sup>167</sup> San Diego, Boulder, Sioux City, Las Cruces, and Prince George's County detectives record tape suspect interviews in only serious felony cases.<sup>168</sup> New York, Chicago, and Philadelphia officers typically only record the confessions of the accused, rather than entire interrogations.<sup>169</sup> The Houston, Austin and Los Angeles police departments allow officers complete discretion to decide whether or not they will record suspect statements.<sup>170</sup> Many more police departments have no official recording policy, but police officers still choose to record their interactions with suspects to protect themselves and preserve evidence.<sup>171</sup>

## V. CONFESSIONS OUTSIDE THE STATIONHOUSE

Both criminal suspects and the police stand to gain tremendously from a recording rule that extends beyond the interrogation room. If recording policies draw a distinction between the station house and other interrogation sites, officers may find ways to subvert the recording requirement when it suits their interests. And even in air-tight cases, the

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*supra* n. 2, at 2. Other police departments using recording include Fort Wayne (Ind.), Houston (Tex.), Orange County (Cal.), St. Louis (Mo.), Kansas City (Mo.), Tulsa (Okla.), and the Bronx (N.Y.).

165. *Portland Police Department Standard Operating Procedure*, in *Recording of Custodial Interrogations: A Resource Guide* (Innocence Project, New York, N.Y. June 6, 2003); Sullivan & Thomas, *supra* n. 165, at 3.

166. *Id.*

167. Shaila K. Dewan, *New York Police Department Bucks a Growing Trend*, N.Y.P.D. News (Sept. 2, 2003) (available at <http://www.nypdnews.com/90203taping.html>).

168. Sullivan & Thomas, *supra* n. 165, at 1-6.

169. Mark Fazlollah, *More and More Convictions Come Undone*, Phila. Inquirer (Feb. 24, 2003) (available at <http://www.truthinjustice.org/unraveling.htm>).

170. Sullivan & Thomas, *supra* n. 165, at 4-6; S.K. Bardwell, *HPD Has No Policy on Taping*, Houston Chron. S5 (Feb. 27, 2002).

171. See e.g. Carlos Sadovi, *Cops Use Cameras to Fight Brutality Claims*, Chi. Sun-Times 5 (Jan. 16, 2003) (In Chicago, many police officers have begun carrying their own personal video cameras with them to protect against accusations of police brutality. In one case, a Chicago detective video recorded the suspect and the scene of an arrest. Later, when the suspect filed a \$21 million police brutality suit, the officer had evidence directly contradicting the abuse charges. Ironically, officers can be suspended for creating these tapes).

absence of testamentary evidence from interviews conducted in the back of patrol cars, at crime scenes, in suspects' homes, and on the street will raise the suspicions and doubts of judges and juries.<sup>172</sup>

Although Paul Cassell's Salt Lake City study indicates that suspects facing interrogation outside police stations may be less likely to confess,<sup>173</sup> in some situations, these suspects may be more susceptible to psychological coercion.<sup>174</sup> A suspect caught at the scene of the crime, guilty or innocent, may feel an overbearing sense of guilt or pressure to confess.<sup>175</sup> With freedom close at hand suspects may also believe that officers will let them go if they "come clean." Officers can also easily re-create the coercive atmosphere of an interrogation room by interrogating suspects in isolated, private places for interminable periods of time.<sup>176</sup>

In jurisdictions that only require station house taping, officers have flouted recording rules by conducting interrogations in police cars, on the street and, in at least one instance, a motel room.<sup>177</sup> The circumvention of recording requirements has been a predictable result of the limited application of the recording requirement to interrogations conducted in places of "detention."<sup>178</sup> Unlike the broader concept of "custodial interrogation" which covers all instances in which a suspect has been arrested or otherwise significantly deprived of his freedom,<sup>179</sup> "detention" typi-

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172. See *State v. Kekona*, 886 P.2d 740, 746 (Haw. 1994); Andrew Smith, *Interrogating Under Video's Watchful Eye*, *Newsday* A29 (Apr. 30, 2003) (noting Prosecutor Collins claims, "You can rest assured that if none of these things are happening under the watchful eye of the camera, there will be allegations that they happened before or after . . . the videotaping.").

173. See Cassell, *supra* n. 34, at 509.

174. See *supra* Part II.

175. *Id.*

176. See Dennis Payne, *Police Liability* 199-201 (2002) (recounting the case of a defendant brought to trial for the death of his girlfriend's four-year-old child. Detectives interrogated the suspect at his apartment for four hours. Although they told him he was not under arrest and did not read him his *Miranda* rights, four detectives interrogated him; they refused to allow him to speak to his wife or father or obtain a glass of water. Subsequently, after being taken to the station house and receiving the *Miranda* warning, the suspect gave a thirty-two minute interview in which he admitted to playing a role in the child's death).

177. See *Shindle v. State*, 731 P.2d 582 (Alaska App. 1987).

178. See *e.g. Stephan v. State*, 711 P.2d 1156, 1160 (Alaska 1985) (stating "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.").

179. See *Rhode Island v. Innis*, 446 U.S. 291, 298-99 (1980) ("That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to 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 latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.").

cally encompasses only those interviews conducted in police stations or jails.<sup>180</sup>

In *Stephan v. State*<sup>181</sup> the Alaska Supreme Court recognized the perverse incentives it was creating by restricting the scope of its constitutionally mandated 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 that 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 the opinion.<sup>182</sup>

*Shindle v. Alaska*,<sup>183</sup> presented the Alaska Court of Appeals with a clear instance of the type of "bad faith" foreseen by the *Stephan* court. Police videotaped the arrest of Shindle on suspicion of drug possession at a motel and then turned the camera off.<sup>184</sup> Fifty minutes later Shindle waived his Fourth Amendment rights and allowed officers to conduct warrantless searches of his house and truck.<sup>185</sup> Ironically, despite the availability of a videocamera, the court denied Shindle's motion to suppress self-incriminating statements. The court reasoned that the motel did not constitute "a place of detention" and Alaska's video recording mandate was therefore inapplicable.<sup>186</sup> Even more incredibly, the court ruled that the fifty-minute conversation held in a motel room, while police officers detained Shindle and allegedly threatened to seize his truck and arrest his girlfriend, was not even a custodial interrogation.<sup>187</sup>

Although Minnesota's recording rule is stronger because it necessitates videotaping of all custodial interrogations, the rule's feasibility and "substantial violation"<sup>188</sup> exceptions similarly allow officers to easily avoid taping. For instance, in *Minnesota v. Schroeder*,<sup>189</sup> an appellate court found that a criminal defendant could not suppress unrecorded custodial statements made in the back of a police car.<sup>190</sup> Both officers in

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180. See e.g. Tenn. H. 1138, 103rd Gen. Assembly., Reg. Sess. (2003) ("Place of detention' means a facility under the control of law enforcement.").

181. *Stephan v. State*, 711 P.2d 1156 (Alaska 1985).

182. *Id.* at 1165, n. 33.

183. *Shindle v. State*, 731 P.2d 582 (Alaska App. 1987).

184. *Id.* at 583.

185. *Id.*

186. *Id.* at 584.

187. *Id.* at 584-85.

188. *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994).

189. *State v. Schroeder*, 560 N.W.2d 739 (Minn. App. 1997).

190. *Id.* at 739-40.



the car had tape-recorders, but they claimed that neither device was functional.<sup>191</sup> The court found that the failure of officers to record the interrogation was not a "substantial violation" of the recording rule because the suspect was apprised of his *Miranda* rights and spoke voluntarily.<sup>192</sup> It was not feasible, the court held, to expect officers to have working audio-recorders in the back of patrol cars.<sup>193</sup>

As cameras become more widely available, videotaping is now possible on the street, in the back of patrol cars, and in suspects' homes.<sup>194</sup> While Alaska and Minnesota have gone further than most states in protecting the rights of suspects, their reluctance to effectively extend the recording rule outside the stationhouse undermines their video-recording rules. In the interrogation room the suspect is isolated, alone, and under the complete authority of police officers.<sup>195</sup> But is not the same also true in a locked motel room or in the back of a patrol car en route to jail? Courts do not draw an artificial distinction between the station house and the patrol car in requiring delivery of the *Miranda* warning.<sup>196</sup> Regardless of where a suspect has been taken into custody, he must waive his *Miranda* rights or the ensuing interrogation is inadmissible. If cheap and easy-to-operate electronic recording devices have made videotaping feasible outside of the station house, it makes little sense for courts and legislatures to afford suspects one constitutional protection in the back of a patrol car while neglecting other, recognized constitutional rights.

Patrol car and officer-mounted cameras are the natural extension of any recording policy. In some instances it is necessary or preferable for officers to conduct interviews or interrogations outside the station house. Particularly when the officer needs vital information to thwart a crime in progress, time may not allow the officer to take the suspect to the station house for a lengthy interrogation. An officer may also justifiably believe that a suspect may be more willing to talk in his own home, hospital room, or on the street corner. Allowing officers access to mobile technologies lets the officer use her discretion and judgment in choosing when

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191. *Id.* at 740.

192. *Id.*

193. *Id.* at 740-41. Of course, even if the Minnesota and Alaskan courts did require the videotaping of all custodial interrogations, officers could still potentially skirt videotaping rules by interviewing suspects before they are taken into custody. *State v. Conger*, 652 N.W.2d 704, 706 (Minn. 2002) ("Fox intentionally did not record Conger's interview, though equipment was available. He said he chose not to record the interview because Conger was not in custody, and because 'sometimes 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.'").

194. *See infra* Part VI.

195. *See* Gudjonson, *supra* n. 29, at 26.

196. *See e.g. Commonwealth v. Jones*, 677 N.E.2d 683 (Mass. App. 1997); *State v. Juarez*, 903 P.2d 241 (N.M. App. 1995); *Santos v. Bayley*, 400 F. Supp. 784 (D.C. Pa. 1975).

and where to conduct an interview. Video cameras or even tape-records preserve a valuable record of suspect's statements in context and reduces admissibility disputes.<sup>197</sup>

## VI. THE FEASIBILITY OF A BROADER RECORDING REQUIREMENT

### A. VIDEO CAMERAS IN POLICE CARS

Video cameras in every police car in America may soon be a reality. The International Association of Chiefs of Police estimates that the number of police cars equipped with video cameras has surged from one in ten to nearly half.<sup>198</sup> As of 2000, every state police agency made some use of video cameras in patrol cars.<sup>199</sup> If cameras are already present in police cars, it is only logical that they should be used to videotape suspect interrogations and confessions. Recent camera technologies now make it possible for most cameras to be adjusted to record events both inside and outside of the police car. Some systems even include back-seat microphones to more accurately capture suspects' statements.<sup>200</sup> Most in car recording systems allow for continuous taping for an entire twelve-hour shift and many include remote operation features and officer-mounted microphones.<sup>201</sup>

Local concerns about abusive police behaviors including the excessive use of force, dangerous police pursuits, and abuse of detained suspects have driven many police agencies to install these cameras.<sup>202</sup> Sixty-two percent of local police departments with more than 100 officers now equip their cars with cameras.<sup>203</sup> After state troopers shot three suspects on the New Jersey turnpike in 1998, Governor Christie Whit-

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197. Paul Cassell, *Miranda's Social Costs: An Empirical Reassessment*, in *The Miranda Debate* 231 (Richard A. Leo & George C. Thomas III ed., 1998) [hereinafter "Cassell, *Empirical*"].

198. See Candice Combs, *Cameras Go on Patrol with Chattanooga Police*, *Chattanooga Times B1* (Aug. 27, 2003).

199. See Schwabe, Davis & Jackson, *supra* n. 8, at 107.

200. Brooke A. Masters, *For Drunk Drivers in Alexandria, Playback Time: Police Test Cameras To Bolster Evidence*, *Wash. Post T03* (Mar. 22, 2001).

201. *Id.*

202. See Barnhardt, *supra* n. 24; Patrick McMahon, *Increased Clamor for Cameras in Cop Cars*, *USA Today* (July 18, 2002) (available at <http://www.usatoday.com/news/nation/2002/07/19/copcams.htm>); Glenn Puit, *Cost Makes Video Cameras Long Shot for Police*, *Las Vegas Rev. J.* (Feb. 9, 1999) (available at [http://www.reviewjournal.com/lvrj\\_home/1999/Feb-09-Tue-1999/news/10542203.html](http://www.reviewjournal.com/lvrj_home/1999/Feb-09-Tue-1999/news/10542203.html)) ("In the Las Vegas Valley, community concern about police misconduct has sparked a movement to create a citizens review board that will police the police.").

203. *But see*, U.S. Dept. of J., Bureau of Justice Statistics, *Law Enforcement and Management Statistics: Local Law Enforcement 2000*, 27 NCJ 196002 (Jan. 2003) [hereinafter "*Law Enforcement Statistics*"].

man mandated cameras in all state police cars.<sup>204</sup> In Maryland, a recent judicial consent decree stemming from a racial-profiling suit requires the state to install as many video cameras in patrol cars as the state budget will allow.<sup>205</sup> In South Dakota, the highway patrol does not have a camera in every car, but all highway patrol officers are equipped with tape recorders and must tape every suspect interview conducted in patrol cruisers.<sup>206</sup> The city of Seattle has equipped a number of its police cars with cameras<sup>207</sup> and hundreds of other municipal departments are either installing cameras or seeking funding for recording equipment.<sup>208</sup> Although the extent of recording varies by department and the largest police departments have had difficulty installing cameras in their cars,<sup>209</sup> the number of video-capable cars should continue to increase.

### B. A UNIVERSAL RECORDING REQUIREMENT

Police use of portable cameras is difficult to calculate, but sixty seven percent of police agencies serving jurisdictions of more than a million people currently possess mobile surveillance video technology.<sup>210</sup> Mobile electronic recording equipment is often far cheaper and more readily available than expensive interrogation room cameras or sophisticated police cruiser taping systems.<sup>211</sup> Although hand-held cameras can be unwieldy and heavy,<sup>212</sup> technological solutions are available. Hands-free, wireless, voice-activated and miniaturized technologies<sup>213</sup> may allow officers the flexibility and freedom of movement to record interactions with suspects even in dangerous situations. Courts and

204. McMahan, *supra* n. 202.

205. Barnhardt, *supra* n. 24.

206. *U.S. v Azure*, 1999 U.S. Dist. LEXIS 22319 (S.D. 1999) (containing an order suppressing suspect statement, reports, transcripts, and exhibits).

207. McMahan, *supra* n. 202.

208. See *Law Enforcement Statistics*, *supra* n. 204.

209. See *id.* (noting that only 13 percent of municipal departments serving populations of more than 250,000 have installed video-cameras in patrol cars); See also Schwabe, Davis & Jackson, *supra* n. 8, at 107.

210. *Id.*

211. Portable video cameras can cost as little as \$150. Interrogation room and patrol car camera systems cost a minimum of several thousand dollars. See *infra* nn. 227, 229.

212. If officers are required to devote their attention to equipment, they may be vulnerable to attack from the suspect or a third party. If a police officer's hands are on the camera she may not be able to quickly obtain access to her gun or mace.

213. See Combs, *supra* n. 199, at B1 (noting that camera microphones attach to officer uniforms and cameras in car can be remotely operated); Paul Eng, *Third Eye Not-So Blind*, <http://printerfriendly.abc.news.com/printerfriendly/Print?fetchFromGLUE=true> (Sept. 30, 2003) (Reporting the development of \$300-\$500 miniature cameras that can be attached to clothing that will be marketed to police departments); See also Mark Bassett, *Deja View Debuts Wearable Camcorder*, [http://www.camcorderinfo.com/content/deja-view-debuts-wearable-camcorder-11\\_09\\_03.htm](http://www.camcorderinfo.com/content/deja-view-debuts-wearable-camcorder-11_09_03.htm) (accessed May 5, 2004).

legislatures may also consider "exigent" or "emergency circumstances" clauses that provide limited exceptions to mandatory recording rules.<sup>214</sup> To make recording more convenient many recording policies also provide that when an interview is conducted outside the station house, audiotaping alone is sufficient.<sup>215</sup> If recording policies allow the use of tape recorders, cost, safety, and technology concerns may become virtual non-issues. Of course, as the quality and availability of video camera technology continues to improve, police departments should keep pace with developments.

## VII. OBJECTIONS TO POLICE RECORDING REQUIREMENTS

### A. FUNDING CONCERNS

The most frequently cited objection to video taping interrogations is the cost.<sup>216</sup> Indeed, the costs of installing video equipment, training staff to use the equipment, and storing and transcribing videotapes can be prohibitive.<sup>217</sup> Moreover, the additional administrative and transaction costs of admitting videotape evidence into courtrooms may also deter potential proponents. Nonetheless, as technology continues to improve and becomes cheaper and easier to use, video cameras become a more viable proposition. Basic stationhouse and handheld video cameras can now be purchased for as little as one hundred fifty dollars, and sophisticated recording equipment can be obtained for a few thousand dollars.<sup>218</sup> Detectives in Kankakee, Illinois, equipped an interrogation room with video equipment for only \$5,000.<sup>219</sup> Patrol car camera systems can cost anywhere from \$1,500 to \$10,000 per car, but the market for patrol car video systems is competitive.<sup>220</sup> A typical system, mar-

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214. See *supra* n. 153.

215. DuPage County Sheriff, Detective Division, *Criminal Investigations: Recording Interviews*, in *Recording of Custodial Interrogations: A Resource Guide* (Innocence Project, New York, N.Y. June 6, 2003).

216. McGuire, *supra* n. 22, at 1C. (stating Chicago Mayor Daly squelched a proposed ordinance requiring videotaping of all interrogations, calling it too costly).

217. *Id.* (stating Broward County prosecutors estimate that equipping three rooms with video cameras will cost \$17,500, and training officers to use the equipment will be an additional \$7,000. The chief cost, however, will be transcribing anywhere from 58,000 to 230,000 pages of testimony per year at an average of \$4.90 to \$14 per page).

218. See *No More Excuses*, C6; see also Brian Moore, *Shepherdsville Upgrades Evidence Tracking; Police also Improve Setup for Interviews*, *Courier J.* 1H (Nov. 19, 2003). (stating that the Shepherdsville police department bought a video surveillance system that allows supervisors in three different offices to simultaneously view an ongoing interrogation).

219. Ill. H., Task Force on Videotaping Interrogations and Confessions, *Statement of Chief of Police for Kankakee City Police Dept., Bill Doster* (July 23, 1999).

220. See McMahan, *supra* n. 202 at 3A; but see Barnhardt, *supra* n. 24. (reporting that the estimated cost of equipping Maryland patrol cars is \$55,000-\$65,000. It seems likely that she has erred).

keted by Kustom Signals, costs about \$4,500 and comes with a high-resolution digital camera and voice-command features.<sup>221</sup> In comparison, DuPage County, Illinois paid out \$3.5 million in its settlement in the false confession of Rolando Cruz and Alejandro Hernandez and Cook County paid \$38.5 million after it released the Ford Heights Four.<sup>222</sup> Facing the costs of multi-million dollar false conviction and civil rights suits; videotaping might be the cheaper alternative for many embattled police departments.

Some seventy percent of police agencies already have video recording equipment.<sup>223</sup> Although some of this equipment is obsolete and may be ill suited to record interrogations,<sup>224</sup> police agencies can obtain funding from national, state, and local sources. For instance, in 2002, the National Institute of Justice had a budget of over \$178 million to develop police technology and provide grants to local law enforcement agencies.<sup>225</sup> Congress has earmarked an additional \$100 million for technology development through the COPS Technology program since 1999.<sup>226</sup> Government grants for cameras in patrol cars are widely available. Since 2000, the Community Oriented Policing Services' In-Car Camera Grant Program has provided \$21 million in funding to install cameras in over 5,000 patrol cars in 49 states and the District of Columbia.<sup>227</sup> In 2003, the program provided \$3.2 million to 21 states for an additional 747 cameras.<sup>228</sup> COPS also provided training to grantees through its Law Enforcement Mobile Video Institute ("LEMVI") on issues including racial profiling, police brutality, civil rights, and police accountability.<sup>229</sup>

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221. See *Police In-Car Company Directory*, [www.policeone.com/police-products/vehicle-equipment/in-car-video/manufacturers](http://www.policeone.com/police-products/vehicle-equipment/in-car-video/manufacturers) (Jan. 18, 2004) (listing seventeen different police car, camera manufacturers including: CruiseCam, Decateur Electronics, Kustom Signals, MPH, Inc., Martel Electronics, Stalker Radar, ESA, International Police Technologies, L&E Mobile Computers & Mounts, Inc., and MPD, Inc.).

222. See *No More Excuses*, *supra* n. 218, at C6.

223. Schwabe, Davis & Jackson, *supra* n. 8, at xvii.

224. *Id.*

225. U.S. Census Bureau, *Consolidated Fed. Funds Report: Fiscal Year 2002*, Office of Justice Programs, *National Institute of Justice Research, Evaluation & Development Project Grants* (2003).

226. Schwabe, Davis & Jackson, *supra* n. 8 at 121. (stating that although most federal money is earmarked for particular programs, up to 30 percent remains for grant programs and discretionary use).

227. U.S. Dept. of J., Community Oriented Policing Service, *COPS In-Car Grant Program, COPS Fact Sheet* (2003) (available at <http://www.cops.usdoj.gov/mime/open.pdf?Item=746>) [hereinafter *COPS, 2003*].

228. U.S. Dept. of J., Community Oriented Policing Service, *COPS In-Car Camera Grant Announcement* (2002) (available at <http://www.cops.usdoj.gov/mime/open.pdf?Item=743>).

229. See *COPS, 2003*, *supra* n. 227.

In 2000-2001, 79 percent of police departments serving populations of more than 225,000 received federal funding for technology acquisition (97 percent of those that requested it).<sup>230</sup> Although rural and small urban police departments had far less success in obtaining federal grants, 59 percent of rural police departments that requested funding received it.<sup>231</sup> Many of these technology grants were extremely generous. In 2003, the Office of Community Oriented Policing provided technology grants of \$1,996,000 to the Orange County, California, Sheriff's Department, \$2,980,500 to the Milwaukee Police Department, and \$1,975,317 to the Texas Law Enforcement Mobile Video Institute.<sup>232</sup>

In addition to federal grants, state and local funding are also critical resources for local police departments.<sup>233</sup> Recording equipment may be bought in bulk at relatively low cost through cooperative purchasing agreements.<sup>234</sup> By banding together several local departments in a county or small state, with similar budgets and needs, can split the costs of researching, testing, and buying recording equipment.<sup>235</sup>

Even in large cities, videotaping is now a viable option for most police departments. William Geller reported that the average length of an interrogation is only 2-4 hours,<sup>236</sup> and Richard Leo reported that over 70 percent of the interviews he observed lasted less than one hour.<sup>237</sup> Although transcription and storage costs potentially comprise the largest portion of videotaping costs, these costs can be allayed through careful cataloging of tapes, use of digital technologies,<sup>238</sup> and carefully scheduled destructions of recordings.<sup>239</sup> Departments may also cut costs by limiting recording requirements to cases involving violent felonies.<sup>240</sup>

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230. Schwabe, Davis & Jackson, *supra* n. 8 at 135.

231. *Id.*

232. See COPS, 2003, *supra* n. 227.

233. See *e.g.* Moore *supra* n. 218 at 1H. (stating that the Shepherdsville, Kentucky police department funded a station house recording system largely through a \$6,000 donation from a local charity).

234. Schwabe, Davis & Jackson, *supra* n. 8, at xxiv.

235. *Id.*

236. Geller, *supra* n. 2, at 4.

237. Leo, *Inside*, *supra* n. 67, at 279.

238. See *No More Excuses*, *supra* n. 218 at C6. (noting that thanks to digital technology, the Kanakee County Sheriff's Department stored 157 videotapes on one small bookshelf in the station house).

239. All tapes in homicide cases should be preserved indefinitely. Tapes in all other cases may be destroyed after exhaustion of appeals or after the statute of limitations has expired.

240. See Drizin & Colgan, *supra* n. 31 at 406 (Limiting videotaping to cases involving violent felonies would be a purely cost saving device. To prevent officers from erring on the side of under inclusion and failing to record interrogations of suspects accused of violent felonies, a recording rule might place a bar on the entry into evidence of all confessions elicited from such suspects unless it was not reasonably apparent at the time of arrest that

Many police departments already use selective video recording to cut costs. Geller found that video-equipped police agencies recorded interrogations of 81 percent of homicide suspects, 77 percent of accused rapists, and 71 percent of aggravated battery and assault suspects, but only 44 percent of burglary suspects and 34 percent of suspects accused of other property crimes.<sup>241</sup>

### B. THE "CHILLING EFFECT"

Another frequently cited objection to electronic recording is the potential "chilling-effect" it will have on suspects.<sup>242</sup> Some 28.3 percent of police agencies in Geller's National Institute of Justice study believed that suspects were somewhat less willing to talk on tape.<sup>243</sup> The fear that a suspect will refuse to speak in the presence of a recording device may be linked to standard police interrogation texts indicating that recording is undesirable. For example, Inbau, Reid & Buckley stress the need for complete isolation of the suspect and argue that any distraction will shift the balance of power between suspect and interrogator and reduce the likelihood of a successful interrogation.<sup>244</sup> They strongly oppose videotaping because they believe it will reduce the number of confessions officers obtain.<sup>245</sup>

For the most part, however, empirical evidence indicates that recordings have no impact on the likelihood of confession. Both Geller's study and a second study in Canada reveal that suspects are no less likely to confess in the presence of an electronic recording device.<sup>246</sup> Additionally, a third study found that electronic recording did not interfere with police officer's use of standard interrogation techniques.<sup>247</sup> Al-

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they had committed a violent felony. By applying this reasonableness standard, the court could insure that officers erred on the side of over-caution in recording suspect interviews where they were not sure if the suspect had committed a violent felony).

241. Geller, *supra* n. 2, at 3.

242. See OLR Research Report, *supra* n. 199 ("Several [Connecticut] police chiefs revealed strong views against videotaping interrogations. Some said that suspects would be reluctant to talk with a video camera rolling since they knew everything they said would be recorded and heard in court."); Arthur Santana, *D.C. Council to Consider Police Interrogation Bill*, Wash. Post B02 (Nov. 30, 2002). (D.C. Police Chief Ramsey expressed his disagreement with a city council interrogation bill claiming, "Some interviews might be done at a person's home. It does have a chilling effect on witnesses who want to provide information who might otherwise have provided information if it weren't on tape."); Smith, *supra* n. 173.

243. Cassell, *Lost Confessions*, *supra* n. 34, at 555.

244. See Inbau, Reid & Buckley, *supra* n. 68, at 177.

245. *Id.*

246. See Geller, *supra* n. 2, at 6; Cassell, *Empirical*, *supra* n. 197, at 181 (noting Alan Grant study in which it was found that videotaping did not reduce the confession rate and only 4.8 percent of Canadian suspects refused to have their interrogations videotaped).

247. Gudjonsson, *supra* n. 29, at 39 (referring to Willis, Macleod & Nash study).

though police officers and prosecutors may fear that jurors will condemn many of the psychological ploys caught on tape, this has not proven to be the case.<sup>248</sup>

### C. PRIVACY CONCERNS

In addition to cost concerns, many officers dislike video cameras because they believe cameras pose a threat to their independence and exercise of discretion. Peter Manning notes that many officers view the camera as an intrusive, “big brother.”<sup>249</sup> Officers may fear that videotaping interrogations will raise the expectations and demands made by supervisors. If a recording indicates that an officer chose to let a guilty suspect free, the officer could face formal or informal sanctions. If supervisors use videotape in this way it could increase the pressure officers feel to make arrests they believe are unnecessary or unproductive. Constant monitoring of an officer’s interactions with suspects could increase stress levels and may even reduce officer performance.<sup>250</sup> Officers may also feel violated if cameras record continuously and capture every personal break or conversation.

If such feelings are strong enough, officers may misuse or even sabotage video-recording equipment.<sup>251</sup> Manning remarks that of all the technologies found within patrol cars, officers are most likely to tamper with video recording equipment: “These cameras . . . can be shaped to officers’ routines.”<sup>252</sup> Cameras are frequently switched off, not to hide abusive or immoral conduct, but merely to allow officers the opportunity to relax and avoid censure for an offhand comment or extra long break.<sup>253</sup> Sensibly crafted video-recording rules may ease officer’s qualms about videotaping. Interrogation room and patrol car systems that can be turned on and off may be preferable to continuous recording systems. As long as officers are reprimanded for failures to record “custodial interrogations,” police departments may allow officers some dis-

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248. Geller, *supra* n. 2, at 6. Short of physical abuse or prolonged psychological coercion, jurors are likely to accept most police interrogation techniques as standard operating procedure. See *No More Excuses*, *supra* n. 218, at C6.

249. See Peter Manning, *Policing Contingencies* 120-21 (2003); Reid R. Frazier, *Cameras Set to be Installed in Five Shaler Police Cruisers*, Trib. Rev. (Dec. 8, 2003) (available at [www.pittsburghlive.com/x/tribune-review/tribnorth/news/s\\_168905.html](http://www.pittsburghlive.com/x/tribune-review/tribnorth/news/s_168905.html)). (“Mannell said he was uncomfortable with some types of video cameras that are on from the time the key is turned in a car’s ignition. ‘If you have them . . . running all the time, you’re turning (into) Big Brother.’”).

250. John E. Eck, *Alternative Futures for Policing*, Police Innovation and Control of the Police 71 (David Weisburd & Craig Uchida eds. 1993).

251. Manning, *supra* n. 249, at 155.

252. *Id.* (describing a ride-along with the LAPD, Manning noted that the very first thing the officer did was to disable the 12-hour video camera).

253. *Id.* at 163.



cretion in the use of recording equipment. If officers accept video cameras as a policing tool, rather than as an imposition, videotaping policies will ultimately be more effective.

#### D. TECHNOLOGY CONCERNS

Critics may cite technical problems as an important reason to shy away from any mandatory taping requirement.<sup>254</sup> During videotaping vital testimony may be lost because interviewee and interrogator interrupt one-another. Microphones may not pick-up the voices of suspects speaking in low tones, rapidly, or slurring their speech, and background noises may drown-out critical testimony.<sup>255</sup> Additionally, raw videotape may include testimony that is inadmissible on evidentiary grounds, forcing the court to become a video-editor and leaving the jury with a perplexing and incomplete version of the interrogation.<sup>256</sup> Lastly, video-recording equipment may malfunction and may not be operable at the time of the interrogation or video-recordings may be unintentionally erased.<sup>257</sup>

While these concerns are legitimate, many are easily resolved through adequate technology training and operation guidelines. Although only about one of three police departments currently receive federal technological support, several federal agencies, including Law Enforcement Online ("LEO") and the National Law Enforcement and Corrections Technology Centers, are readily available sources for technology advice and training.<sup>258</sup> If police officers and detectives are properly trained to use recording equipment they are much more likely to record complete and accurate interrogations. Proper placement of the suspect and interrogator and calibration of the equipment can resolve many audibility problems. In stationhouse interrogations; it may be possible for supervisors to monitor interviews, in separate rooms, as the interrogation proceeds.<sup>259</sup> Thus, even if an interrogating officer is not aware that the recording is inaudible, a supervisor watching the taping can intervene and make the necessary audio and video adjustments.<sup>260</sup>

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254. Inbau, Reid & Buckley, *supra* n. 68, at 177-78.

255. *Id.*

256. See e.g. *Lanham v. Commonwealth*, No. 2003-SC-0268, 2005 WL 2043703 (Ky. 2005) (addressing whether part of electronically recorded interrogation must be redacted as prejudicial to defendant).

257. *Id.*

258. See Schwabe, Davis & Jackson, *supra* n. 8, at xxiii-xxiv.

259. See *Portland*, *supra* n. 165.

260. See e.g. *DuPage County Sheriff*, *supra* n. 215 (noting that the DuPage County Sheriff assigns a second detective to monitor all videotaping to ensure that the tape does not run out).

If a police officer discovers that her recording equipment is inoperable and cannot be immediately fixed, a suspect may be transferred to another patrol car or taken to another local police station that has working equipment. Implementing strict tape storage policies and limiting officer access to video evidence libraries can avoid situations in which tapes are altered or recordings are lost. Like other sensitive pieces of police evidence, access to police tapes must be limited to a few supervisors and the detectives working on the case. Tapes that are not needed for further investigatory purposes may be erased to save space and protect the privacy of suspects.<sup>261</sup>

#### E. DEFENSE OBJECTIONS

Despite their potential value in exonerating innocent suspects, many defense attorneys also oppose recording police interviews.<sup>262</sup> A primary concern for defense attorneys is that videotaping may be employed selectively and sporadically. Thus, police may use recording when they believe that a confession will be readily forthcoming, but choose not to use taping in interviews that require longer interrogations or involve potentially "sympathetic" suspects. If a recording is created that highlights the unreliability or suggestiveness of a suspect, officers may also choose to destroy the tape. In order to prove reversible error, the Supreme Court requires defendants to meet the nearly impossible standard of proving that a videotaped interrogation contained substantial exculpatory evidence of innocence and that officers were aware of this value and erased the tape in "bad faith."<sup>263</sup> Of course, if the federal government intends to use the recording at trial it must provide defense counsel with a copy under federal criminal rules of evidence.<sup>264</sup> Many state recording proposals also require prosecutors to provide defendants with videotapes before trial.<sup>265</sup> But even if videotapes are provided to defense counsel, any recording of a confession, even a false confession, is a terrible burden for the accused to overcome.

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261. See McMahon, *supra* n. 202, at C6.

262. See Geller, *supra* n. 2, at 7.

263. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

264. Fed. R. Crim. P. 16(a)(1)(A) ("Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.")

265. See *e.g.* Wash. H. 1932, 58th Leg., Reg. Sess. (2003) ("[A] statement made by a defendant during a custodial interrogation is inadmissible as evidence against the defendant in a criminal proceeding unless . . . (f) The defendant was provided with a complete and accurate copy of the recording not later than twenty days before the date of the criminal proceeding.").

In one of the most infamous wrongful conviction cases of the past twenty years, the videotaped confessions of Antron McCray, Kevin Richardson, Raymond Santana, and Kharey Wise convinced prosecutors, jurors, and New Yorkers that they brutally raped and nearly murdered the "Central Park Jogger."<sup>266</sup> Although the videotape captured some factual errors, inconsistencies in the suspects' stories and the suggestive questioning methods of detectives, the admissions of the four<sup>267</sup> teenagers were damning. Absent recordings of the prior fourteen to thirty hours of interrogation, the jury could not properly assess the reliability of the confessions.<sup>268</sup> It took a confession from the true perpetrator and DNA evidence to eventually exonerate the Central Park Jogger defendants in 2002.<sup>269</sup>

Psychologist G. Daniel Lassiter of Ohio University claims that videotaped interrogations and confessions may also actually keep jurors from detecting coercion.<sup>270</sup> Camera angles can be manipulated to focus solely on the suspect, misrepresenting the setting in which the interrogation is taking place.<sup>271</sup> What the jury does not see, the demeanor and expression of interrogators, may be critical in determining the reliability of a confession.<sup>272</sup>

The solution to claims of selective or incomplete use of videotaping is to require videotaping of interrogations and confessions in their entirety. By excluding tapes that are incomplete or that manipulate camera angles as prejudicial, judges can shape the policies and practices of local police stations. Although police may complain that few jurors may want to sit through twelve or fourteen hours of an interrogation, defense counsel should have the opportunity to glean interrogation tapes for evidence of psychological or physical coercion. Defense counsel can decide what portions of the interrogation should be shown to the jury to give jurors a better idea why a defendant may have confessed falsely.

In Chicago, separate juries recently acquitted two men accused of murder and indicated that the absence of the complete interrogation on tape undermined the credibility of recorded confessions.<sup>273</sup> One of the

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266. See Saul Kassin, *False Confessions and the Jogger Case*, N.Y. Times, A31 (Nov. 1, 2002).

267. A fifth suspect, Yusef Salaam, did not confess on tape. *Id.*

268. *Id.*

269. See Kassin & Gudjonsson, *supra* n. 54, at 34.

270. G. Daniel Lassiter et. al., *Criminal Confessions on Videotape: Does Camera Perspective Bias their Perceived Veracity?*, 7 Current Res. in Soc. Psychol. (2001) (available at [www.uiowa.edu/~grpproc/crisp/crisp.7.1.htm](http://www.uiowa.edu/~grpproc/crisp/crisp.7.1.htm)); see also Tom Siegfried, *Camera Can Sway Jury's View of Video Confession*, Dallas Morning News, 3C (Feb. 17, 2003).

271. Lassiter, *supra* n. 270, at 2-3; see also Gudjonsson, *supra* n. 29, at 40.

272. *Id.*

273. Angela Rozas & Joshua Howes, *Two Juries Dubious over Confession Tapes' Merits; They Wanted Interrogations Included*, Chi. Trib. 1 (Aug. 17, 2003).

murder suspects, Leroy Washington, confessed after thirty four hours in custody. The other suspect, eighteen-year-old Terry Wilson, confessed after eighteen hours of detention. A juror in the Wilson case noted, "I, more or less throughout, totally ignored what the kid was saying on the confession . . . I didn't know enough about what preceded it to know if it was true or not."<sup>274</sup>

#### F. EXCEPTIONS AND REMEDIES

Both prosecutors and criminal defendants may be wary of a videotaping requirement that gives either too broad or too narrow of a remedy for the failure to record an interrogation. Most state legislatures and courts that have considered the issue have determined that failure to record an interrogation should render the contents of that interrogation inadmissible except for purposes of impeachment.<sup>275</sup> However, most videotaping rules also leave open exceptions based on mistake, excuse, or feasibility. For instance, in *Stephan*, the court held that unrecorded custodial interrogations were subject to exclusion "only if the failure [to record] is unexcused."<sup>276</sup> The Alaskan Court placed the burden on the state to prove by a preponderance of the evidence that recording the interrogation was not feasible.<sup>277</sup> By contrast, the Minnesota Supreme Court found that unrecorded interrogations should only be excluded if the violation of the recording rule could be deemed "substantial." The Court defined substantial to include situations in which the "violation was gross, willful and prejudicial to the accused."<sup>278</sup>

To make a recording rule more palatable for police, prosecutors, and the public it is probably necessary to leave open a "good faith" exception for equipment failure. Categorical exclusion of all unrecorded police interrogations would create strong incentives among police officers to ensure that taping equipment was in good working order and functioning properly during interviews. However, vigilance is unlikely to prevent the occasional, unanticipated technical glitch. In these rare cases, the Louisiana Senate Bill may offer a useful model.<sup>279</sup> The Bill provides that to admit unrecorded statements, the prosecution must prove by "clear and convincing" evidence, that equipment failed *and* "obtaining

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274. *Id.*

275. See e.g. H. 1138, 103d Gen. Assemb., Reg. Sess. (2003); *Stephan v. State*, 711 P.2d 1156 (Alaska 1985); *State v. Scales*, 518 N.W.2d 587 (Minn. 1994).

276. *Stephan*, 711 P.2d at 1162 ("Acceptable excuses," noted by Alaska's Court, include equipment or power malfunction or the refusal of a suspect to answer questions).

277. *Id.*

278. *Scales*, 518 N.W.2d at 593.

279. La. S. 734, 2004 Leg., Reg. Sess. (available at [http://www.legis.state.la.us/leg\\_docs/04RS/CVT9/OUT/0000L6DI.PDF](http://www.legis.state.la.us/leg_docs/04RS/CVT9/OUT/0000L6DI.PDF)).

replacement equipment was not feasible."<sup>280</sup> This narrow exception ensures that in actual instances of equipment failure, officers will seek out alternative equipment.

#### G. THE LIMITS OF VIDEOTAPE

Even if a videotape does capture every moment and nuance of an interrogation, the existence of an electronic recording does not ensure that jurors will cease finding some false confessors guilty and guilty suspects innocent. Apart from the flaws and subjectivity inherent within the recording process itself, each juror views tapes through their own subjective lens. The trial of Los Angeles police officers in the beating of Rodney King provides an excellent example of how different subjective understandings can shape a juror's perception of videotape.<sup>281</sup> During the criminal trial of the LAPD officers, defense attorneys broke the film down, frame by frame, and argued that all fifty-six blows delivered by officers were justifiable uses of force.<sup>282</sup> After viewing the tape more than thirty times, an all white, Simi Valley jury accepted defense counsel's interpretation of the video and acquitted the officers. Not only did the jury endorse the defense's interpretation of the seemingly damning videotape, but they also believed officer's accounts of what had taken place before the videotaping.<sup>283</sup>

As the King trial indicates, context is critical in providing the framework for which jurors will understand videotape evidence. Good lawyering and good expert witness testimony by defense counsel or prosecutors can plant doubt in jurors' minds about what took place before the video camera started to roll and convince them that what seems obvious at first glance is not reality. A partial solution to this problem is for police officers or detectives to preface any interrogation with an explanation of the context in which the recording is taking place. Indeed, many videotaping policies require officers to begin tapes with a short introductory statement revealing the time and location of the interview as well as a statement regarding the *Miranda* status of the suspect.<sup>284</sup> From defense counsel's perspective, however, short of videotaping a suspect from the moment of arrest to the moment of trial, no recording requirement can ever fully protect the criminal suspect.

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280. *Id.*

281. Regina Coleman, *Why Seeing Isn't Always Believing*, 21 W. St. U. L. Rev. 321, 327-34 (1993) (arguing that white, Simi Valley jurors were predisposed to accepting the defense's interpretation of the tape, because they had much more favorable views of law enforcement than African-Americans in Los Angeles).

282. *Id.*

283. *Id.* at 331-32.

284. See e.g. *Portland*, *supra* n. 165.

## VIII. THE BENEFITS OF VIDEO-RECORDING FOR CRIMINAL SUSPECTS

### A. CREATING AN OBJECTIVE RECORD

In his 1993 study, William Geller found that videotaping interrogations and confessions creates more incriminating and more exculpatory evidence for trial.<sup>285</sup> Videotaping provides a more accurate record of the circumstances in which interrogations take place and allows both judges and jurors to better assess the suspect and the interrogator. For guilty suspects, a taped interrogation and confession may encourage them to enter a plea bargain.<sup>286</sup> For innocent suspects, video recordings may explain what precipitated a false confession. In cases in which the suspect is young, mentally ill, intoxicated, or retarded a videotaped record allows judges and jurors the opportunity to see for themselves how the interrogator may have influenced the suspect

In a number of cases, videotaped interviews have already proven their value as tools of justice. For example, the taping of Richard Bingham's interrogation and confession in the rape and murder of a 17-year-old in Alaska may have prevented his conviction.<sup>287</sup> Bingham contended that he suffered from blackouts and had no memory of the crime; juror's accepted his story after seeing his drunken confession.<sup>288</sup> Without a videotaped record, jurors may not have any convincing evidence that a suspect is suggestible or was easily coerced into confessing.<sup>289</sup>

Even in cases in which suspects are not predisposed to confess, videotapes allow fact-finders to assess the credibility of confessions. Tapes capture the tone of the suspect's voice and her demeanor. While the transcript of a suspect's confession might convey the appearance of guilt, a videotape of the same confession may reveal that the suspect was slumping into a chair or barely coherent from sleep deprivation. Even the emphasis a suspect places on different syllables in a phrase may convey a materially significant difference.<sup>290</sup>

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285. See Geller, *supra* n. 2, at 6.

286. *Id.* at 7.

287. Jan Hoffman, *As Miranda Rights Erode, Police Get Confessions from Innocent People*, N.Y. Times A1 (Mar. 30, 1998).

288. *Id.*

289. For example, in Connecticut, Richard Lapointe, a mentally handicapped man suffering from Dandy-Walker Syndrome, confessed to the rape and murder of his wife's grandmother after nine and a half hours of interrogation. Lapointe's confession was riddled with inconsistencies and he was probably physically incapable of committing the crime. Absent a recording of his interrogation, Lapointe's defense attorney had no way of definitively proving the unreliability of the confession and Lapointe was sentenced to life in prison. Leo & Ofshe, *Consequences*, *supra* n. 38, at 459-60.

290. See DeMarzo & de Vise, *supra* n. 25 ("One 'confession' reviewed by the Herald, that of Frank Lee Smith, turned out to be nothing more than an oblique admission of guilt - at

Finally, an objective record also eliminates the need for a “swearing contest” in which officers and suspects present vastly different stories about what happened in the interrogation room.<sup>291</sup> The “swearing contest” between officers and criminal suspects is not much of a contest. In the absence of material exculpatory evidence, (which may not exist in many cases), false confessors are faced with the very difficult burden of proving: 1) their confession was a lie induced by the police, 2) they are now telling the truth, and 3) the jury should not find this denial unreliable. By contrast, police officers and detectives traditionally have had the advantages of: 1) status and respect within the community, 2) a perceived lack of self-interest in the outcome, and 3) the corroborating testimony of colleagues. If used correctly, video cameras provide a neutral record of events that can eliminate “swearing matches” and preconceived notions of innocence and guilt.

#### B. PROTECTING CONSTITUTIONAL RIGHTS

Videotaping suspect interviews documents the manipulative and potentially coercive tactics that officers sometimes use to elicit confessions. In the confines of a windowless interrogation room or the backseat of a cruiser, a suspect may understand his confession as the only means of survival. Michael Crowe falsely confessed to the murder of his sister only after telling investigators: “The only reason I’m trying to lie here is because you presented me with two paths, one I’m definitely afraid of. I’d rather die than go to jail.”<sup>292</sup> After watching over ten hours of videotape in which overzealous investigators threatened, bullied, and lied to Crowe, a California Superior Court judge dismissed the case.<sup>293</sup> For those suspects who break under police compulsion and confess falsely, the videotape provides their only reasonable means of exoneration.

Many scholars also view the video recording requirement as an important supplement to *Miranda*, ensuring that the warning is given and exposing cases in which interrogation continues after *Miranda* privileges are invoked.<sup>294</sup> Richard Leo found that officers continued interrogating

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best. Detectives claimed that Smith blurted out that a witness couldn’t have seen him at the crime scene because it was dark. He never told police that he was the killer. But court papers characterized the outburst as a confession, and the statement helped put an innocent man on Death Row for 14 years. Smith died of cancer months before his exoneration.”)

291. See Sullivan, *supra* n. 7, at 9.

292. See Dobb, *supra* n. 52.

293. Wanda J. DeMarzo & Daniel de Vise, *Experts: Tape Police Interrogations*, Miami Herald (Dec. 24, 2002) (available at <http://www.miami.com/mld/miamiherald/news/local/4804170.htm>).

294. See Stephen Schulhofer, *Miranda’s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 N.W. U. L. Rev. 500, 556-57 (1996).

suspects almost 20 percent of the time after invocation of *Miranda* rights, or in 4 percent of all interrogations.<sup>295</sup> An officer's failure to read *Miranda* warnings or failure to stop questioning a suspect can easily be documented on camera.<sup>296</sup>

Videotaping interactions between officers and suspects can also provide evidence in civil and criminal suits brought against police officers. Although only about 6 percent of arrests involve the use of force<sup>297</sup> and officers use excessive force<sup>298</sup> in only about 1.8 percent of encounters with potential offenders,<sup>299</sup> claims of police abuse are very high. A 1991 Gallup poll reported that 5 percent of Americans believed that they had suffered abuse at the hands of police.<sup>300</sup> Among minorities, 9 percent reported police abuse.<sup>301</sup> Videotapes can change police behavior on the street, behind the wheel and in the interrogation room.<sup>302</sup> Officers may even temper their use of practices that may not violate the law, but that jurors and judges may find coercive or reprehensible.

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295. Leo, *Inside*, *supra* n. 67, at 276-77.

296. Video cameras may also protect a defendant's Fourth Amendment rights against unreasonable searches and seizures related to pretextual traffic stops. In many states, videotaping has also become a useful tool in fighting against racial profiling. See *e.g.* Barnhardt, *supra* n. 24.

297. Kenneth Adams, *Measuring the Prevalence of Police Abuse of Force*, *Police Violence*, 61 (William A. Geller & Hans Toch eds., 1996).

298. *Graham v. O'Connor*, 490 U.S. 386, 396 (1989) ("Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake . . . . Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it . . . . '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' . . . however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.").

299. Robert Warden, *The Causes of Police Brutality*, *Police Violence* 34 (William A. Geller & Hans Toch eds., 1996).

300. Timothy Flanagan & Michael Vaughn, *Public Opinion About Police Violence*, *Police Violence* 120 (William Geller & Hans Toch eds., 1996).

301. *Id.*

302. *But see* Leo & Ofshe, *Consequences*, *supra* n. 38, at 466 (describing how the Duncanville, Texas, police department fired Lieutenant Robert Moore after he obtained a confession from Tammy Lynn Harrison by threatening her with the electric chair).



## IX. THE BENEFITS OF VIDEO-RECORDING FOR POLICE DEPARTMENTS

### A. TACTICAL ADVANTAGES

The greatest beneficiaries of a mandatory video recording rule are not criminal suspects and defense attorneys, but police and prosecutors. William Geller's survey revealed that nearly every police agency in America found videotaping useful and planned to continue the practice.<sup>303</sup> Police agencies reported that recording had little effect on a suspect's propensity to confess and increased the quantity and quality of incriminating evidence available at trial.<sup>304</sup> In addition to evidentiary advantages, videotaping can provide tactical advantages to police officers during interrogations.<sup>305</sup>

With the videotape rolling, officers can concentrate on the suspect instead of their copious notes. The interview can progress at a natural, conversational pace rather than through stilted questions and answers. This may give suspects less time to concoct answers and may make interrogations more effective and more time efficient. Videotaping also allows other officers to passively participate in the interrogation process. Supervisors monitoring interrogations through live feeds or over police car radios can evaluate the performance of officers on the spot and unobtrusively redirect lines of questioning. In some cases interviewers can take breaks, glean the information provided thus far, and adjust interviewing methods. Police officers may even playback portions of the interrogation to the interviewee when they catch him in a lie.

### B. OFFICER TRAINING AND MONITORING

Recording interrogations and suspect-police interactions also provides a key training tool for officers. Several scholars note that police investigators often possess weak interviewing skills.<sup>306</sup> Police interrogators commonly interrupt suspects, speak too quickly, ask loaded or leading questions, and proceed haphazardly through interviews.<sup>307</sup> Videotaping allows officers to learn from their own mistakes and the mistakes of other officers. Police departments can accumulate videotape data to find patterns and trends to better tailor interrogations to fit particular criminal profiles. Apart from suspect interviews, police cruiser and officer-mounted cameras provide police recruits with real-life confrontations. New officers can benefit significantly from assessing how an

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303. Geller, *supra* n. 2, at 10.

304. *Id.*

305. See Sullivan, *supra* n. 7, at 6 (noting that videotaping is an officer's version of "instant replay").

306. Conti, *supra* n. 41, at 30.

307. *Id.*

officer performed in a difficult circumstance and what techniques or strategies may have diffused the situation. If different tapes of the same incident are preserved, officers can assess complex situations and judge the behavior and responses of multiple actors. Finally, videos can document the tragic errors that officers sometimes make and ensure that those mistakes are not needlessly repeated.

Moreover, videotapes of suspect-police interactions are also useful for internal monitoring.<sup>308</sup> Police departments that have standard performance reviews may look to videotapes in evaluating officer behavior and performance. Instead of awarding promotions solely on the basis of the number of arrests or the recommendations of other officers, superiors can review tapes of the officer engaging suspects in the interrogation room or in real-life situations. Likewise, if an officer has received a number of complaints, internal review committees can investigate by reviewing not only the incident in question, but also recent interactions the officer has had with criminal suspects.<sup>309</sup>

### C. MORE CONVICTIONS AND FEWER SUPPRESSION CLAIMS

Prosecutors have found that video taping interrogations and confessions results in more guilty pleas and more severe sentences.<sup>310</sup> Recording eliminates the need for a "swearing contest" between police officers and suspects that propose different versions of the same interview.<sup>311</sup> This allows for fewer suppression motions from defendants and deters frivolous appeals.<sup>312</sup> Videotaped confessions give prosecutors leverage in obtaining more plea bargains on better terms for the state.<sup>313</sup> Prosecutors have also discovered that recorded confessions are powerful, and

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308. Andrew Flanagin, *The Impact of Contemporary Communication and Information Technologies on Police Organizations, Law Enforcement, Communication and Community* 96 (Howard Giles ed., 2002) ("[P]atrol car videotapes of traffic stops have been used not only to document officers' activities (in order to provide evidence to build legal cases against criminal suspects) but also for training officers. Videotapes of traffic stops can serve as examples of both proper and improper field behaviors.").

309. For those detectives that cross the line and abuse criminal suspects, videotapes can indicate their lack of fitness to supervisors. For instance, recently in Charlottesville an interrogation room camera captured a detective taunting a suspect and then beating him after he pushed a snapshot camera away from his face. The officer is now facing assault charges. April Witt, *Maryland Weighs Taping Police Interviews*, Wash. Post B1 (Feb. 12, 2002).

310. Geller, *supra* n. 2, at 6, 10; *but see supra* n. 218. (comparing the benefits of having fewer cases brought to trial must be weighed against the administrative costs of presenting videotape evidence to juries. The extensive use of videotape evidence may elongate trials as juries are forced to watch and interpret several hours of interrogation).

311. Joseph Grano, *Confessions, Truth and the Law*, 221 (U. Mich. Press 1994).

312. Cassell, *Empirical*, *supra* n. 197, at 231.

313. *See generally* Sullivan, *supra* n. 7.

often irrefutable, evidence at trial. Videotapes sway juries.<sup>314</sup> Indeed, one study has concluded that jurors presented with videotape evidence retain 100 percent more information than those who are not shown videotape evidence and 650 percent more than those that only hear oral evidence.<sup>315</sup> In some cases, videotaping a suspect's statements may lead to a conviction months or even years after the interrogation when subsequent incriminating evidence is uncovered. Tapes may allow detectives to continue pursuing cases in which they strongly suspect guilt or have obtained a confession, but have no corroborating evidence. At trial prosecutors will not have to rely wholly on the memories of detectives and incomplete or missing files: they have a complete record of the suspect's interrogation.

#### D. CAPTURING THE TRUE PERPETRATOR

Videotaping interrogations can also help police departments and prosecutors recognize false confessors. If a videotaped confession is suspicious or was obtained under tainted circumstances, police should explore alternative theories and alternative suspects.<sup>316</sup> In the rush to solve crimes, initial impressions and assumptions can prove erroneous. Convicting the "wrong man" can allow the true perpetrator to remain at large. For instance, after the false confession of Jerry Frank Townsend (later exonerated by DNA tests), the real killer of a girl in East Saint Louis went on to kill two more girls.<sup>317</sup> In a second case, the false confession of a welder from Maryland detracted attention from a rapist and murderer who subsequently assaulted five more women.<sup>318</sup> Ensuring that prosecutors bring the right person to trial not only saves taxpayers' time and money, in some instances, it may even save lives.

#### X. CONCLUSION

Reformers may view the recent trend towards video recording interrogations with optimism, but they should remain critical of newly adopted recording procedures and policies. Although videotaping may be the best method of ensuring that a suspect's rights are protected in the interrogation room and beyond, it is not a panacea for the problem of false confession. If improperly structured or monitored, police officers

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314. *Id.* at 311.

315. Karen Martin Campbell, *Roll Tape-Admissibility of Videotape Evidence in the Courtroom*, 26 U. Mem. L. Rev. 1445, 1447 (1996).

316. See Warden, *supra* n. 23 (estimating that of the 25 suspects convicted on the basis of a false confession in Illinois, officers may have pursued viable alternative suspects in 13 of the cases).

317. Margaret Talbot, *True Confessions*, *The Atlantic* (July/Aug. 2001) (available at [www.theatlantic.com/doc/prem/200312/talbot](http://www.theatlantic.com/doc/prem/200312/talbot)).

318. *Id.*

and prosecutors can easily circumvent recording requirements. One possible consequence of mandating video recording in police stations is that officers may be more inclined to conduct interrogations in other contexts. Thus, any sensible recording policy must look past the station house and consider video cameras in police cars and mobile camera technologies.

To properly protect the interests of criminal suspects, videotaping rules must require taping of the entire interrogation and confession. Recording only confessions may actually lead to the wrongful conviction of more false confessors. Taping must also be applied uniformly in all criminal cases or to an entire class or category of cases to ensure that the rights of suspects are equally protected. Ultimately, the success of any state or locally implemented videotaping rule hinges on three corollaries: (1) developing broad and clear recording policies and rules; (2) providing the requisite technological and financial resources to municipal police departments; and (3) obtaining the cooperation of police officers and prosecutors in implementing, monitoring, and enforcing recording policies.

