University of Richmond Law Review

Volume 40 | Issue 2 Article 4

1-1-2006

The Electronic Recording of Criminal Interrogations

Roberto Iraola

Senior Advisor to the Deputy Assistant Secretary for Law Enforcement and Security, Department of the Interior.

THE ELECTRONIC RECORDING OF CRIMINAL INTERROGATIONS

Roberto Iraola *

I. INTRODUCTION

Should law enforcement officers be required to record, by video or audiotape, custodial interrogations of suspects? If so, how much, the entire interrogation or just the confession?[1] Many prosecutors and police departments maintain that a recording requirement will hamper law enforcement and discourage suspects from talking.[2] Proponents of this measure argue that the recording of interrogations protects against false confessions, augments the effective administration of justice, and serves to improve the relationship between the public and the police.[3]

---

* Senior Advisor to the Deputy Assistant Secretary for Law Enforcement and Security, Department of the Interior. J.D., 1983, Catholic University School of Law, 1983. The views expressed herein are solely those of the author and do not purport to reflect the views of the Department of the Interior.

1. A 1993 study found that, in 1990, about one-third of law enforcement agencies in jurisdictions with populations exceeding 50,000 were videotaping at least some interrogations. *Videotaping Interrogations and Confessions,* FBI L. ENFORCEMENT BULL., Jan. 1994, at 24.

2. *See, e.g.*, Rick Hepp, *State Considers Tape-Recording Parts of All Police Interrogations*, THE STAR-LEDGER (Newark, NJ), Feb. 20, 2005, at 26 ("Opponents of tape-recorded interrogations . . . worry they could hinder a police officer's attempt to ferret out the truth."); Monica Davey, *Illinois Will Require Taping of Homicide Interrogations*, N.Y. TIMES, July 17, 2003, at A16 ("Opponents of such a measure have argued that a recording requirement could prevent the police from carrying on interviews as they had before, or discourage suspects from speaking openly.").

3. As noted by Professor Kamisar:

> It is not because a police officer is more dishonest than the rest of us that we should demand an objective recordation of the critical events. Rather, it is because we are entitled to assume that he is no less human — no less inclined to reconstruct and interpret past events in a light most favorable to himself — that we should not permit him to be "a judge of his own cause."

Yale Kamisar, *Foreword:* Brewer v. Williams — *A Hard Look at a Discomfiting Record*, 66 GEO. L.J. 209, 242–43 (1977); *see also* Steven A. Drizin & Marissa J. Reich, *Heeding the*

This article generally examines the developing case law on this question. Because of the incriminating nature of confessions, the article, by way of background, initially provides an overview of the history and evolution of the Fifth Amendment privilege against self-incrimination and discusses the law surrounding the admissibility of confessions at trial. This is followed by a brief analysis of the federal law on evidence preservation. Lastly, the article discusses how the federal and state courts have responded to challenges by defendants that their confessions should have been suppressed because they were not recorded electronically.

II. THE PRIVILEGE AGAINST SELF-INCRIMINATION AND THE LAW GOVERNING THE ADMISSIBILITY OF CONFESSIONS

The origins of the privilege against self-incrimination can be traced to medieval English common law.[4] By 1650, the privilege had been established in English common law.[5] In the United States, the colonists started recognizing the privilege as a common law right during the second half of the seventeenth century.[6] Shortly after they declared their independence, eight of the thirteen colonies incorporated a privilege against self-incrimination

---

Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions, 52 DRAKE L. REV. 619, 622–28 (2004) (discussing how electronic recording of interrogations assists in preventing false confessions, increases the effective administration of justice, and serves to improve the relationship between the police and the public); Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 692 (1996) ("[E]lectronically recording custodial interrogations promotes the goals of truth-finding, fair treatment, and accountability in the legal process. By creating an objective and reviewable record of police questioning, we further the policy objectives that underlie our dual concerns for crime control and due process.").

4. *See* Christine L. Reimann, *Fencing the Fifth Amendment in Our Own Backyard*, 7 PACE INT'L L. REV. 177, 178–79 (1995) (discussing origins of the privilege). *But see* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2638 (1996) ("[T]he roots of the privilege in the early seventeenth century are to be found, not in the common law of England, but in the *ius commune* — the law applied throughout the European continent and in the English prerogative and ecclesiastical courts.").

5. *See* Quinn v. United States, 349 U.S. 155, 161 (1955) ("As early as 1650, remembrance of the horror of Star Chamber proceedings a decade before had firmly established the privilege in the common law of England."); De Luna v. United States, 308 F.2d 140, 148 (5th Cir. 1962) ("By the middle of the seventeenth century the privilege against being questioned *until accused* had become firmly embedded in the common law as a broad right to remain silent whenever an answer might tend to incriminate.").

6. *See* United States v. Gecas, 120 F.3d 1419, 1453 (11th Cir. 1997).

in their state constitutions,[7] and in 1791, as a component of the Fifth Amendment,[8] the privilege against self-incrimination became part of the federal Bill of Rights.[9]

The privilege "protects a person only against being incriminated by his own compelled testimonial communications."[10] Broadly speaking, the policies and purposes underlying the privilege are the preservation of the accusatorial system, respect for individual privacy and dignity, and prevention against governmental overreaching.[11] When establishing the parameters of the

---

7. *Id.* at 1454. The eight colonies were Delaware, Maryland, Virginia, Massachusetts, Pennsylvania, New Hampshire, North Carolina, and Vermont. *Id.* at 1454–55.

8. The Fifth Amendment states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

9. *See Quinn*, 349 U.S. at 161. For well over half a century, given the respective sovereignty of the federal and state governments, the law allowed each government to compel a witness to provide testimony, even though the witness would then incriminate himself under the other sovereign's laws. *See, e.g.*, Knapp v. Schweitzer, 357 U.S. 371, 379–80 (1958) (holding that states could compel a witness to give testimony that would incriminate him under federal law); Hale v. Henkel, 201 U.S. 43, 68–69 (1906) (recognizing that potential state prosecution did not justify a witness's silence when immunity from federal prosecution was afforded). This ended with *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964), when the Supreme Court ruled that a "state witness [could] not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits [could not] be used in any manner by federal officials in connection with a criminal prosecution against him." *Id.* at 79.

10. Fisher v. United States, 425 U.S. 391, 409 (1976); *see also* United States v. Patane, 124 S. Ct. 2620, 2626 (2004) ("[T]he core protection afforded by the Self-Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself at trial."); *cf.* United States v. Hubbell, 530 U.S. 27, 35 (2000) ("[E]ven though the act may provide incriminating evidence, a criminal suspect may be compelled to put on a shirt, to provide a blood sample or handwriting exemplar, or to make a recording of his voice.").

11. As the Court explained in *Murphy*, the privilege against self-incrimination:

> reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load; our respect for the inviolability of the human personality and of the right of each individual to a private enclave

self-incrimination clause, the Supreme Court has noted that it "must have a broad construction in favor of the right which it was intended to secure."[12]

Originally, in federal cases, the test for an inadmissible confession was expressed in terms of whether there had been improper inducements, promises, or threats.[13] Subsequently, the test evolved not only to whether there had been threats or promises, but more broadly, whether the confession "was, in fact, voluntarily made."[14] The basis for exclusion of an involuntary confession in the federal system is the Fifth Amendment privilege against self-incrimination.[15]

> where he may lead a private life, our distrust for self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent.

Murphy, 378 U.S. at 55 (internal citations and quotations omitted); *see also* Pennsylvania v. Muniz, 496 U.S. 582, 596 (1990) ("At its core, the privilege reflects our fierce unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt.") (internal quotation marks omitted) (quoting Doe v. United States, 487 U.S. 201, 212 (1988); United States v. Nobles, 422 U.S. 225, 233 (1975) ("The Fifth Amendment privilege . . . protects 'a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation.'") (quoting Couch v. United States, 409 U.S. 322, 327 (1973)).

12. Counselman v. Hitchcock, 142 U.S. 547, 562 (1892); *see also* De Luna v. United States, 308 F.2d 140, 149 (1962) ("Our courts, however, have not stood for a narrow constitutional construction of the Fifth Amendment based on a literal reading of the language in the light of its historical origins.").

13. *See, e.g.*, Hopt v. Utah, 110 U.S. 574, 585 (1884) ("[T]here seems to have been no reason to exclude the confession of the accused; for the existence of any such inducements, threats or promises seems to have been negatived by . . . the circumstances under which it was made."). *See generally* Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 149 (1997) ("At common law, confessions induced by any promise were excluded as unreliable. As a result, the exclusionary principle became established in America during the nineteenth century.").

14. Ziang Sung Wan v. United States, 266 U.S. 1, 14 (1924) ("In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made.").

15. *See, e.g.*, Missouri v. Seibert, 124 S. Ct. 2601, 2607 (2004) ("In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person shall be compelled in any criminal case trial to be a witness against himself.") (internal quotation marks omitted); Dickerson v. United States, 530 U.S. 428, 433 (2000) ("Over time . . . cases recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment."); United States v. Faulkingham, 295 F.3d 85, 90 (1st Cir. 2002); *see also* 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE, § 6.1(c), at 440–41 (1999) [hereinafter 2 LAFAVE ET AL.].

The test for voluntariness, in the case of state prosecutions, initially was grounded in the Due Process Clause of the Fourteenth Amendment and reflected three principal concerns.[16] The first revolved around confessions "of doubtful reliability because of the practices used to obtain them."[17] A second concern entailed confessions "obtained by offensive police practices even if reliability is not in question (for example, where there is strong corroborating evidence)."[18] Lastly were confessions "obtained under circumstances in which the defendant's free choice was significantly impaired, even if the police did not resort to offensive practices."[19]

In *Miranda v. Arizona*,[20] the Supreme Court ruled that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from [a] defendant can truly be the product of his free choice."[21] Accordingly, *Miranda* requires that before interrogating[22] a suspect in custody,[23] law enforcement officials must inform

---

16. *See* 2 LAFAVE ET AL., *supra* note 15, § 6.2(b), at 444. In *Malloy v. Hogan*, 378 U.S. 1 (1964), the Court "recognized that the Fourteenth Amendment incorporates the Fifth Amendment privilege against self-incrimination, and thereby opened *Brams*'s doctrinal avenue for the analysis of state cases." Withrow v. Williams, 507 U.S. 680, 689 (1993). *See generally* Davis v. North Carolina, 384 U.S. 737, 740 (1966) ("The standard of voluntariness which has evolved in state cases under the Due Process Clause of the Fourteenth Amendment is the same general standard which applied in federal prosecutions — a standard grounded in the policies of the privilege against self-incrimination.").

17. 2 LAFAVE ET AL., *supra* note 15, § 6.2(b), (c), at 446–48 (citing as an example *Beecher v. Alabama*, 389 U.S. 35, 36 (1967) (holding a gun to a suspect's head)).

18. *Id.* § 6.2(b), at 446.

19. *Id.* This last strand, however, appears to have been narrowed significantly in *Colorado v. Connelly*, 479 U.S. 157 (1986), when the Court ruled that "[a]bsent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Connelly*, 479 U.S. at 164; *see also* White, *supra* note 13, at 115–16 ("Whereas at common law, an involuntary confession was primarily defined in terms of unreliability, under the post-*Connelly* due process test, a confession's lack of reliability will not be considered in determining whether it is involuntary.").

20. 384 U.S. 436 (1966).

21. *Id.* at 458.

22. Generally, interrogation has been defined as "express questioning or its functional equivalent." Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980).

23. Whether a suspect is in custody turns on the degree to which restrictions on the suspect's freedom of movement are "'of the degree associated with a formal arrest.'" Minnesota v. Murphy, 465 U.S. 420, 430 (1984) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)). Furthermore, "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." Stansbury v. California, 511 U.S. 318, 323 (1994). In *Thompson v. Keohane*, 516 U.S. 99 (1995), the Court set forth the following custody test for *Miranda* purposes:

> Two discrete inquiries are essential to the determination: first, what were the

the suspect of his rights.[24] An incriminating statement following such interrogation may subsequently be introduced by the government in a prosecution of the suspect in its case-in-chief [25] if the government establishes that the suspect voluntarily, knowingly, and intelligently waived his *Miranda* rights.[26]

In summary, the Fifth Amendment privilege against self-incrimination provides a defendant with grounds to suppress his confession if it was either involuntary or obtained in violation of *Miranda*.[27] Thus, if a defendant's confession was obtained by "'techniques and methods offensive to due process,' or under circumstances in which the suspect clearly had no opportunity to exercise 'a free and unconstrained will,'" his statement is inadmissible under the Fifth Amendment.[28] Also, if there was not a

---

> circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the "ultimate inquiry": [was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."

Id. at 112 (alteration in original) (quoting *Beheler*, 463 U.S. at 1125); *see also* Tankleff v. Senkowski, 135 F.3d 235, 242 (2d Cir. 1998) ("A suspect is entitled to *Miranda* warnings only if he or she is interrogated while 'in custody.'").

24. Under *Miranda,* before questioning a suspect who is in custody, law enforcement officials must inform the suspect that: (i) he has the right to remain silent; (ii) any statement he makes may be used against him at trial; (iii) he has the right to be represented by an attorney during questioning; and (iv) if he cannot afford an attorney, one will be appointed for him. *Miranda*, 384 U.S. at 479. Law enforcement officials must use this formulation or "other procedures [that] are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." *Id.* at 467.

25. If the statement was obtained in violation of *Miranda,* the government may still use it for impeachment at trial so long as it was made voluntarily. *See* Oregon v. Hass, 420 U.S. 714, 723 (1975); Harris v. New York, 401 U.S. 222, 224 (1971).

26. *See* Edwards v. Arizona, 451 U.S. 477, 482 (1981). If a defendant affirmatively invokes his right to have counsel present during the interrogation:

> a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he had been advised of his rights. . . . [A]n accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id. at 484–85.

27. *See* Dickerson v. United States, 530 U.S. 428, 444 (2000) ("The requirement that *Miranda* warnings be given does not, of course, dispense with the voluntariness inquiry."); *see also* Wilson v. Lawrence County, 260 F.3d 946, 953 (8th Cir. 2001) ("Advising a suspect of his rights does not automatically mean that any subsequent confession is voluntary or that officers may use any methods to secure a confession, particularly when they know the suspect is unlikely to fully understand those rights.").

28. Oregon v. Elstad, 470 U.S. 298, 304 (1985) (quoting Haynes v. Washington, 373

voluntary, knowing, and intelligent waiver of rights under *Miranda*, a defendant's statement must be suppressed.[29]

Challenges to the admissibility of a confession take place outside of the presence of the jury.[30] The government bears the burden of establishing,[31] at least by a preponderance of the evidence, that the confession was voluntary,[32] and that the waiver of *Miranda* rights also was voluntary.[33] If a court concludes that a defendant knowingly, intelligently, and voluntarily waived his rights under *Miranda*, that his statement was made in the course of a custodial interrogation, and that the statement was voluntary, then the statement will be received into evidence.[34] Voluntariness must be assessed by taking into "consideration 'the totality of all the surrounding circumstances — both the characteristics of the accused and the details of the interrogation.'"[35]

U.S. 503, 514–15 (1963)).

29. *See, e.g.*, New York v. Quarles, 467 U.S. 649, 654 (1984) ("The *Miranda* Court . . . presumed that interrogation in certain custodial circumstances is inherently coercive and held that statements made under those circumstances are inadmissible unless the suspect is specifically informed of his *Miranda* rights and freely decides to forgo those rights."); *cf. Dickerson*, 530 U.S. at 444 ("The disadvantage of the *Miranda* rule is that statements which may by no means be involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result.").

30. *See* Wayne T. Westling & Vicki Waye, *Videotaping Police Interrogations: Lessons from Australia*, 25 AM. J. CRIM. L. 493, 498–99 (1998) ("Rule 104(a) of the Federal Rules of Evidence requires courts to hold a hearing on the admissibility of confessions out of the presence of the jury. Comparable rules may be found in most state evidence or criminal procedure codes.").

31. *See* Brown v. Illinois, 422 U.S. 590, 604 (1975) ("[T]he burden of showing admissibility rests . . . on the prosecution.").

32. *See* Colorado v. Connelly, 479 U.S. 157, 169 (1996).

33. *See* Missouri v. Seibert, 124 S. Ct. 2601, 2608 n.1 (2004) ("The prosecution bears the burden of proving, at least by a preponderance of the evidence, the *Miranda* waiver . . . and the voluntariness of the confession."). At the state level, the substantial majority of courts have adopted the preponderance standard on the admissibility issue. *See* State v. James, 678 A.2d 1338, 1353–54 (Conn. 1996).

34. *See* Daniel Donovan & John Rhodes, *Comes a Time: The Case for Recording Interrogations*, 61 MONT. L. REV. 223, 226 (2000) ("If a court is satisfied that a defendant knowingly, intelligently and voluntarily waived his Miranda rights, made statements in response to custodial interrogation by government agents, and that the statements were voluntary, the statements can be admitted.").

35. *Dickerson*, 530 U.S. at 434 (2000) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)). Factors to consider include: (i) the age, education, and intelligence of the defendant; (ii) the length of the detention; (iii) the length and nature of the questioning; (iv) whether the defendant was advised of his constitutional rights; and (v) whether the defendant was subjected to physical punishment. *Schneckloth*, 412 U.S. at 226.

III. DUE PROCESS AND PRESERVATION OF EVIDENCE

Supreme Court case law on the question of evidence preservation, by analogy,[36] has guided the analysis of some state courts in ruling that the federal Constitution imposes no duty to record custodial interrogations.[37] The two Supreme Court cases which address this issue and have been relied upon by the lower courts are briefly discussed below.

In *California v. Trombetta*,[38] the Court held that the Due Process Clause of the Fourteenth Amendment was not violated when a law enforcement agency failed to preserve, for defendant's review, breath samples obtained pursuant to a drunk-driving arrest.[39] To begin with, the law enforcement officials "were acting 'in good faith and in accord with their normal practice.'"[40] Furthermore, to meet the test of constitutional materiality, the "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means," neither of which criteria was present with respect to the breath samples.[41]

Subsequently, in *Arizona v. Youngblood*,[42] the Court held that the Due Process Clause of the Fourteenth Amendment did not require law enforcement officials to preserve evidence which, if subjected to additional tests, may have exonerated the defendant.[43] The Court found that "unless a criminal defendant can show bad

36. Whether this analogy fits has been questioned. *See* Stoker v. State, 692 N.E.2d 1386, 1389 (Ind. Ct. App. 1998) ("[Recording of an interrogation] does not involve the preservation of exculpatory evidence, but creation of evidence which would provide alternative, but perhaps more reliable, proof of a fact, or would confirm and be in addition to other evidence of the same fact."). *But see* Gail Johnson, Comment, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 750 (1997) (arguing State v. Spurgeon, 820 P.2d 960 (Wash. Ct. App. 1991), a case analogous to *Stoker*, "fail[s] to take into account the phenomenon of false confessions").

37. *See infra* note 53.

38. 467 U.S. 479 (1984).

39. *Id.* at 488.

40. *Id.* (quoting Killian v. United States, 368 U.S. 231, 242 (1962)).

41. *Id.* at 489.

42. 488 U.S. 51 (1988).

43. *Id.* at 57–58.

faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."[44]

IV. THE FEDERAL CASES

The federal courts uniformly have rejected the argument that the Constitution mandates, as a matter of due process, that a defendant's confession be electronically recorded. The first reported opinion which appears to have addressed the issue surrounding the electronic recording of confessions is *United States v. Coades.*[45] In *Coades,* the defendant was convicted of attempted bank robbery.[46] On appeal, he argued that his confession, which was presented through the testimony of an FBI agent, should have been suppressed because it was not recorded stenographically or electronically.[47] Rejecting this contention on separation of powers grounds, the United States Court of Appeals for the Ninth Circuit held that the need for a rule regarding the electronic recording of confessions "and the particular form such a rule should take are appropriate matters for consideration by Congress, not for a court exercising an appellate function."[48]

After *Coades*, the United States Courts of Appeals for the First,[49] Ninth,[50] Tenth,[51] and District of Columbia[52] Circuits sum-

---

44. *Id.* at 58. More recently, in *Illinois v. Fisher*, 540 U.S. 544 (2004), the Court reaffirmed its prior holding in *Youngblood* that when "potentially useful," as opposed to "material exculpatory" evidence has been destroyed, the bad faith test governs. *Id.* at 547–48.

45. 549 F.2d 1303 (9th Cir. 1977).

46. *Id.* at 1304.

47. *Id.* at 1305.

48. *Id.* Two commentators have criticized this ruling arguing:

> Separation of Powers analysis, however, ignores the fact that *Miranda* originated with the courts, not the legislature, and that the exclusionary rule is presumed to be a judicial device, not a Constitutional or legislative mandate, and that the courts historically have fashioned remedies to preserve and protect Constitutional rights. Moreover, recording statements is more than a public policy issue, it is a question of fundamental fairness, otherwise known as due process.

Donovan & Rhodes, *supra* note 34, at 242.

49. *See* United States v. Torres-Galindo, 206 F.3d 136, 144 (1st Cir. 2000) ("While the Court recognizes that th[e] practice [of not recording confessions] is susceptible to abuse, the appellants have offered . . . no evidence or argument that would indicate any impropriety in this case. Nor have they articulated how such impropriety, were it present, might constitute a violation of their Fifth Amendment rights.").

50. *See* United States v. Toscano-Padilla, No. 92-30247, 1993 U.S. App. LEXIS 15411, at *5 (9th Cir. June 16, 1993) ("We decline to hold, as appellant apparently encourages,

marily have rejected the argument that the failure to record a confession violates due process.[53] The First and Eighth Circuits, however, also have suggested that the recording of a defendant's custodial incriminating statement would advance the goals of the criminal justice system.[54] District courts in the Sixth Circuit also have drawn an adverse inference against the government in the context of the waiver of *Miranda* rights when it failed to record the interrogation electronically.[55]

---

that a failure by law enforcement officials to record an interrogation violates due process and automatically mandates suppression."); *see also* Ridgley v. Pugh, No. 98-35429, 1999 U.S. App. LEXIS 7408, at *4 (9th Cir. Apr. 14, 1999) ("With respect to the police officer's failure to tape record a portion of [appellant's] interrogation, we conclude that this claim does not state a violation of a federal constitutional or statutory right.").

51. *See* United States v. Zamudio, No. 99-2256, 2000 U.S. App. LEXIS 8235, at *8, *10 (10th Cir. Apr. 26, 2000) (denying certificate of appealability based in part on petitioner's claim that "his Fifth Amendment rights were violated by the DEA's failure to tape-record his interrogation").

52. *See* United States v. Yunis, 859 F.2d 953, 961 (D.C. Cir. 1988) ("[T]here is no constitutional requirement that confessions be recorded by any particular means. At most, the failure by the FBI to use equipment at its disposal might support a larger inference that the agents' testimony did not accurately portray the circumstances surrounding [defendant's] confession.").

53. *See* Mastin v. Senkowski, 297 F. Supp. 2d 558, 606 (W.D.N.Y. 2003) ("[Petitioner] has cited no Supreme Court or other federal precedent for the proposition that the failure to videotape his interrogation violated any right guaranteed under the United States Constitution. . . . [S]everal circuit courts have concluded that the federal Constitution does not obligate police officers to record interrogations or confessions.").

A number of state courts, interpreting the Due Process Clause of the Federal Constitution, have recognized that it is not violated by the failure of the police to record an interrogation electronically. *See* Stephan v. State, 711 P.2d 1156, 1160 (Alaska 1985); Coleman v. State, 375 S.E.2d 663, 664 (Ga. Ct. App. 1988); Stoker v. State, 692 N.E.2d 1386, 1389 (Ind. Ct. App. 1998); Brashars v. Commonwealth, 25 S.W.3d 58, 60 (Ky. 2000); State v. Buzzell, 617 A.2d 1016, 1018 n.4 (Me. 1992); People v. Martin, 741 N.Y.S.2d 763, 764 (N.Y. App. Div. 2002); State v. Thibodeaux, 459 S.E.2d 501, 507 (N.C. 1995); State v. Smith, 684 N.E.2d 668, 686 (Ohio 1997); State v. James, 858 P.2d 1012, 1017 (Utah. Ct. App. 1993); State v. Spurgeon, 820 P.2d 960, 961 (Wash. Ct. App. 1991); State v. Kilmer, 439 S.E.2d 881, 892 n.15 (W. Va. 1993). In doing so, many of these courts have relied on the Supreme Court decisions in *Trombetta* and *Youngblood* regarding preservation of evidence. *See Stephan*, 711 P.2d at 1160; *Stoker*, 692 N.E.2d at 1389; *Brashars*, 25 S.W.3d at 60; *James*, 858 P.2d at 1017; *Spurgeon*, 820 P.2d at 961; *Kilmer*, 439 S.E.2d at 892 n.15; *see also* Kordenbrock v. Scroggy, 919 F.2d 1091, 1103 (6th Cir. 1990) (holding that no due process violation occurred when tape of defendant's confession was erased after the confession was transcribed because the police did not act in bad faith).

54. *See Torres-Galindo*, 206 F.3d at 144 n.3 ("[T]here is little doubt that accurate, contemporaneous recording of custodial statements would facilitate the truth-seeking aims of the justice system, and it would also facilitate review on appeal."); Hendricks v. Swenson, 456 F.2d 503, 506 (8th Cir. 1972) ("If a proper foundation is laid for the admission of a video tape . . . we feel that it is an advancement in the field of criminal procedure and a protection of defendant's rights. We suggest that to the extent possible, all statements of defendants should be so preserved.").

55. *See, e.g.*, United States v. Lewis, 355 F. Supp. 2d 870, 873 (E.D. Mich. 2005) (find-

V. THE STATE CASES

The law regarding the electronic recording of a defendant's interrogation is more developed at the state level. Court rulings in Alaska and Minnesota mandate such recording; laws in Texas, Illinois, Maine, and the District of Columbia also address this requirement in different ways.

In *Stephan v. State,*[56] the Supreme Court of Alaska held that under the Alaska constitution, the unexcused failure to record electronically the entire interrogation of a suspect at a place of detention — including the waiver of *Miranda* rights — violated a suspect's rights to due process, generally rendering the statement inadmissible.[57] Construing the due process clause of the Alaska constitution as affording greater rights than those guaranteed by the United States Constitution,[58] the court reasoned that the recording of a confession protects three distinct interests — the interest of the defendant in having an objective means to evaluate what occurred during the interrogation, the interest of the public in effective and honest law enforcement, and the interest of police officers in defending against allegations that they were involved in improper police practices.[59]

---

ing inadequate proof of waiver of *Miranda* rights, in part because "the interviews were not memorialized by video or audio recording, notwithstanding that equipment to do so was available, and notwithstanding the fact that one of the officers had previously been involved in a interview situation where the failure to record was criticized."); United States v. Thornton, 177 F. Supp. 2d 625, 628 (E.D. Mich. 2001) ("The Court notes that neither the interrogation nor confession were audio or video taped. . . . It certainly harms the prosecution in a close case when the court cannot evaluate the actual confession.").

56. 711 P.2d 1156 (Alaska 1985).

57. *Id.* at 1158, 1162. Prior to its ruling in *Stephan* cementing the obligation to record custodial interrogations on the Alaska constitution's due process clause, the Supreme Court of Alaska had, on several occasions, alluded to the importance of recording such statements. *See, e.g.*, McMahan v. State, 617 P.2d 494, 499 n.11 (Alaska 1980); S.B. v. State, 614 P.2d 786, 790 n.9 (Alaska 1980); Mallott v. State, 608 P.2d 737, 743 n.5 (Alaska 1980).

58. *Stephan*, 711 P.2d at 1160. *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) ("State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.").

59. *Stephan*, 711 P.2d at 1161. The court summarily rejected the argument that a requirement that the entire interrogation be recorded would have a "chilling effect" on the suspect's willingness to provide a statement. *Id.* at 1162. The court held that "[g]iven the fact that an accused has a constitutional right to remain silent, under both the state and federal constitutions, and that he must be clearly warned of that right prior to any custodial interrogation, this argument [was] not persuasive." *Id.*

While adopting a general rule of exclusion, the court noted that failure to record a part of the interrogation would not bar the introduction of a recorded statement if the unrecorded portion was, by all accounts, innocuous.[60] Similarly, a defendant's statement may be admitted if there was no challenge to its accuracy or how it was obtained.[61] Also, the rule did not apply to statements obtained before a violation of the recording requirement occurred.[62] Lastly, where the recording of a statement stopped for some impermissible reason, those statements which were properly recorded prior to the cessation of the recording may be admitted.[63]

In *State v. Scales,*[64] the Supreme Court of Minnesota, following *Stephan*'s lead and "disturbed by the fact that law enforcement officials" had failed to heed prior warnings to record custodial interrogations, imposed such a requirement.[65] Unlike *Stephan*, however, the court in *Scales* did not impose this requirement on the basis of the state constitution, but rather, on the basis of its supervisory power over the administration of justice.[66] The court in *Scales* ruled that all custodial interrogations, including the advice and waiver of *Miranda* rights, should "be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention."[67]

As in *Stephan*, the court in *Scales* adopted a rule of exclusion for statements obtained in violation of the recording requirement.[68] The court held that this determination had to be made on a case-by-case basis and that the test for suppression would rest on whether the recording violation was deemed substantial.[69]

---

60. *Id.* at 1165.
61. *Id.*
62. *Id.*
63. *Id.*
64. 518 N.W.2d 587 (Minn. 1994).
65. *Id.* at 592.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* In defining substantiality, the court looked to Sections 150.3(2) and (3) of the Model Code of Pre-Arraignment Procedure. *Id.*

The highest state courts in New Hampshire and Massachusetts have fashioned different rules to address the lack of a recording. In *State v. Barnett*, 789 A.2d 629 (N.H. 2001), the Supreme Court of New Hampshire ruled, based on its supervisory power over the administration of justice, that after a waiver of *Miranda* rights, a tape recording of an interrogation will be admitted into evidence only if it reflects the entire interrogation. *Id.* at 632. If it does not, the recording would be excluded but "evidence gathered during the interroga-

The District of Columbia[70] and three states — Illinois,[71] Texas,[72] and Maine[73] — have passed laws requiring the recording of a defendant's interrogation under certain circumstances.[74] The Supreme Court of New Jersey has established a committee to study and make recommendations regarding the electronic recording of custodial interrogations.[75] When the legislature has not spoken, however, the majority of state courts have declined to find a due process right under their governing state constitution requiring the electronic recordation of interrogations[76] or declined to impose such an obligation by court rule.[77]

---

tion may still be admitted in alternative forms, subject to the usual rules of evidence." *Id.* at 632–33; *see also* State v. Jones, 49 P.3d 273, 279 (Ariz. 2002) ("It would be a better practice to videotape the *entire* interrogation process, including advice of rights, waiver of rights, questioning, and confessions.").

In *Commonwealth v. DiGiambattista*, 813 N.E.2d 516 (Mass. 2004), the Supreme Judicial Court of Massachusetts held that when the prosecution introduces a defendant's unrecorded confession or statement that was elicited during custodial interrogation, or at a place of detention, the defendant is entitled to a cautionary instruction. *Id.* at 533. As formulated by the court, this instruction should advise the jury that "the State's highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that, because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care." *Id.* at 533–34.

70. Electronic Recording Procedures and Penalties Temporary Act of 2005, § 201, 52 D.C. Reg. 3151, 3152 (Apr. 1, 2005) (directing the Chief of the Metropolitan Police Department to develop and implement a General Order establishing the procedures governing the electronic recording of interrogations). In January 2005, Mayor Anthony A. Williams vetoed a bill that would have created a presumption that unrecorded statements were involuntary, and thus inadmissible, absent a government showing to the contrary by clear and convincing evidence. Carol D. Leonnig, *Bill to Tape D.C. Police Interviews Is Vetoed*, WASH. POST, Jan. 24, 2005, at B1.

71. 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West Cum. Supp. 2005) (effective July 18, 2005).

72. TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3 (Vernon 2005).

73. ME. REV. STAT. ANN. tit. 25, § 2803-B.1.K (Cum. Supp. 2004).

74. *See* United States v. Lewis, 355 F. Supp. 2d 870, 872 (E.D. Mich. 2005) ("The District of Columbia, Illinois, Maine, and Texas have, by legislation, imposed a recording requirement for certain types of cases and interrogations."); *DiGiambattista*, 813 N.E.2d at 530 ("[T]hree States and the District of Columbia have, by legislation, imposed a recording requirement for certain types of cases and interrogations.").

75. *See* State v. Cook, 847 A.2d 530, 547 (N.J. 2004). In April 2004, New Jersey's Attorney General issued station house recording guidelines in murder investigations. *See* Hepp, *supra* note 2.

76. *E.g.*, People v. Holt, 937 P.2d 213, 242 (Cal. 1977) ("[W]e are aware of nothing in the language or history of the California constitutional due process provisions which would support a construction of that charter which mandates a more stringent standard than that of the Fourteenth Amendment."); People v. Raibon, 843 P.2d 46, 49 (Colo. Ct. App. 1992) ("[A]bsent state legislation supplementing the rights set forth in the [Colorado] Constitution, [the court] would not by 'judicial fiat' prescribe such a requirement."); State v. James, 678 A.2d 1338, 1360 (Conn. 1996) ("[W]e are not persuaded, in light of our his-

tory, precedent and the flexible notions of due process, that conditioning the admissibility of confessions on their recording is a requirement of due process under the state constitution."); Coleman v. State, 375 S.E.2d 663, 664 (Ga. Ct. App. 1988) ("[N]either the Georgia Constitution nor the Constitution of the United States mandates [the electronic recording of custodial statements.]"); State v. Kekona, 886 P.2d 740, 745–46 (Haw. 1994) ("[W]e do not agree that the due process clause of our State Constitution requires [electronic recording of all custodial interrogations.]"); State v. Rhoades, 820 P.2d 665, 675 (Idaho 1991) (declining to adopt protections of the state constitution beyond parameters embodied in federal constitutional guarantees); Stoker v. State, 692 N.E.2d 1386, 1390 (Ind. Ct. App. 1998) ("Article One, Section Twelve of the Indiana Constitution does not require law enforcement officers to record custodial interrogations in places of detention."); State v. Morgan, 559 N.W.2d 603, 609 (Iowa 1997) ("[Electronic recording of interrogations is] in no way mandated by any provision in the Iowa Constitution."); State v. Speed, 961 P.2d 13, 24 (Kan. 1998) ("[I]t has never been the law in Kansas that conversation between a suspect and a police officer during interrogation that is not recorded is not admissible."); Brashars v. Commonwealth, 25 S.W.3d 58, 63 (Ky. 2000) ("[W]e conclude that the due process protections in Section Eleven of the Constitution of Kentucky do not mandate the recording requirement advocated by the appellants."); State v. Buzzell, 617 A.2d 1016, 1018 (Me. 1992) ("While there are obvious benefits to be realized when statements are recorded, [appellant] has not persuaded us that recording is essential to ensure a fair trial, or that the due process clause of our state constitution requires electronic recording of custodial interrogation."); People v. Fike, 577 N.W.2d 903, 906 (Mich. Ct. App. 1998) ("[W]e do not believe that the Due Process Clause of our state constitution requires such a practice."); Williams v. State, 522 So.2d 201, 208 (Miss. 1988) ("[T]his Court has never held nor does our constitution require that the mere absence of a tape recording renders . . . statements [made during a custodial interrogation] inadmissible."); Jimenez v. State, 775 P.2d 694, 697 (Nev. 1989) ("[We decline to] adopt a rule requiring the tape recording of defendants' statements."); State v. Barnett, 789 A.2d 629, 632 (N.H. 2001) ("Consistent with the overwhelming majority of States that have addressed this issue, we hold that due process does not require the recording of custodial interrogations."); People v. Martin, 741 N.Y.S.2d 763, 764 (N.Y. App. Div. 2002) ("Because '[t]here is no Federal or State due process requirement that interrogations and confessions be electronically recorded' . . . defendant was not denied due process based on the failure of the police to record the interrogation resulting in her statement.") (alteration in original) (quoting People v. Falkenstein, 732 N.Y.S.2d 817, 817 (N.Y. App. Div. 2001); State v. Thibodeaux, 459 S.E.2d 501, 507 (N.C. 1995) ("[The argument that failure to record electronically custodial statements violated due process] is without merit."); State v. Smith, 684 N.E.2d 668, 686 (Ohio 1997) ("Neither the Ohio Constitution nor the United States Constitution requires that police interviews, or any ensuing confessions, be recorded by audio or video machines."); Commonwealth v. Craft, 669 A.2d 394, 397 (Pa. Super. Ct. 1995) ("[C]ustodial interrogations do not need to be recorded to satisfy the due process requirements of the Pennsylvania Constitution."); State v. Godsey, 60 S.W.3d 759, 771 (Tenn. 2001) (([N]either the state nor the federal constitution requires electronic recording of interrogations."); State v. Villarreal, 889 P.2d 419, 427 (Utah 1995) ("[C]ontemporaneous recording of a confession is not mandated by the Utah Constitution."); State v. Gorton, 548 A.2d 419, 422 (Vt. 1988) ("This Court has never previously held that the Vermont Constitution mandates tape-recording of a suspect's voluntary statements as a requirement of due process, nor does our reading of the Vermont Constitution find any support for defendant's position."); State v. Spurgeon, 820 P.2d 960, 962 (Wash. Ct. App. 1991) ("[Rejecting the argument] that the Washington State Constitution requires police officers to tape record interrogations conducted at the jail house on penalty of exclusion of the evidence if they fail to do so."); State v. Kilmer, 439 S.E.2d 881, 893 (W. Va. 1993) ("[W]e decline to expand the Due Process Clause of the West Virginia Constitution . . . to encompass a duty that police electronically record the custodial interrogation of an accused."); *see also* Starks v. State, 594 So. 2d 187, 196 (Ala. Crim. App. 1991) ("[A] statement is admissible regardless of whether it was re-

VI. CONCLUSION

Notwithstanding the overwhelming weight of authority at the federal and state level rejecting, on constitutional or supervisory grounds, a rule mandating the electronic recording of custodial interrogations, many of those same courts have recognized that, when feasible, such a practice advances the administration of justice in several ways.[78] For example, it eliminates swearing contests between the police and the defendant regarding what was said.[79] It also assists in establishing that the confession was vol-

---

corded electronically or otherwise."); Baynor v. State, 736 A.2d 325, 331 (Md. 1999) ("[Rejecting the argument] that all custodial interrogations must be recorded for a trier of fact to be able to determine the totality of the circumstances related to the voluntariness of a confession.").

77. *See Brashars*, 25 S.W.3d at 63 n.19 ("We . . . decline . . . to adopt such a requirement independent of constitutional requirement in our supervisory capacity."); *DiGiambattista*, 813 N.E.2d at 532 ("Notwithstanding predominantly positive experiences in those jurisdictions that have imposed recording requirements as a prerequisite to admissibility, we are hesitant to formulate a rigid rule of exclusion, and all its corollary exceptions and modifications (each of which would potentially spark new disputes in motions to suppress)."); *Gorton*, 548 A.2d at 422 ("[W]e do not believe it appropriate to require, by judicial fiat, that all statements taken of a person in custody be tape-recorded."); *Kilmer*, 439 S.E.2d at 893 ("[W]e decline to establish an absolute rule requiring such recording.").

78. *See, e.g., Torres-Galindo*, 206 F.3d at 144 n.3 (1st Cir. 2000) ("[T]here is little doubt that accurate, contemporaneous recording of custodial statements would facilitate the truth-seeking aims of the justice system, and it would also facilitate review on appeal. Given the inexpensive means readily available for making written, audio, and video recordings, the failure to use such devices may raise some interesting issues."); Hendricks v. Swenson, 456 F.2d 503, 506 (8th Cir. 1972) ("If a proper foundation is laid for the admission of a video tape . . . we feel that it is an advancement in the field of criminal procedure and a protection of defendant's rights. We suggest that to the extent possible, all statements of defendants should be so preserved."); *Stoker*, 692 N.E.2d at 1390 ("[I]n light of the slight inconvenience and expense associated with the recoding of custodial interrogations in their entirety, it is strongly recommended, as a matter of sound policy, that law enforcement officers adopt this procedure."); *Kilmer*, 439 S.E.2d at 893 ("[I]t would be the wiser course for law enforcement officers to record, either by videotape or by electronic recording device, the interrogation of a suspect where feasible and where such equipment is available, since such recording would be beneficial not only to law enforcement, but to the suspect and the court when determining the admissibility of a confession.").

79. *Raibon*, 843 P.2d at 49 ("We recognize that the recording of an interview . . . either by audiotape or otherwise, may remove some questions that may later arise with respect to the contents of that interview. For that reason, it may well be better investigative practice to make such a precise record of any interview as the circumstances may permit."); *Kekona*, 886 P.2d at 746 ("A recording would be helpful to both the suspect and the police by obviating the 'swearing contest' which too often arises when an accused maintains that she asserted her constitutional right to remain silent or requested an attorney and the police testify to the contrary."); *Buzzell*, 617 A.2d at 1018 (noting that one of the benefits of electronic recording is the "conserv[ation of] judicial resources by reducing the need for the 'swearing contests' that often occur at suppression hearings."); *Godsey*, 60 S.W.3d. at 772 ("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 the

untary.[80] Many commentators share this assessment,[81] and those police departments which record interrogations embrace the practice.[82]

As this issue continues to be examined by legislatures and appellate courts, additional jurisdictions may elect to impose a recording requirement,[83] at least as to the incriminating statement

---

interrogation. As a result, the judiciary would be relieved of much of the burden of resolving these disputes.").

80. United States v. Lewis, 355 F. Supp. 2d 870, 873 (E.D. Mich. 2005) ("Affording the Court the benefit of watching or listening to a videotaped or audiotaped statement is invaluable; indeed, a tape-recorded interrogation allows the Court to more accurately assess whether a statement was given knowingly, voluntarily, and intelligently."); *Williams*, 522 So. 2d at 208 ("If a recording does exist it will often help to demonstrate the voluntariness of the confession, the context in which a particular statement was made, and of course, the actual content of the statement."); *James*, 858 P.2d at 1018 (agreeing with *Williams* that recording "may show the 'voluntariness of the confession'") (quoting *Williams*, 522 So. 2d at 208).

81. *See, e.g.*, Donovan & Rhodes, *supra* note 34, at 227–30; Drizin & Reich, *supra* note 3, at 639–46; Kamisar, *supra* note 3, at 233–43; Wayne T. Wesyling, *Something is Rotten in the Interrogation Room: Let's Try Video Oversight*, 34 J. MARSHALL L. REV. 537, 549 (2001); White, *supra* note 13, at 153–55. In 2004, the American Bar Association accepted a resolution urging courts and legislatures throughout the country to enact rules or laws requiring the entire videotaping of custodial interrogations. *Lewis*, 355 F. Supp. 2d at 872–73 & n.4.

82. *See* Adam Liptak, *Taping of Interrogations Is Praised by Police*, N.Y. TIMES, June 13, 2004, at 35 ("Police departments that electronically record the interrogations of suspects have come to embrace the practice, according to a new survey of more than 200 law enforcement agencies in 38 states.").

83. *See* Johnson, *supra* note 36, at 747–48 ("Given the generally favorable stance of many state courts toward the practice of recording, it may simply be a matter of time before they decide to take more than a hortatory approach towards recording, as the Supreme Court of Minnesota finally decided to do."). As the court in *DiGiambattista* recognized, however, the judicial promulgation of a bright-line rule barring unrecorded confessions raises a number of issues:

> [A]doption of a rule excluding evidence of unrecorded interrogations necessitates precise identification of what interrogations will be subject to that rule — does it cover only custodial interrogations, or should it also cover any non-custodial interrogation conducted in particular locations (e.g., at police stations)? If the requirement were to be premised on the custodial (as opposed to noncustodial) nature of the interrogation, what . . . [should be] do[ne] with interrogations that start out as noncustodial but arguably become custodial at some later (and often disputed) point during questioning? A rule of exclusion would also have to allow for justifiable failures to record — e.g., equipment malfunction, or the suspect's refusal to allow recording (or insistence that the tape recorder be turned off at a particular point during the interrogation). With regard to a suspect who is willing to speak to the interrogator but initially unwilling to be recorded, would . . . [there be a] need to impose some requirement that the interrogator make a good faith effort to convince the suspect to agree to recording, lest that ostensible "justification" for not recording too easily become the exception that swallows the rule? Notwithstanding predominantly positive experiences in those jurisdictions that have imposed recording requirements as a prerequisite to admissibility, we are hesitant to

resulting from the interrogation.[84] In the meantime, courts will continue to make preliminary determinations of reliability on the basis of conflicting testimony,[85] and at trial, a defendant may introduce evidence challenging the reliability of his or her confession.[86]

---

formulate a rigid rule of exclusion, and all of its corollary exceptions and modifications (each of which would potentially spark new disputes in motions to suppress).

Commonwealth v. DiGiambattista, 813 N.E.2d 516, 532 (Mass. 2004) (citation omitted).

84. *See Villareal*, 889 P.2d at 427 (Utah 1995) ("Notwithstanding the desirability of recording confessions, it is neither practicable nor possible to require contemporaneous recordings in all instances. When a formal confession is given in a police station, it could, and should, be recorded."). *But see Stephan*, 711 P.2d at 1162 (Alaska 1985) ("To satisfy this due process requirement, the recording must clearly indicate that it recounts the entire interview."); State v. Jones, 49 P.3d 273, 279 (Ariz. 2002) ("It would be a better practice to videotape the *entire* interrogation process, including advice of rights, waiver of rights, questioning, and confessions."); State v. Scales, 518 N.E.2d 587, 592 (Minn. 1994) ("[A]ll custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention."); *Barnett*, 789 A.2d at 632 (N.H. 2001) (ruling that after a waiver of *Miranda* rights, for a tape recording of an interrogation to be admitted into evidence, the recording must reflect the entire interrogation).

85. *See James*, 678 A.2d at 1360 (Conn. 1996) ("We are not persuaded that determinations of admissibility traditionally made by trial courts are inherently untrustworthy or that independent corroboration of otherwise competent testimonial or documentary evidence regarding the existence and voluntariness of a confession is necessary to comport with constitutional due process requirements."); Brashars v. Commonwealth, 25 S.W.3d 58, 62 (Ky. 2000) ("[T]rial judges commonly decide, without independent corroboration, disputed issues regarding whether a defendant gave consent to a search of his home or vehicle or whether a defendant's conduct gave rise to reasonable suspicion for a detention or probable cause for a search.").

86. *See* Crane v. Kentucky, 476 U.S. 683, 690 (1986) ("We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence.") (citations omitted).

***