

# FAITH-BASED *MIRANDA*?: WHY THE NEW *MISSOURI v. SEIBERT* POLICE “BAD FAITH” TEST IS A TERRIBLE IDEA

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Just five years ago, it seemed possible that police officers might never need to tell anyone ever again that they had the “right to remain silent.” In the spring of 2000, pundits, court watchers, and television producers throughout the United States contemplated a world without *Miranda*.<sup>1</sup> When *Dickerson v. United States*<sup>2</sup> was announced in late June, it defied expectations. *Miranda* opponents who had hoped that the Rehnquist Court might resurrect 18 U.S.C. § 3501 to destroy *Miranda* were disappointed. *Miranda* supporters were relieved that a decision emblematic of the Warren Court’s deference to individual liberties had survived.<sup>3</sup> Across the political spectrum, everyone seemed surprised that the Chief Justice, and all but the two most conservative members of the current Court, had become *Miranda*’s unlikely champions.

We are just beginning to discover whether *Dickerson*’s grant of constitutional legitimacy has any real value. On June 28, 2004, the Court decided two *Miranda* cases: *Missouri v. Seibert*<sup>4</sup> and *United States v. Patane*.<sup>5</sup> *Patane* is a simple case that limits the scope of *Miranda* by allowing the admission of physical evidence obtained through unwarned custodial interrogation.<sup>6</sup> The obvious danger of *Patane* is that the Court created a new incentive for police officers to violate *Miranda*. After *Patane*, rational police officers will ignore *Miranda* whenever the

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

2. 530 U.S. 428 (2000).

3. See, e.g., Charles D. Weisselberg, *In the Stationhouse After Dickerson*, 99 MICH. L. REV. 1121, 1121–22 (2001) (“In *Dickerson v. United States* [sic], the Court turned back . . . a challenge [to the landmark ruling] and placed *Miranda* upon a more secure, constitutional footing.”).

4. 124 S. Ct. 2601 (2004).

5. 124 S. Ct. 2620 (2004).

6. *Id.* at 2632.

large and immediate benefits of obtaining incriminating physical evidence outweigh the possible harm to some future prosecutor of exclusion of a statement (but not the physical evidence) in the unlikely event that the case goes to trial.<sup>7</sup> *Seibert*, decided the same day, excluded a post-*Miranda* confession that had been preceded by unwarned custodial interrogation.

At first glance, *Seibert* may look like a *Miranda* victory, but this is an illusion. *Seibert* is not a direct assault on *Miranda*, but it contains a covert and potent danger. The plurality decision condemned police practices designed to circumvent *Miranda*, but the case is governed by Justice Kennedy's concurrence. Justice Kennedy, writing only for himself, created a new rule that excludes statements resulting from similar *Miranda* violations *only* if the defendant can prove that the police officer acted in bad faith.<sup>8</sup> In the unlikely event that a defendant is able to establish actual bad faith, Justice Kennedy's new test contains a second hurdle. Statements taken by police officers who violate *Miranda* in bad faith will be admitted whenever the prosecutor can establish that the police took "curative measures."<sup>9</sup>

The new bad faith test is the unfortunate byproduct of the Court's legitimate practical concern that the police deliberately ignore *Miranda*. Writing for the *Seibert* plurality, Justice Souter denounced training programs designed to teach police officers to circumvent *Miranda*.<sup>10</sup> According to Justice Souter, "[s]trategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* held Congress could not do by statute."<sup>11</sup> The problem identified by the plurality is that the "reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not have made if he understood his rights . . . ."<sup>12</sup> The *Seibert* plurality was expressing the frustration of a Supreme Court forced to recognize that it has no real power to control police misconduct.<sup>13</sup>

*Seibert*'s explicit condemnation of pervasive police misconduct reveals that it would have been naive to think that *Dickerson*'s constitutional imprimatur on *Miranda*'s "bright line rules"<sup>14</sup> would enhance law enforcement compliance.<sup>15</sup>

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7. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2466 n.9 (2004) (noting that in fiscal year 2000 more than ninety-three percent of federal criminal cases and ninety-five percent of state cases were disposed of through guilty pleas).

8. *Seibert*, 124 S. Ct. at 2616 (Kennedy, J., concurring).

9. *Id.*

10. *Id.* at 2608–09 (Rehnquist, C.J.) (citing efforts throughout the United States to educate law enforcement officers on how *Miranda* can be circumvented).

11. *Id.* at 2613.

12. *Id.* at 2610–11.

13. "'Officer Hanrahan's intentional omission of a *Miranda* warning was intended to deprive Seibert of the opportunity knowingly and intelligently to waive her *Miranda* rights.'" *Id.* at 2606–07 (quoting *State v. Seibert*, 93 S.W.3d 700, 706 (Mo. 2002)).

14. See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 339 (1985) ("[T]he whole point of *Miranda* and its progeny has been to prescribe 'bright line' rules for the authorities . . . ."); *United States v. Melendez*, 228 F.3d 19, 21 (1st Cir. 2000) ("*Miranda* established a bright-

*Dickerson*, for all of its constitutional trappings, did not change the essential fact that a violation of *Miranda* does not violate the Fifth Amendment.

This is no surprise. *Miranda*'s defects are congenital. When Chief Justice Warren, in the interest of compromise, refused to don the "constitutional straightjacket" that would have bound *Miranda* to the Privilege Against Self-Incrimination, he knew that *Miranda* would be vulnerable to attack from outside and within the Court.<sup>16</sup>

Over the past four decades, the Supreme Court has further diminished *Miranda*'s power to deter police violations by carving out a series of significant exceptions. Statements obtained in violation of *Miranda* can be presented to a grand jury.<sup>17</sup> These statements can be used by the prosecutor at trial if the violation was for public safety reasons<sup>18</sup> or if the statements are used to impeach.<sup>19</sup> Derivative evidence obtained through *Miranda* violations is also admissible.<sup>20</sup> Police officers who disregard *Miranda* do not face mandatory criminal or civil sanctions.<sup>21</sup> *Miranda*'s impotence is not a problem for some members of the Court. In her *Seibert* dissent, Justice O'Connor noted that "[t]his Court has made clear that there is simply no place for a robust deterrence doctrine with regard to violations of *Miranda v. Arizona*."<sup>22</sup> However, at least four members of the Court seem deeply troubled by the fact that the police are "draining the substance out of *Miranda*."<sup>23</sup>

*Seibert* recognizes the deterrence problem, but provides a dangerous solution. The new bad faith test shifts an impossible and inappropriate burden onto

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line rule making the warnings . . . conditions precedent to the admissibility of statements uttered by a suspect during the course of a custodial interrogation.").

15. The empirical evidence shows that *Miranda* has had a negligible impact on confession rates, *see infra* note 54, and that police officers are often trained to avoid *Miranda*, *see Weisselberg, supra* note 3, at 1123 ("[M]any police officers in California have been trained during the last decade that *Miranda*'s rules are merely nonconstitutional 'recommended' or 'suggested' guidelines . . .").

16. "[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straightjacket which will handicap sound efforts at reform, nor is it intended to have this effect." *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

17. *United States v. Calandra*, 414 U.S. 338 (1974).

18. *See New York v. Quarles*, 467 U.S. 649, 654 (1984) ("The prophylactic *Miranda* warnings . . . are 'not themselves rights protected by the Constitution . . .'" (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)).

19. *See Oregon v. Hass*, 420 U.S. 714 (1975) (providing that the *Harris* impeachment exception applies to post-invocation statements); *Harris v. New York*, 401 U.S. 222 (1971) (holding that a statement taken in violation of *Miranda* may be used to impeach).

20. *See United States v. Patane*, 124 S. Ct. 2620 (2004).

21. *See Chavez v. Martinez*, 538 U.S. 760, 764–75 (2003) (rejecting U.S.C. § 1983 action by suspect interrogated without warnings in emergency room immediately after being shot numerous times by the police).

22. *Missouri v. Seibert*, 124 S. Ct. 2601, 2616 (2004) (O'Connor, J., dissenting).

23. *Id.* at 2613.

the defendant, who must now prove that a particular police officer acted in bad faith. In practice, *Seibert* cannot deter the police because judges forced to apply a subjective bad faith *Miranda* test will make disparate and arbitrary admissibility decisions. In theory, a police officer's bad or good faith should not determine whether *Miranda* has been violated. Of course, *Miranda* inquiries have always involved the *post hoc* judicial scrutiny of relevant facts. But the burden has always been on the prosecutor, the focus has always been on objectively ascertainable facts, and the court's only concern has been the state of mind of the suspect, not the police officer. While Justice Kennedy paid lip service to the assumption that "Miranda's clarity is one of its strengths,"<sup>24</sup> he set the stage for judicial forays into the dense thicket of the human mind that are the antithesis of clearly defined rules.

A post-*Seibert* future, where defendants must convince judges that a particular police officer acted in bad faith, will be a nightmare. Although *Seibert* involved a question-first interrogation strategy, its new distinction between good and bad faith *Miranda* violations could have a broad and unwelcome reach. The problem with *Seibert* is not that the new rule will ignore some epidemic of inadvertent *Miranda* violations; these are presumably rare. The real danger is that opportunistic *Miranda* foes will successfully persuade judges to ignore *Miranda* violations whenever the police were acting in good faith or took curative measures.

*Seibert* creates the risk that future pretrial *Miranda* hearings will devolve into credibility battles focused on irrelevant and unanswerable questions inevitably won by the men and women in blue. This may have already begun. The Third Circuit recently applied *Seibert* to admit a defendant's statement where the court found that the *Miranda* violation was "unfortunate and unexplained . . . [and] a simple failure to administer the warnings rather than an intentional withholding that was part of a larger, nefarious plot."<sup>25</sup>

There is an alternative future. *Seibert* provides adequate *Miranda* protection without Justice Kennedy's bad faith test. When *United States v. Fellers*<sup>26</sup> was recently remanded from the Supreme Court to the Eighth Circuit, the appellate court applied the *Seibert* plurality's multi-factor test to conclude that "the officers' conduct in this case did not vitiate the effectiveness of the *Miranda* warnings . . . ."<sup>27</sup> *Fellers* demonstrates that courts can assess multiple custodial interrogations without delving into the subjective intent of the police officer. The Eighth Circuit used the *Seibert* plurality's objective standards to distinguish between "co-extensive interrogations" and situations where "subsequent *Miranda* warnings . . . present[] . . . [the suspect] with a new and distinct experience as well as a genuine choice whether to follow up on the earlier admission."<sup>28</sup>

The best option would be for *Seibert* to be read to bar all *Miranda* violations (committed in good or bad faith) that "deprive a defendant of knowledge

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24. *Id.* at 2616 (Kennedy, J., concurring).

25. *Reinert v. Larkins*, 379 F.3d 76, 91 (3d Cir. 2004).

26. 397 F.3d 1090 (8th Cir. 2005).

27. *Id.* at 1097.

28. Although the Eighth Circuit notes that its conclusion "comports with Justice Kennedy's concurrence in *Seibert*," subjective police bad faith is not a central component of *Feller's* *Miranda* analysis. *Id.* at 1098.

essential to his ability to understand the nature of his rights and the consequences of abandoning them.”<sup>29</sup> The plurality and dissenting opinions in *Seibert* indicate that eight members of the Court did not adopt Justice Kennedy’s new bad faith test,<sup>30</sup> and this resistance is already perceptible among the appellate courts.<sup>31</sup>

If *Seibert* did not include a bad faith test, the Court’s ban on unwarned pre-interrogation questioning could transform *Miranda* into a more effective deterrent. The best way to ensure that custodial confessions are free from coercion, include adequate *Miranda* warnings, and are preceded by a knowing and intelligent waiver of rights is for the *entire* interrogation to be videotaped. Proponents of new laws requiring that custodial interrogations be videotaped could use *Seibert* in two ways. First, *Seibert* implicitly supports the adoption of more effective enforcement mechanisms because the Supreme Court has finally acknowledged that *Miranda* alone is not an effective deterrent. More specifically, *Seibert* should bar police officers from engaging in preliminary (off-camera) interrogations and waiting until after they have obtained a statement to turn the camera on and provide *Miranda* warnings.

The time is ripe for *Seibert* to play a role in legislative and judicial efforts to mandate that all custodial interrogations be videotaped. Since February 2004, these laws have been introduced in nineteen states.<sup>32</sup> In August 2004, the Massachusetts Supreme Judicial Court held that defendants whose interrogations were not at least audiotaped are entitled to a jury instruction that jurors “should weigh evidence of the defendant’s alleged statement with great caution and care.”<sup>33</sup> *Seibert*, without its bad faith test, could help reduce police misconduct, improve interrogation practices, and enhance legal decisions.

## I. THE MISSOURI V. SEIBERT BACKGROUND: DICKERSON V. UNITED STATES

### A. *Miranda* Is a Constitutional Rule

By 2000, it was not easy for the *Dickerson* Court to hold onto *Miranda*. Although 18 U.S.C. § 3501 had sat dormant for more than thirty years, the law was always intended to supersede *Miranda*.<sup>34</sup> The federal statute was enacted two years after *Miranda* in an effort to eliminate the *Miranda* requirement that police officers provide pre-interrogation warnings and obtain a valid waiver prior to all custodial interrogations.<sup>35</sup> Under section 3501, judges assessing the voluntariness of

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29. *Seibert*, 124 S. Ct. at 2603 (citation omitted).

30. *Id.* at 2601, 2616 (Kennedy, J., concurring).

31. See *supra* notes 26–28 and accompanying text.

32. See *infra* notes 176–94.

33. Commonwealth v. DiGiambattista, 813 N.E.2d 516, 533–34 (Mass. 2004).

34. *Dickerson* v. United States, 530 U.S. 428, 436 (2000) (“[W]e agree . . . that Congress intended by its enactment to overrule *Miranda*.”).

35. 18 U.S.C. § 3501 (1968), held unconstitutional by *Dickerson* v. United States, 530 U.S. 428 (2000).

statements produced during custodial interrogations would return to the totality-of-the-circumstances standard.<sup>36</sup>

By the late 1990s, the timing of the resurrection of this legislative challenge was perfect. The Supreme Court had spent the intervening three decades disinheriting *Miranda* as the bastard child of the Fifth Amendment. Since 1966, the Court had narrowed the application of *Miranda*. Statements taken in violation of *Miranda* could be used pretrial, to obtain derivative physical evidence, in the grand jury, and at trial, to impeach the defendant or whenever the violation could be excused based on public safety concerns.<sup>37</sup>

Thirty years of *Miranda* doctrine has had two profound effects. In theory, each new case has pushed *Miranda* further from its constitutional source. In practice, each new *Miranda* exception has reduced *Miranda*'s capacity to deter police misconduct. To save *Miranda*, Chief Justice Rehnquist was forced to perform a tight-rope walk between the Court's previous position, that a violation of *Miranda* did not violate the Constitution, and its current view, that 18 U.S.C. § 3501 was unconstitutional.<sup>38</sup>

*Dickerson* required an awkward reconciliation between the Court's persistent characterization of *Miranda* as a mere "prophylactic" rule and *Miranda*'s core tenet: that custodial statements taken without adequate warnings and a valid waiver are presumptively compelled.<sup>39</sup> After decades of uncertainty, *Dickerson* clarified that Congress could not supersede *Miranda* because the Court had created a "constitutional rule."<sup>40</sup> *Dickerson* also held that *Miranda* was preferable to 18 U.S.C. § 3501 because the traditional totality-of-the-circumstances test did not adequately address "the coercion inherent in custodial interrogation [that] blurs the line between voluntary and involuntary statements."<sup>41</sup>

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36. *Id.*

37. *See supra* notes 19–23.

38. Yale Kamisar wrote:

Because the Supreme Court Justices of the 1970s and 1980s "themselves undermined the [*Miranda*] rule, in part by their eagerness to slice pieces off whenever possible, but worse by saying peculiar things like, 'these procedural safeguards were not themselves rights protected by the Constitution,'" the *Dickerson* case has been called "a devil of the Court's own doing."

*Miranda Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in Dickerson*, 33 ARIZ. ST. L.J. 387, 398 (2001) (quoting Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 70).

39. In fairness to Chief Justice Rehnquist, it was quite an accomplishment to get six members of the Court, with widely differing views regarding *Miranda*, to join his opinion. It is also hard to imagine that the Chief Justice could have held onto all six votes if he had written at length about the constitutional status of prophylactic rules in general or *Miranda* in particular.

40. *Dickerson*, 530 U.S. at 444 ("In sum, we conclude that *Miranda* announced a constitutional rule that Congress may not supersede legislatively.").

41. *Id.* at 435.

The *Dickerson* majority opinion was forcefully challenged by Justice Scalia in a vitriolic dissent.<sup>42</sup> Justice Scalia, joined by Justice Thomas, relied on no less of an authority than *Marbury v. Madison* to chastise the majority for ignoring the separation of powers doctrine and engaging in disingenuous dithering about *Miranda*'s relationship to the Fifth Amendment.<sup>43</sup> According to Justice Scalia, "any conclusion that a violation of the *Miranda* rules *necessarily* amounts to a violation of the privilege against compelled self-incrimination can claim no support in history, precedent, or common sense . . . . [and] the Court has (thankfully) long since abandoned the notion that failure to comply with *Miranda*'s rules is itself a violation of the Constitution."<sup>44</sup> The dissenters believed that the Court had refused to confront the stark choice posed by section 3501. In Justice Scalia's view the majority ignored its own doctrine (and "common sense") when it should have stood back and allowed Congress to do its job.<sup>45</sup>

#### ***B. Understanding Miranda's Survival***

How and why did *Miranda* survive? For the past few years, we have been preoccupied with the question of *how*. Chief Justice Rehnquist, anticipating the possibility that he might be criticized for tinkering with the balance of powers, devoted the bulk of his opinion to the question of "whether the *Miranda* Court announced a constitutional rule . . . ."<sup>46</sup> Post-*Dickerson* scholars have mined the decision for insight into the two-hundred-year-old turf battle between Congress and the Supreme Court,<sup>47</sup> and *Dickerson* has even been described as heralding the death of *stare decisis*.<sup>48</sup>

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42. *Id.* at 444–66 (Scalia, J., dissenting).

43. *Id.* at 444–45 (stating that *Marbury v. Madison* "held that an Act of Congress will not be enforced by the courts if what it prescribes violates the Constitution . . . [but] [o]ne will search today's opinion in vain, however, for a statement (surely simple enough to make) that . . . 18 U.S.C. § 3501 . . . violates the Constitution").

44. *Id.* at 450 (emphasis in original).

45. *See id.* at 445 (stating that the "Justices whose votes are needed to compose today's majority are on record as believing that a violation of *Miranda* is not a violation of the Constitution" (emphasis in original)). *See also id.* at 442 (Rehnquist, C.J.) ("The dissent argues that it is judicial overreaching for this Court to hold § 3501 unconstitutional unless we hold that the *Miranda* warnings are required by the Constitution . . . .").

46. *Id.* at 437 (Rehnquist, C.J.).

47. A quick review of the post-*Dickerson* commentary suggests overwhelming concern with the broad separation of powers questions. *See generally* George M. Dery III, *The "Illegitimate Exercise of Raw Judicial Power: The Supreme Court's Turf Battle in Dickerson v. United States*, 40 BRANDEIS L.J. 47 (2001); Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-But-Shallow*, 43 WM. & MARY L. REV. 1 (2001); Arthur H. Garrison, *Rehnquist v. Scalia—The Dickerson and Miranda Cases: A Debate on What Makes a Decision Constitutional*, 25 AM. J. TRIAL ADVOC. 91 (2001); Mitch Reid, *United States v. Dickerson: Uncovering Miranda's Once Hidden and Esoteric Constitutionality*, 38 Hous. L. REV. 1343 (2001).

48. *See* William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53 (2002).

Unfortunately, the separation of powers debate distracts from the more pressing, immediate, and practical questions that arise as courts evaluate police interrogations and make evidentiary rulings in countless criminal trials. This focus on how *Dickerson* rescued *Miranda* reveals nothing about why seven justices, with widely varying views on civil liberties, voted to preserve *Miranda*.

The key to *Dickerson* is contained in the last three paragraphs of the majority opinion. As Chief Justice Rehnquist shifts away from his discussion of *Miranda*'s constitutional legitimacy, it becomes clear that we are not bound to *Miranda* because it is deeply rooted in the Fifth Amendment. *Miranda* simply makes life easier. According to the *Dickerson* Court, "experience suggests that the totality-of-the-circumstances test which § 3501 seeks to revive is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner."<sup>49</sup> Chief Justice Rehnquist also noted that over the past forty years, "our subsequent cases have reduced the impact of *Miranda* on legitimate law enforcement."<sup>50</sup> *Dickerson* suggests that ever since *Miranda*, police officers who decide that they must preserve a suspect's statement for unrestricted prosecutorial use at trial know exactly what they need to do. In fact, everyone knows the drill. This is because *Miranda* is not only a rule of law; it has become, in the words of the Chief Justice, a part of our "national culture."<sup>51</sup>

In *Dickerson*, the values of simplicity and familiarity transcended political ideology. Those who voted to uphold *Miranda* did not need to agree with Justice Warren that "the quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law."<sup>52</sup> They simply needed to prefer to continue to operate under *Miranda*'s fairly simple rules, rather than to return to a system without warnings or standards.<sup>53</sup>

Ironically, some members of the *Dickerson* majority may have favored *Miranda* because pre-interrogation warnings do not actually impede the government from obtaining custodial confessions. Empirical evidence suggests

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49. *Dickerson*, 530 U.S. at 444. In *Dickerson*, the court "appreciated the difficulty of judicial enquiry *post hoc* into the circumstances of a police interrogation . . . and recognized that . . . the 'traditional totality-of-the-circumstances' test posed an 'unacceptably great' risk that involuntary custodial interrogations would escape detection." *Missouri v. Seibert*, 124 S. Ct. 2601, 2607–08 (2004) (emphasis in original) (citations omitted).

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

51. The *Dickerson* Court explicitly recognized the pervasive nature of *Miranda* noting that *Miranda* has become firmly "embedded in routine police practice to the point where the warnings have become part of our national culture." *Id.* at 430. See also James T. Pisciotta, Comment, *Miranda Survives to be Heard: Dickerson v. United States*, 75 ST. JOHN'S L. REV. 673, 673 (2001) ("Very few Supreme Court decisions find their way out of the hallowed halls of academia into the stream of American conscience.").

52. *Miranda v. Arizona*, 384 U.S. 436, 480 (1966) (quoting *Walter v. Schaefer, Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 26 (1956)).

53. *Dickerson*, 530 U.S. at 444 (noting that although § 3501 contains a non-exclusive list of relevant factors, this totality-of-the-circumstances test is far more difficult to apply with consistency than *Miranda*).

that providing *Miranda* warnings does not deter suspects from confessing.<sup>54</sup> In his explicit nod to the conservative right, Chief Justice Rehnquist noted that *Miranda* actually limits a defendant's ability to raise constitutional objections to the admission of his custodial interrogation.<sup>55</sup> This is because "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."<sup>56</sup>

Speculations about individual Justices' motivations and predilections aside, *Dickerson* appeared to promise that the "bright line rules" of *Miranda*, which are simple for the police to operate and for judges to apply with consistency, would continue to govern custodial interrogations for the foreseeable future.<sup>57</sup> This promise was broken in June 2004.

## II. TRACING THE ORIGINS OF THE NEW POLICE BAD FAITH *MIRANDA* TEST

### A. *What Is Question-First Interrogation?*

On its facts, *Seibert* looks like an unlikely *Miranda* monkey wrench. The case could have been decided on fairly narrow grounds. *Seibert* involved a *Miranda* challenge to the question-first interrogation strategy used by Missouri State Police Officer Richard Hanrahan to interrogate Patrice Seibert, a suspect in a murder investigation. At issue was whether, under *Miranda*, Officer Hanrahan could: withhold warnings at the outset of a custodial interrogation; obtain a confession; administer warnings; obtain a waiver; and then persuade Ms. Seibert to repeat her earlier confession.<sup>58</sup> At trial, the suspect's first statement was suppressed.<sup>59</sup> Thus, the defense focused on excluding only Ms. Seibert's second post-warnings statement.<sup>60</sup>

The defense objected to Ms. Seibert's statement on two independent legal grounds. The first argument was that the statement should be excluded as the poisoned "fruit" of her first unwarned confession.<sup>61</sup> The second argument was that "the police, specifically Hanrahan, purposefully violated her constitutional rights

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54. See George C. Thomas III, *Plain Talk About the Miranda Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. REV. 933, 951–56 (1996) (noting that confessions occurred at roughly the same rate before and after *Miranda*); Welsh S. White, *Miranda's Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1219–20 (2001) (noting that a survey of state and federal decisions reveal that police compliance with *Miranda* makes it very hard for a defendant to establish a due process violation).

55. *Dickerson*, 530 U.S. at 444.

56. *Id.* (citations omitted).

57. *Id.*

58. *Missouri v. Seibert*, 124 S. Ct. 2601, 2605–07 (2004).

59. *Id.* at 2606.

60. *Id.* at 2606–07.

61. *Id.* at 2610 n.4.

to due process and her privilege against self-incrimination by not following the procedures outlined in *Miranda v. Arizona*.<sup>62</sup>

### ***B. The Missouri Trial and Appellate Courts***

The trial court rejected both arguments and admitted the defendant's statement.<sup>63</sup> This decision was affirmed by the appellate court.<sup>64</sup> The decision by the Missouri appellate court is notable because the court found that Officer Hanrahan's bad faith was legally irrelevant. According to that court, "we fail to see why an *intentional* violation of the *Miranda* warnings is any more reprehensible than an *inadvertent* one. . . . [And] [d]efendant fails to explain why a person is, in effect, harmed to a greater extent when there is an *intentional* violation."<sup>65</sup> Unfortunately, the Missouri Supreme Court reached a very different conclusion.

### ***C. The Missouri Supreme Court***

#### ***1. The Missouri Supreme Court Misunderstands the Facts***

The Missouri Supreme Court was understandably frustrated that police officers, like Officer Hanrahan, deliberately ignore *Miranda*. According to the court, "the goals of *Miranda* are to deter improper police conduct and to ensure trustworthy evidence."<sup>66</sup> The state supreme court, unlike the state appellate court, believed that the subjective bad faith of the interrogating officer was legally significant. According to the court, "[a]n *intentional* violation of *Miranda* shifts the focus from the goal of gaining trustworthy evidence—though that is still a major concern—to the goal of deterring improper police conduct."<sup>67</sup>

In fact, the Missouri Supreme Court appeared preoccupied with Officer Hanrahan's deliberate bad acts. According to that court, the officer "purposefully withheld a *Miranda* warning."<sup>68</sup> He "made a conscious decision not to advise Seibert of her rights."<sup>69</sup> He used "a tactic to elicit a confession."<sup>70</sup> His interrogation was an "intentional *Miranda* violation"<sup>71</sup> that formed part of "skillfully applied interrogation techniques."<sup>72</sup> These facts, and the "proximity in time and place of the subsequent confession," led the court to conclude that Officer Hanrahan was engaged in a deliberate "end run" around *Miranda* designed to "weaken Seibert's ability to knowingly and voluntarily exercise her constitutional rights."<sup>73</sup>

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62. *State v. Seibert*, No. 23729, 2002 WL 114804, at \*4 (Mo. App. Jan. 30, 2002), *aff'd* by 124 S. Ct. 2601 (2004).

63. *Id.* at \*1.

64. *Id.* at \*9.

65. *Id.* at \*6.

66. *State v. Seibert*, 93 S.W.3d 700, 703 (Mo. 2002).

67. *Id.* at 704.

68. *Id.*

69. *Id.*

70. *Id.* at 705.

71. *Id.*

72. *Id.* at 704.

73. *Id.* at 704–05.

The Missouri Supreme Court endowed the subjective bad faith of Officer Hanrahan with legal significance by placing these facts at the core of its analysis. It is easy to trace the line from the Missouri Supreme Court's statement that judges applying *Miranda* must "ascertain whether the *purpose* of the violation was to 'undermine the suspect's ability to exercise his free will'"<sup>74</sup> to Justice Kennedy's conclusion that statements obtained in violation of *Miranda* must only be excluded if the "interrogation technique was used in a calculated way to undermine the *Miranda* warning."<sup>75</sup>

## 2. The Missouri Supreme Court Misunderstands the Law

The Missouri Supreme Court's misplaced emphasis on police bad faith led the court to misread relevant precedent. These problems are most apparent where the court distinguishes *Seibert* from the only existing *Miranda* case addressing the effect of a pre-warnings interrogation, *Oregon v. Elstad*.<sup>76</sup>

In *Oregon v. Elstad*, which is discussed in more detail below, the Supreme Court rejected the defendant's argument that "an initial failure of law enforcement officers to administer the warnings required by *Miranda v. Arizona*, . . . without more 'taints' subsequent admissions made after a suspect has been fully advised of and has waived his *Miranda* rights."<sup>77</sup> According to the *Elstad* Court, "the dictates of *Miranda* and the goals of the Fifth Amendment proscription against the use of compelled testimony are fully satisfied . . . by barring the use of the [initial] unwarmed statement. . . . [And] [n]o further purpose is served by imputing 'taint' to subsequent statements . . . ."<sup>78</sup>

The Missouri Supreme Court made two mistakes in its *Elstad* analysis. First, the court assumed that *Elstad* was controlling and had to be distinguished.<sup>79</sup> This assumption conflates the defendant's two independent legal arguments. Although *Elstad* seems to bar any reliance on the fruit of the poisonous tree doctrine to exclude statements taken in violation of *Miranda*, the case does not specifically preclude the defendant's alternative argument. The court's second mistake served the court's interest in emphasizing subjective police bad faith. This was the assumption that *Elstad* was distinguishable on its facts and law because "[t]here was no intentional violation of *Miranda* in *Elstad*".<sup>80</sup>

The Missouri Supreme Court distinguished *Elstad* on its facts, noting that the well-intentioned acts of Officer Burke, at issue in *Elstad*, bore no resemblance to Officer Hanrahan's deliberate and improper conduct.<sup>81</sup> The court distinguished *Elstad* on its law by simply reframing the legal question at issue in *Elstad*.

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74. *Id.* (quoting *Oregon v. Elstad*, 470 U.S. 298, 309 (1985)) (emphasis added).

75. *Missouri v. Seibert*, 124 S. Ct. 2601, 2616 (2004) (Kennedy, J., concurring).

76. *Elstad*, 470 U.S. at 298.

77. *Id.* at 300.

78. *Id.* at 318.

79. *Seibert*, 93 S.W.3d at 706 (noting that "*Elstad* also is distinguishable in that there was no evidence, as in the instant case, that the breach of *Miranda* was part of a premeditated tactic to elicit a confession").

80. *Id.* at 704.

81. *Id.*

According to the state court, in *Elstad*, the Supreme Court resolved the question of “whether a law enforcement officer’s *intentional* violation of *Miranda v. Arizona*, in obtaining a statement requires suppression of a second statement, secured after a *Miranda* warning was given.”<sup>82</sup> This statement is simply not true.

The Missouri Supreme Court mischaracterized *Elstad* as a decision focused on subjective police officer intent. The state court bolstered this mistaken interpretation by misreading critical language from *Elstad*.

Justice O’Connor, writing for the *Elstad* Court, stated that when judges properly operate *Miranda*, “the admissibility of any . . . statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.”<sup>83</sup> According to the Missouri Supreme Court, this sentence demonstrated that *Elstad*’s statement was admissible because the Supreme Court found that “there was no *intentional* violation of *Miranda*.<sup>84</sup>

As former President Clinton might be quick to note, that all depends on the meaning of “it.” The Missouri Supreme Court assumed that the “it” referenced by the *Elstad* Court was the *police violation of Miranda* rights, rather than the *suspect’s waiver*.<sup>85</sup> This cannot be correct. Because Justice O’Connor followed the “it” with “knowingly and voluntarily made,” she must have been referring to the suspect’s waiver. This is the only interpretation consistent with the Supreme Court’s well-established requirement that *Miranda* waivers, like all waivers of constitutional rights, must be knowing and voluntary.<sup>86</sup> It is also the only interpretation consistent with the Court’s repeated rejection of tests based on subjective police officer intent.<sup>87</sup>

### III. THE SUPREME COURT DECIDES *MISSOURI V. SEIBERT*

#### *A. The Seibert Plurality Holds That Miranda Bars Question—First Interrogations*

Justice Souter wrote for a *Seibert* plurality that included Justices Stevens, Ginsburg, and Breyer. Justice Souter began by acknowledging that the *Seibert* defense had raised two independent legal arguments.<sup>88</sup> The plurality addressed

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82. *Id.* at 701 (citation omitted) (emphasis added).

83. *Id.* at 704.

84. *Id.* (emphasis added).

85. *Id.* at 704–05.

86. See, e.g., *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (to be effective, waiver of *Miranda* rights must be the “product of a free and deliberate choice rather than intimidation, coercion, or deception”); *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (*Zerbst* applies to waiver of *Miranda*). See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (waiver of any constitutional right requires “an intentional relinquishment or abandonment of a known right or privilege”).

87. Justice O’Connor’s *Seibert* dissent describes this history. See *Missouri v. Seibert*, 124 S. Ct. 2601, 2618 (2004) (O’Connor, J., dissenting) (citing, as two examples of this well-established rule, *New York v. Quarles*, 467 U.S. 649 (1984) and *Whren v. United States*, 517 U.S. 806 (1996)). See *infra* section III(C) (describing how the bad faith *Miranda* test of *Seibert* is contrary to Supreme Court precedent).

88. *Seibert*, 124 S. Ct. at 2607.

both arguments, rejected the first, and found the second argument persuasive.<sup>89</sup> According to Justice Souter, Officer Hanrahan's question-first interrogation violated Ms. Seibert's *Miranda* rights.<sup>90</sup>

The plurality reached this conclusion by viewing the entire interrogation as a single event. According to Justice Souter, *Miranda* warnings "inserted in the midst of coordinated and continuing interrogation . . . are likely to mislead and 'deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'"<sup>91</sup> The plurality held that a police officer who engages in unwarned preliminary interrogation "render[s] [subsequent] *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed."<sup>92</sup> This led the plurality to conclude that "hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent."<sup>93</sup> Thus, according to Justice Souter, the defendant's post-warnings statement must be excluded under *Miranda* because this interrogation "realistically [must be] seen as part of a single, unwarned sequence of questioning."<sup>94</sup>

The *Seibert* plurality did not hold that question-first interrogations inevitably violated *Miranda*. Instead, it instructed that determinations of admissibility should be based on the following criteria:

[T]he completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of the police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.<sup>95</sup>

It is significant that all of the criteria for determining whether *Miranda* has been violated are objectively ascertainable and none relate to the subjective bad faith of the individual police officer. Although the plurality's own test seems unproblematic, support for the Court's new bad faith *Miranda* test lurks within Justice Souter's analysis.

#### ***B. The Seibert Plurality Discusses Subjective Police Bad Faith***

Justice Souter, like the Missouri Supreme Court, was clearly frustrated by police tactics "draining the substance out of *Miranda*"<sup>96</sup> by "get[ting] a confession the suspect would not have made if he understood his rights."<sup>97</sup> Although the *Seibert* plurality did not openly embrace a subjective bad faith test for *Miranda*

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89. *Id.* at 2611–13.

90. *Id.* at 2613.

91. *Id.* at 2611 (citation omitted).

92. *Id.* at 2610.

93. *Id.* at 2611.

94. *Id.* at 2610 n.4.

95. *Id.* at 2612.

96. *Id.* at 2613.

97. *Id.* at 2611.

violations, Justice Souter's effort to distinguish *Oregon v. Elstad*<sup>98</sup> repeated many of the mistakes originally made by the Missouri Supreme Court.

The plurality's selective reiteration of *Elstad*'s facts replicates the state supreme court's emphasis on the good faith nature of Officer Burke's *Miranda* violation.<sup>99</sup> According to Justice Souter, “[i]n *Elstad*, the police went to the young suspect's house to take him into custody on a charge of burglary. Before the arrest, one officer spoke with the suspect's mother, while the other one joined the suspect in a 'brief stop in the living room.'”<sup>100</sup> In Justice Souter's view, the *Elstad* Court was persuaded that *Miranda* did not bar the suspect's subsequent statement because “the officer's initial failure to warn was an 'oversight' that 'may have been the result of confusion . . . or may simply have reflected reluctance to initiate an alarming police procedure before an officer had spoken with respondent's mother.'”<sup>101</sup> Thus, the *Seibert* plurality concluded that “it is fair to read *Elstad* as treating the living room conversation [the initial unwarned interrogation] as a *good-faith Miranda* mistake . . . .”<sup>102</sup> *Elstad* can be distinguished from *Seibert*, according to Justice Souter, because *Elstad*'s facts were “[a]t the opposite extreme . . . [o]f the facts here, which by any objective measure reveal a police strategy adopted to undermine the *Miranda* warnings.”<sup>103</sup>

Justice Souter's focus on police bad faith is central to his *Elstad* analysis. This discussion provides implicit support for the relevance of subjective police bad faith to the application of *Miranda*. There are additional indications that Justice Souter may consider subjective police bad faith to be a valid *Miranda* concern. In his dissent in *United States v. Patane*<sup>104</sup> (decided the same day), Justice Souter emphasized the fact that the *Miranda* violation in *Patane* was committed in good faith just like “the bumbling mistake the police committed in *Oregon v. Elstad*.”<sup>105</sup> However, the *Seibert* plurality did not adopt the bad faith test, and Justice Souter acknowledged in a footnote that because police officers rarely admit to bad faith, *Miranda* should focus “on facts apart from [police officer] intent.”<sup>106</sup>

### ***C. Justice Kennedy's Bad Faith Miranda Test***

Justice Kennedy's decisive fifth vote created the new bad faith *Miranda* test. This test will be applied whenever future *Miranda* violations occur under

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98. *Oregon v. Elstad*, 470 U.S. 298 (1985).

99. “The contrast between *Elstad* and this case reveals a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object . . . .” *Seibert*, 124 S. Ct. at 2612.

100. *Id.* at 2611 (quoting *Elstad*, 470 U.S. at 315).

101. *Id.* (quoting *Elstad*, 470 U.S. at 315–16).

102. *Id.* at 2612 (emphasis added).

103. *Id.*

104. *United States v. Patane*, 124 S. Ct. 2620 (2004).

105. *Id.* at 2631 n.1.

106. *Seibert*, 124 S. Ct. at 2613 n.6.

similar circumstances.<sup>107</sup> The new test is necessary, according to Justice Kennedy, because the plurality's "objective inquiry" is simply too broad.<sup>108</sup>

According to Justice Kennedy, the plurality's test would mistakenly exclude statements taken in violation of *Miranda* "in the case of both intentional and unintentional two-stage interrogations."<sup>109</sup> Justice Kennedy restricts the application of *Miranda*, under similar circumstances, to violations committed in bad faith. Justice Kennedy's "narrower test" excludes statements that result from *Miranda* violations "only in the infrequent case, such as we have here, in which the two-step interrogation technique was used in a *calculated* way to undermine the *Miranda* warning."<sup>110</sup>

Under Justice Kennedy's new test, even when a defendant successfully persuades a court that the interrogating officer was acting with subjective bad faith, his statement may still be admitted. This is because the Court's new bad faith test contains a large loophole. Statements resulting from bad faith *Miranda* violations are admissible whenever the police officers establish that they used "curative measures."<sup>111</sup> These measures, according to Justice Kennedy, "should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and the *Miranda* waiver."<sup>112</sup> Justice Kennedy provided two examples of "curative measures." The first is when there has been "a substantial break in time and circumstances between the pre-warning statement and the *Miranda* warning."<sup>113</sup> The second is when the police officer has provided an "additional warning that explains the likely inadmissibility of the prewarning custodial statement."<sup>114</sup> It is worth noting that these "curative measures," unlike the initial determination of bad faith, are judged using objective standards.

Although Justice Kennedy mentioned *Miranda*'s "central concerns" three separate times, he failed to provide any information about how these concerns should be defined or protected. Instead, Justice Kennedy, like the Missouri Supreme Court and the *Seibert* plurality, focused most of his attention on *Oregon v. Elstad*. In Justice Kennedy's view, "*Elstad* was correct in its reasoning and its result," which were premised on the Court's finding that "[a]n officer may not realize that a suspect is in custody and warnings are required."<sup>115</sup> Justice Kennedy is simply the most powerful voice among the chorus of judges eager to conclude that *Elstad* was based on subjective police officer intent.

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107. *Id.* at 2614–16 (Kennedy, J., concurring).

108. *Id.* at 2616.

109. *Id.*

110. *Id.* (emphasis added).

111. *Id.* at 2615.

112. *Id.* at 2616.

113. *Id.*

114. *Id.*

115. *Id.* at 2615 (Rehnquist, C.J.).

#### IV. WHY THE *SEIBERT* POLICE BAD FAITH *MIRANDA* TEST IS A TERRIBLE IDEA

##### A. Oregon v. Elstad Does Not Support a Police Bad Faith *Miranda* Test

The Missouri Supreme Court stated that “[t]here was no intentional violation of *Miranda* in *Elstad*.<sup>116</sup> Justice Souter asserted that the *Miranda* violation at issue in *Elstad* was an “oversight” and the “result of confusion.”<sup>117</sup> Justice Kennedy focused on the fact that “it was not clear whether the suspect [Mr. Elstad] was in custody at the time.”<sup>118</sup> A brief return to *Oregon v. Elstad* reveals that all of these statements are misleading and none are entirely accurate.

###### 1. The Real Facts of Oregon v. Elstad

In *Oregon v. Elstad*, the Supreme Court did not find that Officer Burke’s violation of Mr. Elstad’s *Miranda* rights was less serious because it was inadvertent. At the time of the trial, there was no doubt that Officer Burke had violated Mr. Elstad’s *Miranda* rights. Before the pretrial proceedings had even begun, the prosecutor decided that Officer Burke’s *Miranda* violation had been so obvious that the state could not seek admission of the defendant’s initial statement.<sup>119</sup> These facts were significant to the Supreme Court, which recognized that Officer Burke had clearly violated Mr. Elstad’s *Miranda* rights. In her opinion for the *Elstad* majority, Justice O’Connor specifically noted that “[t]he State has conceded the issue of custody and thus we must assume that Burke breached *Miranda* procedures.”<sup>120</sup>

If this is true, where did the Missouri Supreme Court, Justice Souter, and Justice Kennedy find support for their arguments that the *Elstad* decision turned on the “fact” that Officer Burke’s *Miranda* violation was inadvertent? They simply took phrases from *Elstad* out of context.

Justice O’Connor did speculate about the nature of the *Miranda* violation, noting that Officer Burke might have breached Mr. Elstad’s *Miranda* rights as “the result of confusion,”<sup>121</sup> or because of his “reluctance to initiate an alarming police procedure before [his partner] had spoken with [the] respondent’s mother.”<sup>122</sup> But this speculations had no bearing on her conclusion that *Miranda* was violated. This is demonstrated by two facts. First, this discussion appears only *after* the *Elstad* Court found that the *Miranda* violation had been conclusively established.<sup>123</sup> Second, Justice O’Connor’s speculation about the circumstances of the interrogation were used to support a very different legal conclusion: that Officer Burke did not actually coerce a confession from Mr. Elstad. This is confirmed in

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116. *State v. Seibert*, 93 S.W.3d 700, 704 (Mo. 2002).

117. *Seibert*, 124 S. Ct. at 2611.

118. *Id.* at 2614 (Kennedy, J., concurring).

119. Brief for the United States as Amici Curiae Supporting Petitioner Rex E. Lee et al. at 3, *Oregon v. Elstad*, 470 U.S. 298 (1985) (No. 83-773).

120. *Elstad*, 470 U.S. at 315.

121. *Id.*

122. *Id.* at 315–16.

123. *Id.*

the immediately subsequent sentence in which Justice O'Connor stated that a "fruits" exclusion was unavailable because "[w]hatever the reason for Burke's oversight, the incident had none of the earmarks of coercion."<sup>124</sup>

## 2. The Real Law of *Oregon v. Elstad*

*Elstad* contains a single sentence that lies at the heart of the current confusion regarding the significance of Officer Burke's subjective intent. Justice O'Connor wrote:

It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by an actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.<sup>125</sup>

The Missouri Supreme Court,<sup>126</sup> Justice Souter,<sup>127</sup> and Justice Kennedy<sup>128</sup> all mistakenly relied on this sentence, or fragments of this sentence taken out of context,<sup>129</sup> to support their conclusion that *Elstad* was based on a distinction between police good and bad faith.

The meaning of this sentence should be clear. There is abundant evidence in the text of *Elstad* that demonstrates that this case simply did not turn on a distinction between good and bad faith *Miranda* violations.<sup>130</sup> Instead, the *Elstad* Court was defining the difference between a violation of *Miranda*'s rules and constitutional violations such as "actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will,"<sup>131</sup> the "coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will,"<sup>132</sup> or a violation of the Fourth Amendment.<sup>133</sup> *Miranda* violations

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124. *Id.* at 316.

125. *Id.* at 309.

126. *State v. Seibert*, 93 S.W.3d 700, 704-05 (Mo. 2002) (quoting *Elstad*, 470 U.S. at 309).

127. *Missouri v. Seibert*, 124 S. Ct. 2601, 2610 n.4 (2004).

128. *Id.* at 2615 (Kennedy, J., Concurring).

129. The Missouri Supreme Court quotes the following sentence fragment: "*Elstad* dealt with what the court described as a 'simple failure to administer the warnings.'" *Seibert*, 93 S.W.3d at 703-04. The state court relied on this quote to support its immediately subsequent assertion that "[t]here was no intentional violation of *Miranda* in *Elstad*." *Id.* at 704. The state court's selective quotation is flagrantly misleading. Justice O'Connor is abundantly clear that by "simple" she does not mean unintentional. In fact, the omitted portion of the sentence defines a "simple" *Miranda* violation as a violation "unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will . . ." *Elstad*, 470 U.S. at 309.

130. This interpretation is further clarified by the *Elstad* Court's statement that "[i]f errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself." *Elstad*, 470 U.S. at 309.

131. *Id.*

132. *Id.* at 312.

alone do not violate the Fifth Amendment. Thus, the failure to provide warnings was “simple,” not because the officer was acting in good faith, but because the *Miranda* violation itself did not violate the Fifth Amendment.

Throughout *Elstad*, the Court contrasted violations of the Fifth and Fourth Amendments, “which have traditionally mandated a broad application of the ‘fruits’ doctrine,”<sup>134</sup> with *Miranda* violations where “the failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced.”<sup>135</sup> Justice O’Connor was clearly concerned that that if the Court were to find that *Elstad*’s statement was tainted, it would improperly assume that a *Miranda* violation was a violation of the Fifth Amendment.<sup>136</sup> It is interesting to note that the federal and state courts that have examined this same sentence from *Elstad* appear to have no difficulty understanding Justice O’Connor’s intent.<sup>137</sup>

#### ***B. Oregon v. Elstad Specifically Rejects Any Consideration of Subjective Police Bad Faith***

The Missouri Supreme Court, Justice Souter, and Justice Kennedy ignored statements from *Oregon v. Elstad* that explicitly refute their current distortion of its facts and law. Justice Souter stated (incorrectly) that “the *Elstad* Court expressed no explicit conclusion about either officer’s state of mind.”<sup>138</sup> Yet he reached the logically inconsistent conclusion that “it is fair to read *Elstad* as treating the living room conversation as a good-faith *Miranda* mistake.”<sup>139</sup> *Elstad* itself demonstrates that this treatment is neither “fair” nor accurate.

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133. *Id.* at 306 (“[A] procedural *Miranda* violation differs in significant respects from violations of the Fourth Amendment . . . .”).

134. *Id.*

135. *Id.* at 310. Justice O’Connor relied on this distinction when she dismissed the litany of cases cited in Justice Brennan’s dissent because they involve either “overtly or inherently coercive methods which raise serious Fifth Amendment and due process concerns” or situations where suspects’ “invocation of their rights to remain silent and to have counsel present were flatly ignored while police subjected them to continued interrogation.” *Id.* at 312 n.3.

136. *Id.* at 311 (“[E]ndowing the psychological effects of *voluntary* unwarned admissions with constitutional implications would, practically speaking, disable the police from obtaining the suspect’s informed cooperation even when the official coercion proscribed by the Fifth Amendment played no part in either his warned or unwarned confessions.” (emphasis in original)).

137. This misreading seems especially egregious when contrasted to the references to this same *Elstad* language contained in other cases. To date, thirty-three federal and state cases quote this sentence from *Elstad*. The vast majority of these courts interpret Justice O’Connor’s words to mean that, absent a due process violation, “the ‘tainted fruit doctrine’ [cannot be used] to suppress a post-*Miranda* statement, despite an earlier *Miranda* violation.” See, e.g., *State v. Yang*, 608 N.W.2d 703, 709 (Wis. 2000), *overruled* by *State v. Knapp*, 666 N.W.2d 881 (Wis. 2003).

138. *Missouri v. Seibert*, 124 S. Ct. 2601, 2612 (2004).

139. *Id.*

In *Elstad*, Justice O'Connor emphasized that “[t]he Court today in no way retreats from the bright-line rule of *Miranda*.<sup>140</sup> In fact, far from “express[ing] no conclusion about either officer’s state of mind,”<sup>141</sup> the *Elstad* Court specifically disavowed any concern with police officer good faith. As Justice O’Connor clearly stated, “[w]e do not imply that good faith excuses a failure to administer *Miranda* warnings.”<sup>142</sup>

### C. *Dickerson v. United States and the First and Ninth Circuits Interpret Oregon v. Elstad*

The Supreme Court, in *Dickerson v. United States*,<sup>143</sup> and the First and Ninth Circuits have not read *Elstad* as a decision that turns on a finding of police bad faith. In *Dickerson*, the Supreme Court provided the following interpretation of *Oregon v. Elstad*. “Our decision in that case [*Elstad*]—refusing to apply the traditional ‘fruits’ doctrine developed in Fourth Amendment cases . . . simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment.”<sup>144</sup> This interpretation of *Elstad*, which does not mention Officer Burke’s subjective intent, is consistent with a reasonable reading of *Elstad* and the understanding of the federal appellate courts.

In two recent cases, federal appellate courts have refused to read *Elstad* as establishing a distinction between good and bad faith *Miranda* violations. In *United States v. Esquelin*,<sup>145</sup> the First Circuit stated that “[i]f we read *Elstad* as a coherent whole, it follows that ‘deliberately coercive or improper tactics’ are not two distinct categories, as *Esquelin* would have it, but simply alternative descriptions of the type of police conduct that may render a suspect’s initial, unwarned statement involuntary.”<sup>146</sup> In *United States v. Orso*,<sup>147</sup> the Ninth Circuit failed to consider a distinction between police good and bad faith, noting that the court was “persuaded that the [*Elstad*] Court simply wished to point out that it is often improper police tactics which render a confession involuntary.”<sup>148</sup> These cases provide a reasonable, appropriate, and consistent understanding of *Elstad*.

## V. WHY THE NEW POLICE BAD FAITH *MIRANDA* TEST IS A TERRIBLE IDEA

### A. *Justice O’Connor Rejects the New Test*

Justice O’Connor’s dissent in *Seibert* was joined by Justices Rehnquist, Scalia, and Thomas. These justices disputed the plurality’s conclusion that Ms. Seibert’s confession was inadmissible under *Miranda*. According to the dissenters,

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140. *Elstad*, 470 U.S. at 317.

141. *Seibert*, 124 S. Ct. at 2612.

142. *Elstad*, 470 U.S. at 318.

143. 530 U.S. 428 (2000).

144. *Id.* at 441.

145. 208 F.3d 315 (1st Cir. 2000).

146. *Id.* at 320.

147. 266 F.3d 1030 (9th Cir. 2001).

148. *Id.* at 1036.

the plurality's test focused inappropriately on a "psychological judgment regarding whether the suspect has been informed effectively of her right to remain silent."<sup>149</sup> The dissenters argued that adherence to *Elstad* required that the Court "refuse to endow these psychological effects with constitutional implications."<sup>150</sup>

Justice O'Connor devoted the bulk of her dissent, not to the plurality opinion, but to Justice Kennedy's controlling concurrence.<sup>151</sup> She began by rather politely noting that "the approach espoused by Justice Kennedy [was] ill advised."<sup>152</sup> However, the gloves came off quickly, and she followed with a forceful rejection of Justice Kennedy's new bad faith *Miranda* test. According to Justice O'Connor, "[b]ecause the isolated fact of Officer Hanrahan's intent could not have had any bearing on Seibert's 'capacity to comprehend and knowingly relinquish' her right to remain silent, . . . it could not by itself affect the voluntariness of her confession."<sup>153</sup>

Justice O'Connor found no doctrinal or practical support for the Court's new police bad faith test.<sup>154</sup> In her view, the test is contradicted by the text of the Fifth Amendment because the subjective intent of the police officer has no bearing on the "[f]reedom from compulsion [that] lies at the heart of the Fifth Amendment, and requires us to assess whether a suspect's decision to speak truly was voluntary."<sup>155</sup> The police bad faith test is also at odds with Supreme Court doctrine, which, according to Justice O'Connor, has consistently "reject[ed] an intent-based test in several criminal procedure contexts."<sup>156</sup> To support her view of the doctrine, Justice O'Connor referenced *New York v. Quarles*, and noted that "one of the factors that led us to reject an inquiry into the subjective intent of the police officer in crafting a test for the 'public safety' exception to *Miranda* was that officers' motives will be 'largely unverifiable'"<sup>157</sup> and *Whren v. United States*, which "made clear that 'the evidentiary difficulty of establishing subjective intent' was one of the reasons (albeit not the principal one) for refusing to consider intent in Fourth Amendment challenges generally."<sup>158</sup> Finally, Justice O'Connor was quite clear that the Court should oppose any test focused on subjective police officer intent because it would involve an "an expedition into the minds of police officers [that] would produce a grave and fruitless misallocation of judicial resources."<sup>159</sup>

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149. *Missouri v. Seibert*, 124 S. Ct. 2601, 2617 (2004) (O'Connor, J., dissenting).

150. *Id.* at 2619.

151. Justice O'Connor ignores the plurality's *Elstad* discussion and assumes that, unlike Justice Kennedy, the plurality simply "reject[ed] an intent-based test." *Id.* at 2618.

152. *Id.*

153. *Id.* (citations omitted).

154. According to Justice O'Connor, "recognizing an exception to *Elstad* for intentional violations would require focusing constitutional analysis on a police officer's subjective intent, an unattractive proposition that we all but uniformly avoid." *Id.*

155. *Id.* at 2617.

156. *Id.* at 2618 (citing *New York v. Quarles*, 467 U.S. 649 (1984), and *Whren v. United States*, 517 U.S. 806 (1996)).

157. *Id.* (citing *New York v. Quarles*, 468 U.S. 649, 656 (1984)).

158. *Id.* (citing *Whren v. United States*, 517 U.S. 806, 813–14 (1996)).

159. *Id.* (citations omitted).

**B. The Police Bad Faith Miranda Test Is Based on False Assumptions**

A police bad faith test for *Miranda* violations defies logic and human experience. It is based on the assumption that only deliberate human acts can be deterred. This ignores the fact that sanctioning both intentional and unintentional violations should lead to better training and compliance. The inevitable and unintended cost of *Seibert*'s focus on good/bad faith is that statements obtained under essentially identical factual circumstances will be admitted or excluded based on speculative, arbitrary, or irrelevant criteria.

The new *Seibert* test also presupposes a qualitative difference between interrogation by a bad cop, who deliberately withholds warnings, and a careless cop, who mistakenly believes that *Miranda* has been satisfied or is unnecessary. This cannot be reconciled with logic or human experience. Although the Missouri appellate court initially recognized that Officer Hanrahan's bad faith was legally irrelevant, noting that "we fail to see why an *intentional* violation of the *Miranda* warnings is any more reprehensible than an *inadvertent* one,"<sup>160</sup> this sensible conclusion was quickly abandoned and would not reappear until Justice O'Connor wrote her dissent. Although Justice O'Connor's language may be more formal, her meaning is equally plain: "[a] suspect who experienced the exact same interrogation as *Seibert*, save for a difference in the undivulged, subjective intent of the interrogating officer when he failed to give *Miranda* warnings, would not experience the interrogation any differently."<sup>161</sup>

**C. The Bad Faith Test Is Contrary to Supreme Court Precedent**

*Seibert*'s police bad faith test cannot be reconciled with forty years of *Miranda* doctrine focused on the *suspect's* perception and experience. The Supreme Court has consistently rejected any consideration of subjective police officer bad faith.<sup>162</sup>

In *New York v. Quarles*,<sup>163</sup> the Supreme Court held that the "the application of the [public safety] exception [to *Miranda*] which we recognize today should not be made to depend on *post hoc* findings at a suppression hearing concerning the subjective motivation of the arresting officer."<sup>164</sup> In *Berkemer v. McCarty*, the Court held that, for *Miranda* purposes, "[a] policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time."<sup>165</sup> In *Moran v. Burbine*, the Court decided that "whether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his [*Miranda*] rights."<sup>166</sup> In *Beckwith v. United States*, the Court held that the police officer's subjective knowledge that a suspect had become the focus of

160. *State v. Seibert*, No. 23729, 2002 WL 114803, at \*7 (Mo. Ct. App. Jan. 30, 2002), *aff'd*, 124 S.Ct. 2601 (2004).

161. *Seibert*, 124 S. Ct. at 2618 (O'Connor, J., dissenting).

162. *Id.*

163. 467 U.S. 649 (1984).

164. *Id.* at 656.

165. 468 U.S. 420, 442 (1984).

166. 475 U.S. 412, 423 (1985).

an investigation was irrelevant to a determination of whether there was custodial interrogation under *Miranda*.<sup>167</sup>

In 2004, in *Yarborough v. Alvarado*, the Supreme Court forcefully reiterated its exclusive focus on objective standards and the suspect's state of mind, not the state of mind of the police officer.<sup>168</sup> In *Yarborough*, the Court held that under *Miranda*, "custody must be determined based on how a reasonable person in the suspect's situation would perceive his circumstances," which "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."<sup>169</sup>

Even in *United States v. Leon*, which likely reflects the Supreme Court's greatest deference to police officer intent, the Court carefully limited its good/bad faith inquiry.<sup>170</sup> *Leon* created an objective standard and required that good faith be supported by objectively ascertainable proof in the form of a facially valid warrant.<sup>171</sup>

## VI. CONCLUSION: HOW THE SUPREME COURT COULD CLARIFY *SEIBERT*, ENHANCE *MIRANDA*, AND HELP IMPROVE POLICE INTERROGATION PRACTICES

If *Seibert*'s police bad faith test gains legitimacy and momentum, *Miranda* violations will continue to increase. Defendants seeking to exclude statements taken in violation of *Miranda* will now be forced to struggle with the impossible and irrelevant burden of proving that the interrogating officer acted with subjective bad faith. Even if a defendant can overcome this obstacle, the new test permits admission of all statements obtained as a result of deliberate bad faith *Miranda* violations whenever the police employ "curative measures."<sup>172</sup> The real danger of *Seibert* is that this test will be adopted by courts reviewing any type of *Miranda* violation. At this point, one can only hope that *Seibert* signals a brief detour, rather than a new direction for *Miranda*. If five members of the Court conclude, as this Article has tried to demonstrate, that the new test is baseless, ill-advised, and unworkable, a better alternative may be possible.

At the next opportunity, the Supreme Court should clarify that *Seibert* bars the admission of all post-*Miranda* violation statements, regardless of the subjective good or bad faith of the police officer, whenever "circumstances . . . challenge[] the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk."<sup>173</sup> If

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167. 425 U.S. 341, 346–47 (1976).

168. 124 S. Ct. 2140 (2004).

169. *Id.* at 2148–49 (citations omitted).

170. *United States v. Leon*, 468 U.S. 897 (1984).

171. *Id.* at 922.

172. *Missouri v. Seibert*, 124 S. Ct. 2601, 2615 (2004) (Kennedy, J., concurring).

173. *Id.* at 2613 (Rehnquist, C.J.). For a thorough and informative analysis of the incentives created by *Miranda*, see Steven D. Clymer, *Are Police Free to Disregard Miranda?*, 112 YALE L.J. 447 (2002).

in the future, *Seibert* is stripped of its police bad faith test, it would enhance rather than distort the developing doctrine and could pave the way for real legislative and judicial reform.

*Seibert*, without its bad faith test, could reinvigorate *Miranda*. Today, *Miranda* cannot effectively prevent rational police officers from choosing the tangible and immediate benefits of *Miranda* violations over the possibility that some future prosecutor will have restricted use of the defendant's statement at trial.<sup>174</sup> If *Seibert* serves no other purpose, its relentless attack on Officer Hanrahan's bad acts remind us that *Miranda* violations are currently difficult, if not impossible, to deter. The best hope for the future comes from more innovative efforts to open the interrogation room to public view and judicial scrutiny.

Obviously, neither the Framers, nor the Warren Court, could have anticipated the myriad technological developments that have transformed criminal investigations and prosecutions. Videotape recorders provide a simple, inexpensive mechanism that, in effect, can expose the actions of the police by transporting a judge back in time, enabling her to watch the interrogation.<sup>175</sup> Efforts to require that custodial interrogations be videotaped are based on two logical assumptions: that police misconduct will be deterred if the interrogation is preserved on videotape; and that judges will make more accurate pretrial decisions when they can examine the most objective and comprehensive factual evidence available.

Videotapes also reduce or eliminate problems of biased testimony, faulty or incomplete memories, and influential factors such as inflection and body language that cannot be transcribed. However, videotaping is pointless if the police are not required to record the *entire* interrogation. *Seibert* can play two critical roles in advancing meaningful efforts to mandate that custodial interrogations be videotaped. First, *Seibert* provides general support for the argument that additional enforcement mechanisms are necessary because, as at least some members of the current Supreme Court have now acknowledged, *Miranda* is frequently ignored.

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174. See Clymer, *supra* note 173, at 450 ("[I]f police interrogators refrain from conduct that violates due process, their decision to employ that compulsion by disregarding *Miranda*'s requirements, rather than to allay it by complying with them, does not run afoul of the Constitution. . . . [Thus,] [i]f police are willing to suffer the exclusionary consequences, they can disregard the *Miranda* rules without violating the Constitution.").

175. In *Commonwealth v. Diaz*, the court stated that:

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

661 N.E.2d 1326, 1329 (Mass. 1996). See also *State v. Godsey*, 60 S.W.3d 759, 772 (Tenn. 2001) ("There can be little doubt that electronically recording custodial interrogations would reduce the amount of time spent in court resolving disputes over what occurred during interrogation."). In fact, according to a study by the Police Executive Research Forum for the United States Department of Justice, more than sixteen percent of the nation's police departments already videotape some interrogations. See William A. Geller, *Research in Brief: Videotaping Interrogations and Confessions* (Nat'l Inst. of Just., Washington, D.C.), Mar. 1993.

Second, *Seibert*'s explicit condemnation of police efforts to circumvent *Miranda* by engaging in pre-warning interrogations suggests that the entire course of police-custodial suspect verbal contact must be videotaped. *Seibert* could prevent the police from making a mockery of videotaping statutes by engaging in preliminary unwarmed off-camera interrogations.

Timing is essential. In 2004 and 2005, new laws requiring the videotaping and/or audio taping of custodial interrogations have been introduced in California,<sup>176</sup> Connecticut,<sup>177</sup> Florida,<sup>178</sup> Georgia,<sup>179</sup> Kentucky,<sup>180</sup> Louisiana,<sup>181</sup> Maryland,<sup>182</sup> Missouri,<sup>183</sup> Nebraska,<sup>184</sup> New Jersey,<sup>185</sup> New Mexico,<sup>186</sup> New York,<sup>187</sup> Oregon,<sup>188</sup> Rhode Island,<sup>189</sup> South Carolina,<sup>190</sup> Tennessee,<sup>191</sup> Texas,<sup>192</sup> Washington,<sup>193</sup> and West Virginia.<sup>194</sup> Mandatory videotaping of all custodial interrogations has already been adopted in Alaska<sup>195</sup> and Minnesota.<sup>196</sup> Illinois,<sup>197</sup> Maine,<sup>198</sup> Texas,<sup>199</sup> and the District of Columbia<sup>200</sup> have, by legislation, imposed a recording requirement for certain types of interrogations. The Massachusetts Supreme Judicial Court recently held that defendants whose interrogations were not at least audiotaped are entitled to a jury instruction that jurors "should weigh evidence of the defendant's alleged statement with great caution and care."<sup>201</sup> The time is ripe for the Supreme Court to transform *Seibert* from a menace to *Miranda* into a case that honors and advances *Miranda*'s essential purpose by encouraging reforms that will reduce police misconduct, enhance interrogation practices, and improve the quality of vitally important legal decisions.

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176. S.B. 171, 2005-06, Reg. Sess. (Ca. 2005).

177. S.B. 1281, 2005 Gen. Assem., Jan. Sess. (Conn. 2005).

178. S.B. 1936, 106th Reg. Sess. (Fla. 2004).

179. H.B. 1395, 147th Gen. Assem., Reg. Sess. (Ga. 2004), available at [http://www.legis.state.ga.us/legis/2003\\_04/versions/hb1395\\_LC\\_29\\_1189\\_a\\_2.htm](http://www.legis.state.ga.us/legis/2003_04/versions/hb1395_LC_29_1189_a_2.htm).

180. H.B. 390, 2004 Leg., Reg. Sess. (Ky. 2004), available at <http://lrc.ky.gov/record/04rs/HB390.htm>.

181. S.B. 734, 2004 Leg., Reg. Sess. (La. 2004).

182. H.B. 118, 418th Gen. Assem., Reg. Sess. (Md. 2004).

183. S.B. 835, 92nd Gen. Assem., 2d Reg. Sess. (Mo. 2004).

184. A.B. 112, 99th Leg., 1st Sess. (Neb. 2005).

185. A.B. 287, 211th Leg. (N.J. 2004).

186. H.B. 382, 47th Leg. 1st Reg. Sess. (N.M. 2005).

187. A.B. 11741, 227th Leg. (N.Y. 2004).

188. S.B. 265, 73rd Leg. Assem. (Or. 2005).

189. S.B. 2227, 2003-04 Leg. (R.I. 2004).

190. S.B. 1177, 115th Gen. Assem. (S.C. 2004).

191. H.B. 204, 104th Gen. Assem. (Tenn. 2005).

192. S.B. 662, 79th Leg. (Tex. 2005).

193. H.B. 2813, 58th Gen. Assem., 2d Reg. Sess. (Wa. 2004).

194. S.B. 655, 79th Leg. (W.V. 2004).

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

196. *Minnesota v. Scales*, 518 N.W.2d 587 (Minn. 1994).

197. 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2005).

198. ME. REV. STAT. ANN. tit. 25, § 2803-B(1)(K) (West 2005).

199. TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3 (West 1999).

200. D.C. CODE ANN. § 5-133.20 (2005).

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