Wrongful Convictions: If Mandatory Recording Is the Antidote, Are the Side Effects Worth It?*

I. INTRODUCTION

In 1966, the United States Supreme Court handed down one of the most controversial opinions in the history of its jurisprudence, *Miranda v. Arizona.* The public’s reaction was both instantaneous and enduring. In his dissent, Justice White predicted that the majority’s ruling would “return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him.” Several figures in law enforcement and politics openly predicted *Miranda*’s detrimental effect on law enforcement. Many citizens believed that *Miranda* “seriously undermined the ability of law enforcement to protect the public from criminals” and “created a door through which scores of criminals could avoid

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1. 384 U.S. 436, 444 (1966) (requiring law enforcement to provide warnings to suspects subject to custodial interrogation).
2. See Welsh S. White, *Miranda’s Waning Protections: Police Interrogation Practices After Dickerson* 57 (2001) (“[F]or at least two years after the *Miranda* decision, conservative criticism of the Supreme Court was not only intense and passionate but often near the center of the political debate.”).
3. *Miranda*, 384 U.S. at 538, 542 (White, J., dissenting) (decrying the majority opinion as a “judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not”). Justice Harlan’s dissent criticized the ruling as “poor constitutional law” and warned that it “would markedly decrease the number of confessions.” *Id.* at 504, 516 (Harlan, J., dissenting). Justice Clark also dissented in part. *Id.* at 499 (Clark, J., concurring in part and dissenting in part) (disagreeing with “the Court’s criticism of the present practices of police and investigatory agencies as to custodial interrogation”).
They argued that providing warnings to suspects would jeopardize the effectiveness of the interrogation process and drastically reduce the number of confessions.6

Yet these fears proved to be largely unfounded. Nearly fifty years later, the *Miranda* exclusionary rule has only minimally impacted criminal prosecutions7 because law enforcement has remained able to obtain confessions during custodial interrogations.8 Indeed, the *Miranda* dissenters’ fears of harm to law enforcement were unjustified.9 Today, some argue that *Miranda* has strengthened the interrogation process or, at least, failed to protect criminal suspects like the Court intended.10 For example, law enforcement’s mere utterance of the *Miranda* warnings gives any subsequent statement made by a suspect “a virtual ticket of admissibility.”11 Once police issue the familiar warnings and obtain a waiver of a suspect’s rights, “*Miranda* is virtually irrelevant to the subsequent interrogation process or as a safeguard against false confessions.”12 When a suspect falsely


6. See White, supra note 2.


10. See Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1093-94 (2010) (“Th[e] use of *Miranda* to short-circuit a meaningful inquiry into the voluntariness of a confession supports scholarship questioning whether *Miranda* remains relevant and, indeed, whether its influence can be harmful.”); see also Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 23 (2010) (“Whatever the mechanism, it is clear that *Miranda* warnings may not adequately protect the citizens who need it most—those accused of crimes they did not commit.” (citation omitted)).


confesses, his or her *Miranda* waiver often impedes any later attempt to challenge that confession.13

Today, a similar debate surrounds the recording of custodial interrogations.14 Typically, proponents of mandatory recording argue that it will decrease the number of wrongful convictions.15 Opponents’ arguments against mandatory recording are reminiscent of the initial reaction to *Miranda*; they believe it will: (1) hinder law enforcement’s effectiveness;16 and (2) create a new loophole through which guilty defendants may escape the penal system without punishment.17 And just like with *Miranda*, these concerns appear unfounded.18 Although several states have instituted mandatory-recording requirements in recent years,19 the debate persists in many jurisdictions.20

Arkansas recently chose a middle-of-the-road approach. In response to *Clark v. State*, Arkansas added Rule 4.7 to its Rules of Criminal Procedure in 2012,21 requiring that “[w]henever practical, a custodial interrogation . . . should be electronically
In determining the admissibility of an unrecorded testimonial statement, courts may consider why law enforcement failed to make a recording; however, courts cannot consider the lack of a recording in seven specific situations. Early scholarly commentary describes Rule 4.7 as a philosophical shift in the right direction but notes that the Rule does not sufficiently protect the rights of criminal defendants. This view is understandable given the pervasiveness of the wrongful-conviction argument in the contemporary legal environment; however, mandatory recording may harm the very people it seeks to help and create unintended consequences for others.

The wrongful-conviction argument for mandatory recording fails to account for how such a requirement affects the vast majority of criminal suspects. Relatively few criminal suspects make false confessions that lead to subsequent wrongful convictions. Although mandatory recording may decrease this number, it has several other effects that benefit law enforcement more than criminal suspects. Moreover, mandatory

22. ARK. R. CRIM. P. 4.7(a).
23. ARK. R. CRIM. P. 4.7(b)(1).
25. See Jacob M. DeYoung, Arkansas Rule of Criminal Procedure 4.7: A Squandered Opportunity or a Step in the Right Direction?, 67 ARK. L. REV. 147, 166 (2014) (“If courts apply the Rule merely on its face, they will waste a tremendous opportunity for advancement in the Arkansas criminal-justice system.”).
28. See infra notes 128-29 and accompanying text.
recording may not cure false confessions as proponents of the wrongful-conviction argument predict. The wrongful-conviction argument is incomplete and potentially damaging to criminal suspects. Further, it may even fail to address the very problem that mandatory-recording proponents hope to resolve. Thus, Arkansas’s new recording rule may fall short on at least one of its idealistic goals.

Part II of this comment discusses the history of the movement to record and the contemporary debate surrounding mandatory recording. It also surveys several types of recording requirements and the typical arguments for and against them. Next, Part III examines the potentially negative effects of mandatory recording for criminal suspects. It then prescribes ways to improve existing recording requirements. Lastly, Part IV argues that although mandatory recording benefits the criminal-justice system generally, these benefits accrue disproportionately to law enforcement at the expense of criminal suspects.

II. RECORDING REQUIREMENTS

A. History

For more than seventy years, progressive elements of the legal community have called for more accurate recordkeeping during law-enforcement interrogations—more specifically for electronic recording. But the United States Supreme Court has yet to weigh in on this issue. This section highlights the history of the movement for recording requirements. Next, it outlines several current recording requirements throughout the United States, both judicially mandated and statutory.


30. See, e.g., RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 293 (2008) (noting that in 1932, Edwin Borchard argued that law enforcement should conduct interrogations “in the presence of phonographic records, which shall alone be introduced as evidence of the prisoner’s statements” (internal quotation mark omitted)).

31. However, the Court noted that tape or video recording might be a good means of assessing the accuracy of hypnotically refreshed testimony. Rock v. Arkansas, 483 U.S. 44, 60 (1987).
1. The Movement to Record

Although the mandatory-recording debate has gained notoriety in recent years, “[c]alls to electronically record interrogations are almost as old as the technology itself.” 32 In the first published interrogation manual in the United States, W. R. Kidd called for the verbatim recording of custodial interrogations through either sound recording or a stenographer. 33 He also advocated the use of “sound movies.” 34 Although some 1950s training manuals echoed Kidd’s push for recording, law enforcement remained split on the issue. 35

In the 1960s and 1970s, several legal scholars advocated for electronic recording as a means of regulating custodial interrogations. 36 In 1961, Bernard Weisberg became the first modern legal reformer to argue for electronic recording, contending that it could provide a necessary check on virtually unfettered police discretion in the interrogation room. 37 Scholars such as Yale Kamisar and Philip Zimbardo echoed Weisberg’s call. 38 However, throughout the next four decades, law-enforcement “trainers and leaders would almost universally oppose any taping requirements.” 39

2. Recording Requirements

a.Judicially Created Recording Requirements

The movement for “electronic recording of interrogations was all but dead until 1985” 40 when Alaska—seeing the potential for unrecorded statements to lead to wrongful convictions—became the first state to require the recording of all custodial

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33. LEO, supra note 30.

34. Id. (internal quotation marks omitted).

35. Id. at 294.

36. Id.

37. Id.


39. LEO, supra note 30, at 294.

40. Id.
interrogations that occur in a place of detention. 41 The Alaska Supreme Court held 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.” 42 Alaska remains the only jurisdiction to recognize a due-process right to electronic recording. 43 And no jurisdiction has found that the U.S. Constitution gives criminal suspects such a right. 44 In 1994, Minnesota became the second state to impose a judicially created recording requirement. 45 Both Alaska and Minnesota’s high courts held that: (1) with some exceptions, the court would suppress products of an unrecorded interrogation at trial; 46 and (2) law enforcement must record specified parts of the interrogation in order to comply with the new requirements. 47 But neither court mandated a specific medium for electronic recording. 48

In 2004, the Massachusetts Supreme Judicial Court adopted what amounts to a recording requirement, but it lacks the exclusionary component of Alaska and Minnesota’s rules. 49 The Massachusetts rule does not formally require law enforcement to electronically record all custodial interrogations; however, the failure to do so entitles the suspect to a favorable jury

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42. Id. at 1158.
46. Stephan, 711 P.2d at 1162, 1165 (limiting the exclusion of unrecorded statements to cases where the failure to record was “unexcused” and the violation of the recording requirement was substantial). In State v. Scales, the Minnesota Supreme Court required law enforcement to electronically record custodial interrogations, yet the court never explained what that requirement entails. 518 N.W.2d at 592.
47. Stephan, 711 P.2d at 1162 (noting that the recording must include “the giving of the accused’s Miranda rights” and “must clearly indicate that it recounts the entire interview”); Scales, 518 N.W.2d at 592 (noting that a recording must include “any information about rights, any waiver of those rights, and all questioning”).
48. See Stephan, 711 P.2d at 1159 n.11 (“While we assume that most law enforcement agencies will employ audio or video tape recordings . . . the use of alternative methods, such as the preparation of a verbatim transcript by a certified shorthand reporter, in lieu of an electronic device, would also satisfy the requirements . . . .”); Scales, 518 N.W.2d at 592.
49. Commonwealth v. DiGiambattista, 813 N.E.2d 516, 533-35 (Mass. 2004) (“Despite our view that recording all interrogations would improve the efficiency, accuracy, and fairness of criminal proceedings, we still decline at this time to make recording of the interrogation a prerequisite to the admissibility of a defendant’s statement.”).
In 2005, the New Jersey Supreme Court mandated, via court rule, the electronic recording of all custodial interrogations involving a list of violent crimes. Four years later, the Indiana Supreme Court mandated the practice for all felony cases by amending its rules of evidence.

b. Statutory Recording Requirements

In 2004, Illinois became the first state to mandate electronic recording by statute, requiring it for all custodial interrogations in homicide cases. In 2005, the District of Columbia, Maine, and New Mexico enacted recording requirements for all custodial interrogations involving certain offenses. Several other states enacted similar laws and court rules in the following years. In 2008, Maryland made it “public policy” for law
enforcement to make an audiovisual recording of custodial interrogations involving certain felonies, although it did not go so far as to mandate recording. Ohio’s recording statute went into effect in mid-2010, creating a presumption of voluntariness for all statements made during custodial interrogations by people suspected of violating one of several enumerated felonies, if the statement was electronically recorded. In late 2012, Michigan enacted a recording requirement for felonies punishable by twenty or more years imprisonment. In early 2014, California’s Senate Bill 569 went into effect, requiring law enforcement to electronically record custodial interrogations of juveniles suspected of homicide.

B. The Contemporary Debate

Proponents of a mandatory recording requirement for all custodial interrogations typically argue along wrongful-conviction lines. First, this section explores the argument for a mandatory recording requirement within this narrow context of wrongful convictions. Next, it surveys the traditional objections to electronic recording. This section then discusses the argument for mandatory recording in the broader context of the criminal-justice system. Finally, it examines the contemporary debate on mandatory recording, using the ongoing Florida debate as the primary illustration.
1. Typical Arguments

a. The Wrongful-Conviction Argument

A veritable swarm of legal scholars and practitioners argue that the mandatory recording of all custodial interrogations is necessary to curtail the number of false confessions leading to wrongful convictions. This section outlines the essentials of this wrongful-conviction argument for mandatory recording.

Almost invariably, the argument begins by noting the high number of wrongful convictions in this country: Since 1989, DNA evidence has exonerated hundreds, perhaps even thousands, of convicts. The argument notes that a large portion of these wrongful convictions involved defendants who made false confessions, and that several key features abound in these cases. First, law enforcement typically elicited the suspect’s false confession through psychologically coercive interrogation methods. Next, the suspect and the police often disagreed on the facts of the case and/or on what occurred during the interrogation. Then, in virtually all of these wrongful-conviction cases, police failed to electronically record the interrogation; although in some cases the police recorded a “recap” of the interview, it only included the suspect’s post-interrogation confession. Lastly, the wrongful-conviction argument identifies several features of the typical law-enforcement interrogation that raise the chances of innocent people confessing to crimes they did not commit. These features include: (1) high-pressure interrogation techniques; (2) promises of leniency and other benefits to the suspect; and (3) threats of harm if the suspect refuses to confess.

60. See supra note 26.
61. See supra note 27 and accompanying text.
63. Leo & Richman, supra note 15.
64. See Kassin et al., supra note 10, at 25.
65. See infra notes 121-22 and accompanying text.
67. Taslitz, supra note 62, at 405 (pointing to “high-pressure interrogation techniques, such as suspect-isolation, time-limited leniency offers, repeated aggressive attacks on suspect guilt-denials, and aggressive confrontation”).
According to the argument, electronic recording makes officers aware that their behavior in the interrogation room will be scrutinized, thus compelling them to avoid the use of improper tactics.\textsuperscript{68} Further, since electronic recording will provide the factfinder with a complete record of an interrogation, factfinders can more easily determine when a confession is false and/or a product of coercion.\textsuperscript{69} The argument concludes that law enforcement could prevent “[m]ost of the wrongful convictions caused by false confessions” if they would electronically record all custodial interrogations in their entirety.\textsuperscript{70} Proponents often insist that recording interrogations would help police departments and prosecutors recognize false confessors and permit factfinders to assess the reliability of confession evidence more accurately.\textsuperscript{71}

To illustrate their argument, these proponents typically highlight examples where people avoided conviction—despite having confessed—thanks to the healing power of electronic recording.\textsuperscript{72} They also point out notable examples of people who were wrongfully convicted and later exonerated by DNA evidence and who could have benefitted from the electronic recording of their interrogation in its entirety (or at all).\textsuperscript{73} Further, the argument emphasizes that wrongful convictions

\begin{itemize}
  \item \textsuperscript{68} Leo \& Richman, \textit{supra} note 15, at 795.
  \item \textsuperscript{69} Kassin \textit{et al.}, \textit{supra} note 10, at 26. Some courts have echoed this argument. \textit{See} Commonwealth v. DiGiambattista, 813 N.E.2d 516, 532 (Mass. 2004) (“When there is a complete recording of the entire interrogation that produced such a statement or confession, the fact finder can evaluate its precise contents and any alleged coercive influences that may have produced it.”).
  \item \textsuperscript{70} Leo \& Richman, \textit{supra} note 15.
  \item \textsuperscript{71} \textit{See, e.g.}, Leo \textit{et al.}, \textit{supra} note 12, at 530; Taslitz, \textit{supra} note 62, at 405.
  \item \textsuperscript{72} \textit{See} Thurlow, \textit{supra} note 44, at 807 (noting that the electronic recording of Richard Bingham’s interrogation and drunken confession to the rape and murder of a seventeen-year-old in Alaska likely prevented his wrongful conviction in 1997).
  \item \textsuperscript{73} A frequently cited example is the “Central Park Jogger” case. \textit{See} Leo \textit{et al.}, \textit{supra} note 12, at 479-84. In 1989, following the rape of a jogger in New York City’s Central Park, police arrested five juvenile males and obtained videotaped confessions from four of them. \textit{Id.} at 479-81. Law enforcement failed to record the hours of preceding interrogations in all four cases. \textit{Id.} at 481. Despite the fact that DNA at the scene of the crime did not match any of the five boys, all were convicted. \textit{Id.} at 482. More than a decade later, a convicted serial rapist admitted to the crime, and all five defendants’ convictions were vacated. \textit{Id.} at 482, 484.
\end{itemize}
cause more harm than the wrongfully convicted individuals by permitting potentially violent offenders to remain at-large.\textsuperscript{74}

b. Traditional Objections to Mandatory Recording

Traditional objections to mandatory recording echo the initial reaction to \textit{Miranda}.\textsuperscript{75} Similarly, most of these objections come from within the law-enforcement community.\textsuperscript{76} Opponents have two primary concerns: (1) that criminal suspects will know police are recording them and will, thus, be unwilling to talk with interrogators, which will reduce the confession rate;\textsuperscript{77} and (2) that law-enforcement implementation and execution will be too costly.\textsuperscript{78} Others argue that recording is simply unfeasible in the interrogation context.\textsuperscript{79} These opponents believe exposing the inner workings of a criminal interrogation may be too “messy” for some factfinders to stomach.\textsuperscript{80} Another concern is that mandatory recording will allow criminals to learn what to expect from law enforcement during an interrogation, in essence creating “training film for criminals.”\textsuperscript{81} Like the initial reaction to \textit{Miranda}, most of the concerns fall within the broader category of reducing law enforcement’s effectiveness.\textsuperscript{82}

\textsuperscript{74} See, e.g., LEO, supra note 30, at 268; Thurlow, supra note 44, at 812 (noting that Jerry Frank Townsend’s false confession to the murder of a young girl distracted Illinois law enforcement from the true perpetrator, who went on to kill two more girls).

\textsuperscript{75} See supra notes 1-6, 16-17 and accompanying text.

\textsuperscript{76} See LEO, supra note 30, at 303.


\textsuperscript{78} See Clark, 374 Ark. at 304, 287 S.W.3d at 575 (noting that the “cost in the purchase and maintenance of recording equipment . . . would be a financial burden for some municipalities” (citing State v. Cook, 847 A.2d 530, 544 (N.J. 2004))); LEO, supra note 30, at 303-04 (explaining why the cost argument is unfounded).

\textsuperscript{79} LEO, supra note 30, at 303-04.


\textsuperscript{81} Id.

\textsuperscript{82} See supra note 6 and accompanying text.
2. Recent Developments Regarding Mandatory Recording

The recording debate often flares up when: (1) a jurisdiction realizes that it has a high rate of false confessions and/or wrongful convictions; 83 (2) DNA evidence disproves a wrongful conviction where the suspect confessed or a convict from a well-known case maintains his or her innocence despite having confessed; 84 or (3) a new jurisdiction joins the ranks of those that require electronic recording. 85 Further, the several non-profit legal organizations that work on overturning wrongful convictions based on false confessions ensure that the issue of mandatory recording remains salient in the public consciousness. 86

Florida offers an interesting test case. The Florida Supreme Court established the Florida Innocence Commission in July 2010 to make policy recommendations on how to eliminate or reduce the amount of wrongful convictions. 87 In October 2011, a Commission member recommended a proposed statute mandating electronic recording for custodial interrogations

83. See, e.g., Steven A. Drizin & Beth A. Colgan, Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois’ Problem of False Confessions, 32 LOY. U. CHI. L.J. 337, 382-84 (2001) (pointing to six recent examples of false confessions in Illinois cases involving capital crimes to illustrate the need for mandatory recording in that state).


85. See, e.g., Clark v. State, 374 Ark. 292, 304, 287 S.W.3d 567, 576 (2008) (noting other states’ approaches to recording requirements in referring the practicability of adopting a similar rule to the Committee on Criminal Practice).

86. For example, the Innocence Project argues that the “electronic recording of interrogations . . . is the single best reform available to stem the tide of false confessions.” False Confessions & Mandatory Recording of Interrogations, INNOCENCE PROJECT, http://www.innocenceproject.org/fxc/False-Confessions.php (last visited Mar. 18, 2014).

involving certain crimes. Trial courts would factor any failure to record into their determinations on the admissibility of statements. Further, any such failure to record would entitle the suspect to a favorable jury instruction similar to that of New Jersey’s.

Seven of the Commission’s nineteen members voted against recommending the proposed statute. Three members argued that the proposed statute did not go far enough, contending that unrecorded statements should be presumed inadmissible. Three others did not believe that a recording requirement was necessary to combat a problem that affected so few. The seventh opponent would have amended an existing Florida jury instruction rather than adopt New Jersey’s instruction.

More than two years have passed since the Commission made this recommendation, but the Florida legislature has yet to act on it. Even with the administrative authority of the state’s high court, the Commission was unable to sway the state legislature to consider several of its reforms, including the recording requirement. The Commission chairman explained the recommendation’s failure as due to a lack of funding. Currently, the Florida House of Representatives is considering a statutory recording requirement that would create a presumption of inadmissibility for unrecorded statements—although a similar bill failed to pass in 2006. As of April 2014, Florida

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89. Id. at 39.
90. Id.
91. Id. at 38.
92. Id. at 40.
93. FINAL REPORT, supra note 88, at 40.
94. Id.
96. Judge Belvin Perry, Jr., chairman of the Commission, explained that the Commission could not “avoid the reality that a number of the problems in our system of justice deal with the issue of adequate funding.” Id.
still does not require its law enforcement to electronically record custodial interrogations.

Other states recently embroiled in the debate reached different outcomes. In 2008, the Arkansas Supreme Court referred the practicability of mandatory electronic recording to its Committee on Criminal Practice for consideration.99 Four years later, in June 2012, the court adopted a new rule of criminal procedure—Rule 4.7100—that compels law enforcement to electronically record “[w]henever practical.”101 Later that year, Michigan enacted a statutory recording requirement for interrogations involving major crimes.102 Somewhat surprisingly, the statute received the support of both defense attorneys and prosecutors.103 Several other state courts have declined to mandate electronic recording absent legislative action condoning the practice.104

3. Mandatory Recording Benefits the Criminal-Justice System Generally

Outside the narrow wrongful-conviction argument, mandatory recording offers several general benefits for the criminal-justice system. First, it saves the court system a lot of time.105 By deterring the use of coercive police tactics during custodial interrogations and providing a complete and objective record of the interrogations, electronic recording reduces the number of defense claims of coercion during interrogations, pretrial motions to exclude custodial statements, and trials.106 Second, courts do not have to call as many witnesses to evaluate the voluntariness of a confession because they can view the

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100. ARK R. CRIM. P. 4.7
103. Id. (noting supporters’ claims that mandatory recording has a “dual positive effect of strengthening prosecutions’ cases when the defendant is guilty but also of protecting against wrongful convictions through coerced or misinterpreted statements”).
104. Taslitz, supra note 62, at 408.
105. LEO, supra note 30, at 302.
106. See id. at 299.
107. Id. at 302.
interrogations directly. 108 Third, by removing secrecy from the custodial-interrogation context, mandatory recording should improve the public’s perception of the criminal-justice system. 109 Specifically, it should improve public relations between police and the general public. 110 Mandatory recording also has several benefits for both law enforcement and prosecutors.

III. THE DARK SIDE OF ELECTRONIC RECORDING FOR CRIMINAL SUSPECTS

A. Potentially Negative Effects for Criminal Suspects

The wrongful-conviction argument often ignores the potentially detrimental effects such a provision would have on criminal suspects generally, and even on those who confessed despite their innocence. First, the manner in which law enforcement records custodial interrogations can affect a factfinder’s subsequent evaluation of voluntariness. 111 Second, video recording exacerbates certain human psychological flaws in detecting when a confession is false, thereby making a difficult task that much harder. 112 Finally, law-enforcement and prosecutorial experience with electronic recording suggests that the practice benefits these groups far more than it benefits suspects. 113

108. Id.
109. Id. at 303.
110. LEO, supra note 30, at 303. Improved public relations “lends greater credibility to detective work—especially in urban communities where police may be distrusted by large segments of the populations—by demonstrating to prosecutors, judges, and juries the lawfulness of police methods and the confessions they obtain.” Id. at 302; see also Taslitz, supra note 62, at 407 (“A recording could reveal racial bias and encourage means for correcting it and can . . . promote law enforcement legitimacy by improving its public accountability.”).
111. G. Daniel Lassiter et al., Videotaped Confessions: Panacea or Pandora’s Box?, 28 LAW & POL’Y 192, 195 (2006) [hereinafter Panacea or Pandora’s Box?].
113. See infra note 142 and accompanying text.
The manner in which law enforcement records an interrogation profoundly affects a factfinder’s evaluation of whether a suspect’s confession was voluntary. Most videotaped interrogations and confessions include only the suspect in the frame. Positioning the camera this way seems natural since the factfinder will evaluate the voluntariness of a suspect’s statements. However, this default camera perspective may have an unintended prejudicial effect on that very evaluation. Other common law-enforcement recording practices may muddle this evaluation even further.

Multiple studies confirm a “camera perspective bias,” where people judge a videotaped confession that includes only the suspect in the frame to be less coercive than the same interaction with both the suspect and interrogator(s) in the frame. The bias cuts the other way as well: People rate video confessions that include only the interrogator(s) in the frame as more coercive than the same interaction with both the suspect and interrogator(s) in the frame. The bias is generalized across different crimes and creates higher perceptions that the suspect’s confession was voluntary than either audio or transcript versions of the same confessions. Lastly, the “equal-focus” perspective—showing both the interrogator(s) and suspect—yields similar perceptions of voluntariness as both audio and transcript versions of the same confession.

Further, law enforcement often records a suspect’s final confession without recording any of the preceding interrogation. Such “recap” recordings potentially convey to
factfinders that a confession was more voluntary than it would have seemed had they watched the entire interrogation. Law enforcement often records these recaps after asking suspects to recount their story multiple times. Thus, by the time the camera is recording, the suspect’s statements may contain little of the emotion and agitation that may have been present initially, making the suspect appear more callous and unremorseful than he or she actually may be. Recording in this manner “may actually lead to the wrongful conviction of more false confessors.”

2. Recording’s Inability to Overcome General Human Biases

As noted previously, one of the primary rationales behind the electronic-recording argument is that it permits factfinders to evaluate more accurately the voluntariness and veracity of a confession. However, this may not be the case. Generally, people are not very good at distinguishing truth from untruth, and they become even worse when viewing a video statement instead of listening to a recording or reading a transcription. A factfinder has a better chance of flagging a false confession when examining an audio or transcript version of a confession rather than a video version. The differing results could derive from the inability of factfinders to accurately discern the voluntariness and veracity of a confession when viewing a video statement.


121. See Kassin, supra note 120; Lassiter & Lindberg, supra note 112, at 181.
122. Lassiter & Lindberg, supra note 112, at 181.
123. Id.
124. Thurlow, supra note 44, at 813 (emphasis added); see also Jay Barth, Another Supreme Court’s Missed Opportunity, ARK. TIMES (July 4, 2012), http://www.arktimes.com/arkansas/another-supreme-courts-missed-opportunity/content?oid=2321970 (noting that law enforcement recorded only a small segment of the interrogation that included Misskelley’s confession). Jessie Misskelley, Jr., one of the “West Memphis Three,” is a good example. See Campbell Robertson, Deal Frees ‘West Memphis Three’ in Arkansas, N.Y. TIMES (Aug. 19, 2011), http://www.nytimes.com/2011/08/20/us/20arkansas.html?_r=0&pagewanted-print (noting that law enforcement interrogated Misskelley for nearly twelve hours before he confessed).
125. See supra note 72 and accompanying text.
126. See Charles F. Bond & Bella M. DePaulo, Accuracy of Deception Judgments, 10 PERSONALITY & SOC. PSYCHOL. REV. 214, 230 (2006) (“[T]he average person discriminates lies from truths at a level slightly better than he or she could achieve by flipping a coin . . . .”); Lassiter & Lindberg, supra note 112, at 184 (“[P]eople generally do little better than chance when it comes to separating lies from the truth.”).
128. Id.
from peoples’ tendencies to think that they can tell whether someone is lying from closely observing that person’s face. However, most scientific evidence discredits this logic. Thus, not all forms of electronic recording appear equal: Video recording exacerbates the general human inability to distinguish fact from fiction.

Further, people tend to attribute another’s actions to internal causes even when external pressures could readily account for them. This phenomenon is known as the “fundamental attribution error.” In assessing the voluntariness of a confession, people are more likely to attribute a confession to the suspect’s dispositions and intentions rather than any coercive conduct on the part of law enforcement. Confession evidence seems so powerful that people do not fully discount the information contained within a confession, even when doing so may be logical or legally appropriate. Video recording can intensify the effect of the fundamental-attribution error because external pressures, such as coercive interrogation tactics, become less salient when a videotaped interrogation includes only the suspect in the frame.

The power of confessions, even if false, to influence the trier of fact is undeniable both in the archives of wrongful convictions and in the laboratory. When police videotape interrogations

129. Id. at 185.
130. See, e.g., id. This evidence is particularly troubling in the confession context given that the verbal content of a suspect’s statement is likely a more reliable source for distinguishing true and false confessions. See id.
132. Id.; Kassin, supra note 120, at 229. The “fundamental attribution error” is a commonsense principle in lay attribution and law that one can trust statements a suspect makes against his self-interest; consider the more specific variant of this principle: “I would never confess to a crime I did not commit.” See Kassin et al., supra note 10, at 24. This principle is also evident in the rules of evidence and criminal procedure. See, e.g., Fed. R. Evid. 804(b)(3) (excepting statements made against one’s self-interest from exclusion by the hearsay rule because they go “so contrary to the declarant’s proprietary or pecuniary interest”).
133. See Lassiter & Lindberg, supra note 112, at 181.
134. See id. at 181-82.
135. See G. Daniel Lassiter et al., Videotaped Confessions: Is Guilt in the Eye of the Camera?, in 33 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 189, 195-97 (Mark P. Zanna ed., 2001). See supra notes 114-18 and accompanying text (discussing the “camera-perspective bias” that results from including only the suspect in the frame).
136. See Kassin et al., supra note 10, at 24. In 1988, an Oklahoma jury convicted Robert Lee Miller, Jr., of two rapes and two murders and sentenced him to death after viewing his twelve-hour taped interrogation that culminated in his confession. Robert Miller,
in the typical manner, they can strengthen the effects of the fundamental-attribution error. People are generally bad at detecting false confessions in the first place, but video recording appears to make their abilities even worse. At the very least, the "application of videotaping to solve the problem of . . . false confessions slipping through the system is not as clear-cut as it might first seem."  

3. Police and Prosecutorial Experience with Electronic Recording Dispels the Traditional Objections

Today, law-enforcement agencies in every state, the District of Columbia, and some federal agencies record the majority of their custodial interrogations. Although law-enforcement agencies often oppose the introduction of recording requirements, police officers’ reactions are remarkably positive after field use. In 2005—eleven years after the Minnesota Supreme Court mandated recording—a state prosecutor referred to the practice as “the best thing we’ve ever had rammed down our throats.” Further, some law-enforcement and prosecutorial organizations have come out in support of electronic recording. Much of law-enforcement
opposition to electronic recording appears unwarranted and is often “born of police inexperience or ignorance” with the practice. Contrary to the traditional law-enforcement objections, electronic recording is a very useful law-enforcement tool.

First, recording does not diminish the ability to obtain confessions, and no one has ever empirically verified that it does. In fact, the very opposite may be true. Next, electronic recording saves both time and money. The argument that electronic recording is prohibitively expensive simply does not hold up to a long-term cost-benefit analysis. Any front-end costs stemming from the purchase and installation of recording equipment “will be repaid many times over by the savings in the time and resources of police, prosecutors, judges, and jurors.” Additionally, electronic recording reduces the amount of time that law-enforcement personnel must spend reconstructing and testifying about interrogations and confessions in court. Less time in court means that law enforcement can devote more time to other investigations. Further, police departments no longer need an additional officer present during interrogations to

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146. Jayne, supra note 77. This part of the mandatory-recording debate is reminiscent of the initial backlash against Miranda and subsequent research dispelling many of the initial concerns regarding its effect on obtaining confessions. See supra notes 7-14 and accompanying text.
147. LEO, supra note 30, at 304.
148. See supra Part II.B.1.b.
149. See Sullivan, supra note 120, at 6 (referring to electronic recording as “law enforcement’s version of instant replay”).
150. Sullivan, supra note 53, at 1129. In a 2003 survey of 112 investigators from Alaska and Minnesota, seventy-four percent reported that mandatory recording did not affect their ability to obtain confessions. Jayne, supra note 77.
151. LEO, supra note 30, at 303 (“[E]lectronic recording does not cause suspects to refuse to talk, fall silent, or stop making admissions.”).
152. Sullivan, supra note 120, at 22 (“[T]he majority of agencies that videotape [interrogations] found that they were able to get more incriminating information from suspects on tape than they were in traditional interrogations.” (emphasis added)).
153. LEO, supra note 30, at 302.
154. See supra note 78 and accompanying text.
155. Leo & Richman, supra note 15, at 793.
157. Leo & Richman, supra note 15, at 793.
158. LEO, supra note 30, at 302.
take notes, which saves time by freeing up an officer to focus on other investigations, and money in the form of salary paid for unnecessary work.\textsuperscript{159} By creating an unadulterated record of the entire interrogation, electronic recording reduces meritless claims of police coercion, which often concern \textit{Miranda} violations.\textsuperscript{160} This reduction helps save “defense costs in civil suits based on police coercion and perjury.”\textsuperscript{161}

Electronic recording also has tactical advantages for law enforcement. It allows law enforcement to assess more accurately whether a suspect participated in a crime.\textsuperscript{162} Officers, aside from any interrogator who is physically present, get to assess the accuracy of a suspect’s statement for themselves.\textsuperscript{163} Further, having a complete, objective record of the interrogation reduces disputes at trial about law enforcement’s treatment of the suspect and what the suspect actually said, which can jeopardize an otherwise solid case.\textsuperscript{164} Lastly, electronic recording allows law-enforcement supervisors to monitor custodial interrogations and “give feedback on proper techniques, thereby improving training.”\textsuperscript{165}

Electronic recording can even help prosecutors secure convictions.\textsuperscript{166} With recordings, prosecutors can “evaluate and prepare their cases more thoroughly.”\textsuperscript{167} This benefit allows more bargaining power during plea negotiations, which leads to more guilty pleas.\textsuperscript{168} Further, the successful recording of a suspect’s custodial interrogation removes any basis for a defense attorney to challenge an interrogator’s behavior or the

\textsuperscript{159} Id.; Leo & Richman, \textit{supra} note 15, at 793. An Arizona police officer noted that the absence of a note taker has the additional benefit of making suspects “more at ease.” Nirider, \textit{supra} note 84.

\textsuperscript{160} LEO, \textit{supra} note 30, at 302. The president of John E. Reid & Associates—a leader in police-interrogation methods—noted that “[w]hen somebody claims there was coercion, the [electronic] record speaks for itself.” Kolker, \textit{supra} note 80, at 89-90 (internal quotation marks omitted).

\textsuperscript{161} Sullivan, \textit{supra} note 53, at 1130.

\textsuperscript{162} LEO, \textit{supra} note 30, at 300.

\textsuperscript{163} \textit{Id.} at 301.

\textsuperscript{164} Sullivan, \textit{supra} note 120, at 6.

\textsuperscript{165} Taslitz, \textit{supra} note 62, at 405.

\textsuperscript{166} See LEO, \textit{supra} note 30, at 303; Thurlow, \textit{supra} note 44, at 810 (“The greatest beneficiaries of a mandatory video recording rule are not criminal suspects and defense attorneys, but police and prosecutors.”).

\textsuperscript{167} LEO, \textit{supra} note 30, at 301.

\textsuperscript{168} See \textit{id.}
mandatory recording would have on the admissibility of any statement, resulting in fewer defense motions to suppress custodial statements based on involuntariness or Miranda violations. Lastly, if a case ends up going to trial, judges and juries are more likely to convict based on a recorded confession rather than on a police officer’s summary of an interrogation that yielded the suspect’s confession. In conclusion, recorded confessions make very powerful trial evidence.

B. Prescriptions for More Effective Recording Requirements

Although mandatory recording has several general advantages for the criminal-justice system, it is “not a panacea for the problem of false confession[s].” Law enforcement can easily circumvent improperly structured or monitored recording requirements. Moving forward, recording requirements must: (1) require video recordings to include both suspects and interrogators in-frame; and (2) electronically record the entire custodial interrogations, rather than just the confession. Wrongful-conviction proponents should adjust their arguments accordingly.

No existing American recording requirement prescribes a method of recording beyond identifying what media are appropriate. As previously mentioned, most videotaped interrogations include only the suspect in the frame, creating a camera-perspective bias in a factfinder’s subsequent evaluation of the confession’s voluntariness. To mitigate

169. Id.
170. LEO, supra note 30, at 297 (noting that electronic recording “prevents suspects from falsely accusing police of failing to give them Miranda warnings or using coercive interrogation methods”); Thomas P. Sullivan et al., The Case for Recording Police Interrogations, LITIG., Spring 2008, at 30, 34 (“[Recording] relieves detectives from having to engage in courtroom swearing matches” about what occurred during the interrogation.); see Leo & Richman, supra note 15, at 793.
172. See Thurlow, supra note 44, at 811-12 (noting that a recorded confession is “often irrefutable” as trial evidence).
173. Id. at 812.
174. Id. at 812-13.
175. See supra Part II.A.2.
176. See supra note 111 and accompanying text.
177. See supra notes 116-19 and accompanying text.
these effects, recording statutes need to include a provision requiring that videotaped interrogations include the suspect and any interrogator(s) present in the frame. Adding this requirement may also reduce the effect of the fundamental-attribution error associated with the camera-perspective bias.\textsuperscript{178} Since the 1990s, New Zealand’s public policy has called for law enforcement to record interrogations from an equal-focus perspective.\textsuperscript{179} Proponents of the wrongful-conviction argument should advocate for more than electronic recording; they need to specify the manner in which law enforcement should make such mandatory recordings.

Further, any subsequent recording requirement should specify that the recording must cover the entire custodial interrogation—from the utterance of the \textit{Miranda} rights to the very end of the interrogation. Although virtually every recording requirement specifies as much,\textsuperscript{180} several police departments that record interrogations at their own discretion do not record in this manner.\textsuperscript{181} Rather, they record a “recap” of the interview that typically includes only the suspect’s confession.\textsuperscript{182} This method of electronic recording can be very damaging to criminal suspects, especially the innocent ones.\textsuperscript{183}

\section*{IV. CONCLUSION}

Although proponents of the wrongful-conviction argument point to electronic recording as the antidote for this country’s wrongful-conviction epidemic, it is more like a long bout of chemotherapy. The side effects are severe, and it may not even treat the very problem that it was implemented to address. While electronic recording may benefit the relative few who falsely confess to crimes they did not commit, it hurts a greater number of defendants who can no longer challenge the circumstances of their custodial confessions. Further, video recording in particular can exacerbate several human psychological frailties that make

\begin{itemize}
\item \textsuperscript{178} See supra notes 131-32 and accompanying text.
\item \textsuperscript{179} See G. Daniel Lassiter et al., \textit{Accountability and the Camera Perspective Bias in Videotaped Confessions}, 1 ANALYSES SOC. ISSUES & PUB. POL‘Y 53, 65 (2001) (noting that New Zealand based its policy decision on earlier research by G. Daniel Lassiter identifying the camera-perspective bias).
\item \textsuperscript{180} See supra notes 53-59 and accompanying text.
\item \textsuperscript{181} See supra note 120 and accompanying text.
\item \textsuperscript{182} See supra notes 120-21 and accompanying text.
\item \textsuperscript{183} See supra notes 121-25 and accompanying text.
\end{itemize}
the already difficult task of determining voluntariness even more onerous. Finally, the fact that police and prosecutors familiar with the practice have cozied up to it should alert wrongful-conviction proponents that they should perhaps rethink their position. As it exists, their argument is far too narrow.

The wrongful-conviction argument is, at best, incomplete, and at worst, it goes against the interests of the very people electronic recording intends to protect. Electronic recording—at least in its current form—is not as bad for police as opponents believe, and it is not as good for suspects as proponents of the wrongful-conviction argument hope it will be. Like *Miranda* before it, the electronic recording of custodial interrogations benefits police and prosecutors despite their initial reluctance to the practice. Arkansas’s new Rule 4.7 is not an adequate protection against the admission of false confessions, and it may even exacerbate the problem.

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