Comes a Time: The Case for Recording Interrogations

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COMES A TIME: THE CASE FOR RECORDING INTERROGATIONS

Daniel Donovan* and John Rhodes**

The fundamental value that the privilege [against self-incrimination] reflects is intangible, it is true, but so is liberty, and so is man's immortal soul. A man may be punished, even put to death, by the state; but ... he should not be made to prostrate himself before its majesty. *Mea culpa* belongs to a man and his God. It is a plea that cannot be exacted from free men by human authority. To require it is to insist that the state is the superior of the individuals who compose it, instead of their instrument.¹

Throughout the 20th Century, law enforcement, prosecutors and the courts have embraced technological developments to investigate and prosecute crime. From wire-taps² to drug sniffing dogs,³ courts have ruled that investigative techniques pass constitutional muster. Government and the courts, however, have resisted utilizing technology to preserve and promote constitutional rights. Repeatedly, at the urging of the prosecution, courts have refused to require that defendant statements be recorded to admit the statements at trial.⁴ Yet, where law enforcement records such statements, the courts have readily admitted the recordings at the prosecution's request.⁵ Thus far, only two American jurisdictions require defendant

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3. See United States v. Place, 462 U.S. 696, 707 (1983) (holding that a dog sniff was not a search).
4. See, e.g., United States v. Coades, 549 F.2d 1303, 1305 (9th Cir. 1977) (holding that recording was not required for admission of statement); State v. Grey, 274 Mont. 206, 214, 907 P.2d 951, 956 (1995) (refusing to adopt a recording requirement; however, the absence of a recording, where recording is feasible, will be viewed with distrust in the assessment of the voluntariness of the statement). See also infra note 52.
5. See Diane M. Allen, Annotation, *Admissibility of Visual Recording of Event or Matter Other Than That Giving Rise to Litigation or Prosecution*, 41 A.L.R.4th 877, § 10 (1985); State v. Brubaker, 184 Mont. 294, 301, 602 P.2d 974, 978 (1979) (holding that tape-recorded statement of defendant's interview could be played for jury since interviewing detective could have testified regarding statements made by defendant).
statements to be recorded in order to admit the statements. The Supreme Court of Montana is perhaps moving toward adopting this requirement. It should. Compelling policy and constitutional reasons support this requirement.

This article will review this support and the constitutional necessity of recording interrogation statements. The article will particularly describe current practices regarding the admissibility of statements, review the benefits of recording, analyze the state of the law on recording and the Supreme Court of Montana's recording jurisprudence, and advocate the due process basis for recording.

I. CURRENT PRACTICES AND INHERENT DEFICIENCIES

Currently, whether to admit a defendant's supposed custodial interrogation statement is governed by Miranda v. Arizona and related inquiries. Compliance with Miranda assures the court that the defendant understood his rights when he made the statements.

Prior to any questioning, the person must be warned that he has a

6. See Stephan v. State, 711 P.2d 1156, 1158 (Alaska 1985) (holding that unexcused failure to electronically record custodial interrogation conducted in place of detention violated suspects' right to due process under Alaska Constitution, and therefore defendants' statements were inadmissible); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) (holding that custodial interrogation shall be electronically recorded where feasible and must be recorded when questioning occurs at place of detention). See also Ragan v. State, 642 S.W.2d 489, 492 (Tex. Crim. App. 1982) (holding that the trial court erred in admitting tape recording for impeachment purposes over the appellant's objection that it contained no warning that a recording was being made). At the time of the Ragan decision, Texas statutorily limited the recording requirement to the impeachment context: a recording was required only when a defendant's statements were admitted for impeachment purposes. Since then, Texas has further narrowed the recording requirement to the admission of oral or sign language statements of the accused. TEX. CODE CRIM. P. ANN. art. 38.22(3)(a)(1) (West 1999).

7. See discussion infra Part IV.

8. This article premises the recording requirement on the availability of a recording device. At the least, audio recording should be required, and where video recording is available, it should be required. Indeed, much like Miranda, should a recording requirement be imposed, law enforcement could easily incorporate video recording of statements into their procedures. Indeed, video recording of drunk driving suspects is standard operating procedure in many jurisdictions.

9. 384 U.S. 436 (1966) (holding that statements obtained from defendants during incommunicado interrogation in police-dominated atmosphere, without full warning of constitutional rights, were inadmissible and violated Defendant's Fifth Amendment privilege against self-incrimination). Miranda's authority may be altered by the Supreme Court's ruling in United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999), cert. granted in part, 120 S. Ct. 578 (1999).
right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.  

As popularized by the television and movie industries, the prosecution cannot use a defendant’s statements responding to custodial interrogation unless the defendant has been informed of and freely waived his Fifth Amendment right to remain silent and his Sixth Amendment right to consult an attorney. Although a verbatim recital of the Miranda warnings is not required and no particular “talismanic incantation” is necessary, law enforcement agencies across the land utilize pre-printed forms with a verbatim recital of the Miranda warnings.

Recital of the warnings is not enough, however. “[A] heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.” The United States Supreme Court has reaffirmed this heavy burden to find a Miranda waiver, requiring:

First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both of the nature of the right being abandoned and consequences of the decision to abandon it.

Thus, before admitting a statement, the court must ascertain that the defendant voluntarily, knowingly and intelligently waived his Fifth and Sixth Amendment rights. At the same time, the court must deploy a four-part inquiry. First, did the accused make any statements? Second, was the

defendant in custody at the time of the statements?16 Third, were the statements made in response to interrogation by government agents?17 And, finally, the court must deem the statements to have been voluntary.18 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.19 Ultimately, that decision turns on the totality of the circumstances.20 Of course, even with such a finding, the ultimate question remains: what was said?

Current practices somewhat answer these inquiries. For instance, the widespread availability and use of preprinted Miranda warnings facilitates law enforcement compliance with Miranda's prescripts. Similarly, written Miranda waivers signed (and sometimes additionally initialed) by the defendant help demonstrate the defendant's knowing waiver of rights.21 Even better, written statements signed by the defendant certainly facilitate the fact-finder's determination of what the defendant stated.

Each of these practices cast some light on what actually happened during the interrogation and the statements of the defendant; at the least, that light may be dim, and at its best, it is only partially illuminating. The fact finder thus must resort to testimony to guide its decision. That testimony provides biased guidance: either it comes from officers who want the statement admitted or it comes from the defendant who wants it suppressed; the fact finder then is left trying to reconstruct an invisible proceeding based on the testimony of witnesses with a stake in the outcome. Recording solves this quagmire. It provides a neutral, objective account of what transpired that

21. Written waivers are evaluated as part of the totality of the circumstances test. See, e.g., Oregon v. Bradshaw, 462 U.S. 1039, 1046 (1983).
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answers each of the above inquiries. It is the best tool for aiding the courts' totality of the circumstance determination. Moreover, it preserves the substance of the statements themselves and the context of the interrogation for evidence at trial. Thus, whether the issue is the admissibility of statements or the reliability of the statements, recording advances justice.

II. THE BENEFITS OF RECORDING

The advantages of recording suspect interrogations, particularly its furtherance of due process, compel adopting such a requirement. "[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, [it] further[s] the policy objectives that underlie [the] dual concerns for crime control and due process." Alaska's Supreme Court recognized that the advantages of recording cut both ways:

The recording of custodial interrogations is not, however, a measure intended to protect only the accused; a recording also protects the public's interest in honest and effective law enforcement, and the individual interests of those police officers wrongfully accused of improper tactics. A recording, in many cases, will aid law enforcement efforts, by confirming the content and the voluntariness of a confession, when a defendant changes his testimony or claims falsely that his constitutional rights were violated. In any case, a recording will help trial and appellate courts to ascertain the truth.

Perhaps most importantly, recording of interrogations will bring an invisible event to life. Otherwise, the trier of fact must reconstruct what occurred months or even years before with

22. See Crane v. Kentucky, 476 U.S. 683, 688 (1986) (confirming "that evidence about the manner in which a confession was secured will often be germane to its probative weight, a matter that is exclusively for the jury to assess").


24. If Montana had adopted a recording requirement, the result in State v. Johnson, 177 Mont. 182, 580 P.2d 1387 (1978), may have been different. There, dismissal resulted because even though a county attorney testified that the defendant was Mirandized, there was no proof regarding what the defendant was told about his rights and thus it was not possible to determine if the defendant was properly advised of his rights. See id. at 188, 580 P.2d at 1390.

incomplete information. "Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms."\(^{26}\) At the outset, a recording will greatly facilitate the Miranda and voluntariness analyses, and a recording details factors relevant to credibility and the ultimate issue—the substance of the defendant's statements: was the defendant informed of his Miranda rights; did he understand them; were they waived; was the waiver voluntary; was the statement voluntary; was either the statement or waiver coerced; the substantive questions asked; how they were asked; and conversely the answers given and how the responses were made; the interrogator's demeanor (and appearance) contrasted with the suspect's behavior (and appearance); the fit between what the tape reveals and the testimony of the people on the tape; as the Eighth Circuit recognized, a tape will display if the defendant "is hesitant, uncertain, or faltering,... [if] he has been worn out by interrogation, physically abused, or in other respects is acting involuntarily, the tape will corroborate him in ways a typewritten statement would not."\(^{27}\)

Additionally, recording will curb improper police tactics. If the interrogator knows he is on tape, he will act accordingly; otherwise, he will risk "losing" his case as well as his reputation. Police tactics are a real concern. In a 1998 *Cornell Law Review* article, Boalt Hall Law Professor Charles D. Weisselberg detailed the "outside Miranda" interrogation tactics promoted by California law enforcement.\(^{28}\) The article is replete with examples of California law enforcement training materials advocating the circumvention of *Miranda*. According to Professor Weisselberg, "Police officers commonly refer to this technique as questioning 'outside Miranda.'"\(^{29}\) Professor Weisselberg concludes that, "There can be no doubt that the practice of questioning 'outside Miranda' has spread throughout California."\(^{30}\) The Ninth Circuit recently addressed outside-Miranda questioning in an opinion denying qualified immunity

\(^{27}\) Hendricks v. Swenson, 456 F.2d 503, 506 (8th Cir. 1972). The court further stated, "we feel that [videotaped interrogations are] 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." *Id.*

\(^{29}\) *Id.* at 133.
\(^{30}\) *Id.* at 136.
to officers who deploy such tactics.\textsuperscript{31}

Conversely, recording will discourage defendants from raising frivolous pretrial challenges to confessions. Relatedly, recordings will impact the accused's trial decision. A defendant faced with the cold recorded reality of his confession may be convinced to plead guilty rather than expose his admissions to a jury. Many law enforcement agencies already videotape confessions.\textsuperscript{32} Regardless of the stage of the proceeding, recording will facilitate justice and resolution of the case and controversy.

It is beyond dispute that, unlike the courts, law enforcement and defendants have an agenda beyond finding the truth. Recording is necessary to promote the judicial function and the search for the truth.

It is not because a police officer is more dishonest than the rest of us that we... demand an objective recording 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 be a 'judge of his own cause.' Defendants, undoubtedly, are equally fallible.\textsuperscript{33}

As the Eighth Circuit explained, "For jurors to see as well as hear the events surrounding an alleged confession or incriminating statement is a forward step in the search for the truth."\textsuperscript{34}

Objectivity is particularly insightful when judging credibility. A recording minimizes the swearing match between law enforcement and the accused over what actually happened. Experience teaches who wins that match. Not surprisingly, internal law enforcement policy discourages recording.\textsuperscript{35} As

\begin{itemize}
  \item \textsuperscript{31} See California Attorneys For Criminal Justice v. Butts, 195 F.3d 1039 (9th Cir. 1999) (amended 2000 WL 1639 January 3, 2000).
  \item \textsuperscript{34} Hendricks v. Swenson, 456 F.2d 503, 507 (8th Cir. 1972).
  \item \textsuperscript{35} See Federal Bureau of Investigation Legal Handbook for Special Agents, § 7-14 (discouraging recording of interviews and noting that if recorded, "the questioning must be carefully prepared so that the tone of voice and wording of the questions do not intimidate or coerce").
\end{itemize}
Justice Douglas noted, "There is the word of the accused against the police. But his voice has little persuasion." Recording will not stack the deck against or favor the defendant. It will make the process fairer. An objective recording cures the effect of the human tendency to recollect events in a self-promoting manner.

Furthermore, fairness enhances integrity. Absent a recording, the courts must determine what happened during an interrogation based on the testimony of the interested parties. Such reliance, where an objective source is readily available, is antiquated and erodes respect for, and the integrity of, the judicial system.

III. THE STATE OF THE LAW

Requiring suspect interviews to be tape recorded has long been recognized as an advancement in criminal justice. It has been adopted by the National Conference of Commissioners on Uniform State Laws and the American Law Institute. Moreover, it is consistent with the apparent policy behind Federal Rule of Evidence 1002 (Best Evidence Rule, requiring an original writing or recording), Rule 613(a) (requiring that a prior statement be shown or disclosed to opposing counsel), Rule 613(b) (allowing a witness to explain or deny a prior inconsistent statement and affording the opposite party to interrogate the witness thereon), and Rule 106 (allowing an adverse party to require the proponent of a statement to introduce other parts of the statement that should be considered with it). More importantly, recording is constitutionally necessary.

Concern for fundamental fairness and with the reality of false confessions has prompted many commentators to advocate recording. Those analysts note law enforcement's near total control of the interrogation and the use of refined psychological tools to gain confessions. Commentators recognize that, "a confession is universally treated as damning and compelling

38. See UNIFORM RULES OF CRIMINAL PROCEDURE 243 (1974) and the MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, § 130.4 at 37 (1975).
39. See also MONT. R. EVID. 106, 613, 1002.

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evidence of guilt [that] is likely to dominate all other case evidence and lead a trier of fact to convict the defendant." 41 Recording, as a remedy for false confessions, ensures due process. 42

Three other common-law countries have now adopted the rule that police must tape record interviews with suspects. In 1988, a Code of Practice in Great Britain took effect that generally requires that police tape record interviews with suspects. A 1993 review of the requirement by the Royal Commission on Criminal Justice reported that, “By general consent, tape recording in the police station has proved to be a strikingly successful innovation providing better safeguards for the suspect and the police officer alike.” 43 Similarly, Canada now has a policy of mandatory videotaping of confessions. 44 In Australia, because of allegations of police “verballing” (that is, fabricating verbal confessions), the High Court held that police must record all confessions or the jury will receive a cautionary instruction suggesting police testimony may be unreliable. 45

Thus far, two American jurisdictions have imposed an interrogation recording requirement. 46 The Supreme Court of Minnesota did so under its “supervisory authority to insure the fair administration of justice,” holding “that all custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention.” 47

The Supreme Court of Alaska requires recording as a matter of due process. The Alaska high court held “that an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a


46. Texas requires a recording in narrow circumstances. See Ragan v. State, 642 S.W.2d 489, 489 (Tex. Crim. App. 1982); see also TEX. CODE CRIM. P. ANN. art. 38.22 (West 1999); supra note 6.

47. State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994).
suspect's right to due process, under the Alaska Constitution, and that any statement thus obtained is generally inadmissible."48 Persuaded by the policy reasons discussed supra, the court ruled that, "Such recording is a requirement of state due process when the interrogation occurs in a place of detention and recording is feasible. We reach this conclusion because we are convinced that recording, in such circumstances, is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self incrimination and, ultimately, his right to a fair trial."49

The Alaska court further recognized that the recording requirement enhances judicial integrity.

The integrity of our judicial system is subject to question whenever a court rules on the admissibility of a questionable confession, based solely upon the court's acceptance of the testimony of an interested party, whether it be the interrogating officer or the defendant. This is especially true when objective evidence of the circumstances surrounding the confession could have been preserved by the mere flip of a switch. Routine and systematic recording of custodial interrogations will provide such evidence, and avoid any suggestion that the court is biased in favor of either party.50

To preserve constitutional rights and promote judicial integrity, Alaska invoked the exclusionary rule:

Exclusion is warranted [when a tape recording is not made of the entire interview] because the arbitrary failure to preserve the entire conversation directly affects a defendant's ability to present his defense at trial or at a suppression hearing. Moreover, exclusion of the defendant's statement is the only remedy which will correct the wrong that has been done and "place the defendant in the same position he or she would have been in had the evidence been preserved and turned over in time for use at trial."51

The remaining jurisdictions which have considered the recording requirement have rejected it.52

49. Id. at 1159-60.
50. Id. at 1164.
51. Id. at 1164 (footnote and citation omitted).
52. See, e.g., Stoker v. State, 692 N.E.2d 1386 (Ind. Ct. App. 1998) (holding that State Constitution imposed no specific duty upon law enforcement officers to record or
IV. RECORDING AND THE SUPREME COURT OF MONTANA

The Supreme Court of Montana first considered the recording requirement in *State v. Grey*. Grey involved employee theft from an auto parts store. Mr. Grey was the primary suspect, thus the police requested that he go to the Kalispell Police Department for an interview. Grey claimed that he was not given his Miranda warnings; law enforcement maintained otherwise, claiming that Mr. Grey was Mirandized but conceding they did not obtain a written waiver or record the Miranda invocation, although the interview was videotaped. Grey moved to suppress his statement and videotape on numerous Fifth Amendment grounds, including the recording argument. The district court denied his motion.
Supreme Court reversed "[b]ased on the totality of the circumstances of police deception and failure to give Grey an adequate Miranda warning." 59

The Court did so without reaching the recording issue but nonetheless commented on it: the Court's gratuitous commentary reflects the fact that recording greatly aids the judiciary's task; as the Court noted, "It is immeasurably more difficult for the State to sustain its burden to prove the voluntariness of a confession when there is no record of the Miranda warning other than the officer's testimony that he gave them." 60 The benefits of recording facilitates the Miranda inquiry. "Significantly, none of the decisions regarding the admissibility of a confession turns on the presence or absence of a single controlling criterion, each reflects a careful scrutiny of all the surrounding circumstances." 61 Recording illuminates most, if not all, of the criteria. 62

Despite its commentary, the Court stopped short of imposing a recording requirement. "We do not hold that the police must tape record or create an audio-visual record of Miranda warnings and the detainee's waiver, as Grey urges we should and as some jurisdictions have." 63 The Court appeared to limit its ruling based on a Separation of Powers rationale. "Although [recording] may be the better practice and would help assure that the accused receives a constitutionally adequate Miranda warning while, at the same time, enhancing the prosecution's ability to meet its burden to prove voluntariness, we leave the imposition of any such procedural requirement to the legislature and to individual law enforcement agencies." 64 As urged infra, the recording requirement cannot be dismissed as a legislative issue; it is a constitutional issue necessitating judicial protection.

Finally, the Court did announce that the failure to record, where such aid was available, is a factor for courts to consider when adjudicating suppression issues.

60. Id. at 213, 907 P.2d at 955.
61. Id. at 210, 907 P.2d at 954 (citing Schneckcloth v. Bustamonte, 412 U.S. 218, 226 (1973)).
64. Id. at 213-14, 907 P.2d at 955-56.
We do hold, that, in the context of a custodial interrogation conducted at the station house or under other similarly controlled circumstances, the failure of the police officer to preserve some tangible record of his or her giving of the Miranda warning and the knowing, intelligent waiver by the detainee will be viewed with distrust in the judicial assessment of voluntariness under the totality of circumstances surrounding the confession or admission. That is all the more so where the evidence demonstrates that, as here, the police officer made a conscious decision not to secure a written waiver or otherwise preserve his giving of the Miranda warning and the detainee's waiver on the premise that to do so would alert the accused to exercise his rights and, thus, jeopardize the interrogation.65

The Supreme Court of Montana revisited the recording issue in State v. Cassell.66 In Cassell, a homicide case, the defendant claimed that he was not given a Miranda warning and moved to suppress his confession on that and related grounds.67 Law enforcement testified that officers read the defendant his Miranda rights and that the defendant waived the rights.68 The officers then recorded the interview of Mr. Cassell.69 During the recorded interview, the officers did not question the defendant regarding his rights or have him acknowledge that he had been informed of those rights and was willing to waive them.70 The same procedure characterized a second recorded interview: law enforcement claimed that they had asked Mr. Cassell if he would like his rights read to him again before the recording began and that Mr. Cassell said that he understood his rights, none of which was recorded.71 The recording captured the interrogation but did not reference that Mr. Cassell had been informed of his rights.72 A claimed third interview was not recorded at all.73

Mr. Cassell relied on Grey to argue that law enforcement must record a defendant's waiver of his rights.74 The Court factually distinguished Grey, ruling that in Grey "the Miranda

65. Id. at 214, 907 P.2d at 956.
67. Id. at 399, 932 P.2d at 479.
68. See id.
69. See id.
70. See id.
71. See id. at 402, 932 P.2d at 481.
73. See id.
74. See id.
warnings were inadequately given" and that "the law enforcement officers used impermissible tactics, including lying and deception, to obtain Grey's confession."\textsuperscript{75} The Court found no such facts in \textit{Cassell}.\textsuperscript{76}

The Court's factual distinction leaves open the question of extending \textit{Grey} and requiring recordings for statements or confessions to be admissible. Although \textit{Cassell} was careful to establish a factual distinction from \textit{Grey}, the Court did reiterate its holding in \textit{Grey}:

Law enforcement officers should be encouraged to preserve a tangible waiver of advising defendants of their rights and a defendant's waiver of those rights. To the extent that they do not, that failure will be viewed with distrust. We declined in \textit{Grey}, however, to require that interviews be tape recorded. How the record is preserved is still up to the law enforcement officers. \textit{Grey} did not set out a rule of exclusion, but a guideline for weighing evidence. Here the law enforcement officers established to the court's satisfaction that the Miranda warnings were properly given and that no impermissible tactics were used and that under the totality of the circumstances the confessions were voluntary. That is all that is required. The fact that the warnings and waiver were not preserved tangibly, even if viewed with distrust, does not terminate the inquiry, if the court is satisfied from all the available evidence, that the State's burden of proof was met.\textsuperscript{77}

Two justices, Trieweiler and Hunt, were not satisfied with this affirmation of \textit{Grey}. They recognized the troubling silence caused by the officers deliberate failure to record the Miranda events. Thus, via a concurring opinion, they "would require either a written waiver of a defendant's right to remain silent, or a record of the Miranda advice that was given to that person and his or her response."\textsuperscript{78} In reaching this conclusion, the concurrence noted that the officers admitted that they did not record the Miranda waiver "because during that time they were establishing rapport with the suspect."\textsuperscript{79} This poor excuse illustrates the necessity of recording. As noted by Justice Trieweiler:

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\textsuperscript{75} \textit{Id.} at 403, 932 P.2d at 481.
\textsuperscript{76} See \textit{id.}
\textsuperscript{77} \textit{Id.}
\textsuperscript{79} \textit{Id.}
The excuse given for not recording Cassell's waiver of his Fifth Amendment rights is equally inadequate. In this case, his interrogators wanted to establish a rapport with him. However, that apparently having been accomplished, nothing prevented them from obtaining an acknowledgment from Cassell, once the recorder had been turned on, that he had been advised of his rights and had waived them. Certainly, that kind of acknowledgment could not have been any more disturbing to him than being asked during a tape recorded interview whether he committed deliberate homicide. 80

Poor excuses typify failures to record, emboldening suspicions about why law enforcement officers and prosecutors resist such a requirement.

As canvassed supra, absent a recording, the courts “are required to speculate about what actually transpired, based on the relative credibility of the witnesses to the conversation.” 81 Where the courts could eradicate this speculation by imposing a recording requirement, the courts failure to do so raises more questions and engenders distrust of the criminal justice system. Of course, law enforcement cannot be expected to advocate recording. Where the courts are left to speculate about what actually happened, “It is no secret that law enforcement will nearly always win that contest. Therefore, they have no incentive to record that part of the conversation, and it follows, they have little incentive to actually give the required advice.” 82

The Cassell concurrence noted these policy and constitutional reasons for adopting a recording requirement. It similarly relied on many of the other compelling factors discussed in section II, supra. For instance, it highlighted the economy and prosecutorial benefit that recording would ensure:

On the other hand, assuming the advice was given, that it was understood, and that the rights were waived, why not record the conversation and avoid the inevitable challenge to the admission or confession? That simple practice would have saved time for the prosecuting attorney, the defense attorney, the trial court, and this Court because it would have established with certainty that Cassell’s statement was either voluntary or that it should be suppressed, in compliance with the Constitution, as applied in Miranda v. Arizona (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d

80. Id. at 405-06, 932 P.2d at 483.
81. Id. at 404, 932 P.2d at 482.
82. Id.
The concurrence also recognized the objectivity, fairness, and integrity that comes with a recording:

The problem is that, in this case, as in Grey, we have no direct knowledge of any of those three [totality of the circumstances] factors. The trial court, and this Court, are required to speculate about all three factors by trying to weigh the relative credibility of the people involved in the interrogation. Such an unreliable process is inexcusable when it is unnecessary because a means of absolute verification was readily available.84

The concurrence further rooted its conclusion in plain commonsense:

When the means is available, as it was in this case, there is no practical justification for the State's failure to record a custodial interrogation. By its failure to do so, it jeopardizes the prosecution by risking suppression of incriminating statements which have been legally obtained. Just as importantly, it makes any determination that detainees have been illegally questioned virtually impossible. Neither outcome is acceptable when the means to avoid it is readily available.85

For now, two Montana Supreme Court justices have recognized the necessity of recording statements. Overwhelming policy and constitutional reasons compel this requirement. And the Court has indicated that it may not be done with the issue. This past year, in State v. Worrall, the Court was careful to state, "While we have not, to date, held that law enforcement officers must memorialize the giving of Miranda warnings prior to interrogation or interviews with witnesses . . . ."86 The Court's inclusion of the "to date" language in Worrall may indicate that the Court is still considering and perhaps moving toward adopting such a requirement.

That is exactly what happened in both Alaska and Minnesota, where the respective supreme courts evolved to a recording requirement. In Scales, the Supreme Court of

83. Id. at 404-05, 932 P.2d at 482.
85. Id. at 406, 932 P.2d at 483.
Minnesota noted that, "In previous cases, we have been concerned about the failure of law enforcement officers to record custodial interrogations."\(^{87}\) In those previous cases, the Minnesota court adopted the Grey holding. As explained in \textit{Scales}, in earlier cases, the court "'urge[d] . . . law enforcement professionals [to] use those technological means at their disposal to fully preserve those conversations and events preceding the actual interrogation' and warned that we would 'look with great disfavor upon any further refusal to heed these admonitions.'\(^{88}\) "[D]isturbed by the fact that law enforcement officials ignored [the court's] warnings,"\(^{89}\) \textit{Scales} decided "that the recording of custodial interrogations 'is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self incrimination and, ultimately, his right to a fair trial.'\(^{90}\)

The Minnesota court based this holding on its supervisory authority.\(^{91}\) The Supreme Court of Montana possesses the same authority and could impose a recording requirement to assure the fair and effective administration of justice.\(^{92}\) Indeed, in the past, the Montana Court has exercised such authority because, "Justice must satisfy the appearance of justice."\(^{93}\) As detailed above, when the courts refuse to adopt a recording requirement, rely on the testimony of interested parties to resolve suppression issues, and almost always side with law enforcement, the integrity of the courts becomes an issue. Montana's Supreme Court has made it clear that, "The people's confidence in the ability of the courts to administer justice must not be diminished. A state ruled by law cannot afford any perceived notion that justice is not being served by the judiciary."\(^{94}\) The Court justified the exercise of its supervisory authority on this basis. It should consider exercising that authority and imposing a recording requirement to eliminate the "aura of possible bias or prejudice"\(^{95}\) that currently plagues the admission of

\(^{87}\). State v. Scales, 518 N.W.2d 587, 591 (citing State v. Robinson, 427 N.W.2d 217, 224 (Minn. 1988); State v. Pilcher, 472 N.W.2d 327, 333 (Minn. 1991)).

\(^{88}\). Id. (quoting State v. Pilcher, 472 N.W.2d 327, 333 (Minn. 1991)).

\(^{89}\). Id. at 592.

\(^{90}\). Id. (quoting Stephan v. State, 711 P.2d 1156, 1159-60 (Alaska 1985)).

\(^{91}\). See id.

\(^{92}\). See MONT. CONST. art. VII, § 2.


\(^{94}\). Id.

\(^{95}\). Id. at 516, 795 P.2d at 465.
unrecorded statements.

Alaska experienced an evolution similar to that in Minnesota. Before the Supreme Court of Alaska adopted a recording requirement in *Stephan*, the court had previously instructed law enforcement to record interrogations. *Stephan* chronicled this evolution.96 Alaska first addressed the issue in *Mallott v. State*.97 There, in a footnote, Alaska's high court “advise[d] law enforcement agencies that as part of their duty to preserve evidence, it is incumbent upon them to tape record, where feasible, any questioning and particularly that which occurs in a place of detention.”98

The court addressed the issue again that same year in *S.B. v. State*.99 As in *Mallott*, and once again in a footnote, the court encouraged recording but did not specify the consequence for failure to do so: “In future cases, it will be a great aid to the trial court's determinations and our own review of the record if an electronic record of the police interview with a defendant is available from which the circumstances of a confession or other waiver of Miranda rights may be ascertained.”100

The court visited the issue for a third time in 1980. *McMahan v. State*101 reiterated the "Mallott Rule," advising law enforcement to record interviews where feasible, and adding that "if Miranda rights are read to the defendant, this too should be recorded."102 Ultimately, the Supreme Court of Alaska took the Mallott Rule to its logical conclusion and imposed the recording requirement in *Stephan*. Montana's Supreme Court should be encouraged to do the same.

*Worrall* itself reflects the evolving nature of Montana's constitutional jurisprudence. There, the Supreme Court applied the *Grey* instruction, holding that unrecorded interviews or statements of informants used for search warrant applications will be viewed with distrust. Specifically, the Court held "that absent the demonstration of exigent circumstances or some other compelling reason, the failure of the investigating officer to preserve some tangible record of the citizen informant's statements made in the controlled environment of the station

97. 608 P.2d 737 (Alaska 1980).
98. Id. at 743 n.5.
100. Id. at 789 n.9 (citing *Mallott v. State*, 608 P.2d 737, 743 n.5 (Alaska 1980)).
102. Id.
house, will be viewed with distrust in the judicial assessment of the truthfulness of the state’s declarations made in the search warrant application to the extent those declarations are based on the citizen informant’s statements.”

The Supreme Court’s extension of *Grey* to the statements of citizen informants in *Worrall* followed similar applications of *Grey* to the preservation of the results of a thermal imaging scan and interviews of children in sexual abuse cases.

In reaching its holding, *Worrall* seized upon many of the policy reasons that compel a recording requirement. For instance, the Court recognized the bias inherent in judging a no-record swearing match between experienced law enforcement officers and the defendant. This fact coupled with law enforcement’s perhaps conscious decision not to record troubled the Court because corrupt performance of law enforcement is “difficult if not impossible to substantiate” “absent a concession from the law enforcement officer.” The Court emphasized that this problem, which degrades the integrity of the criminal justice system, “simply does not have to exist at all.” As the Court concluded:

> We doubt that there is a police station or sheriff’s office in Montana that does not have paper and pens for note-taking and, more than likely, a typewriter for preparing statements, a tape recorder for recording those, and, in many cases, audio-visual recording equipment. Memorializing the reading of an accused’s rights, or an accused’s confession, or, as in the case at bar, a citizen informant’s statement in the controlled environment of the stationhouse, absent exigent circumstances, is neither an onerous nor a high-tech enterprise. Importantly, doing so avoids the sort of “who said what to whom” challenges that require trial courts to be arbiters of the credibility disputes that are nearly always resolved against the defendant.

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104. *See State v. Siegal*, 281 Mont. 250, 278, 934 P.2d 176, 192 (1996) (holding that failure to preserve some tangible record of the results of a thermal imaging scan should be viewed with judicial distrust, though law enforcement officers are not required by law to create a video recording of the result of such a scan).
105. *See State v. Weaver*, 290 Mont. 58, 73-74, 964 P.2d 713, 723 (1998) (declining to adopt a per se rule that interviews of child sexual abuse victims be recorded, but recognizing that “the better practice may be to create some record of the interviews.”).
107. *Id.* at 453, 976 P.2d at 977-78.
108. *Id.* at 453, 976 P.2d at 978.
109. *Id.* at 453-54, 976 P.2d at 978.
Worrall reflects the Supreme Court's concern for objectivity, the integrity of the process, and the promotion of fundamental rights. Moreover, as noted, Worrall expressly suggested that Grey may be extended to require recording for a statement to be admitted, when the Court wrote, "we have not, to date, held that law enforcement officers must memorialize the giving of Miranda warnings prior to interrogation."\(^{110}\) Given this suggestion, the fact that two justices have announced their support of a recording rule, the similarity between Montana's current rule in Grey and the evolution to a recording requirement in Minnesota and Alaska, the compelling support for such a requirement, and for the reasons discussed infra, defendants should continue to litigate the recording issue in Montana.

V. DUE PROCESS REQUIRES RECORDING

In Grey, the Court left "the imposition of any such procedural [recording] requirement to the legislature and to individual law enforcement agencies."\(^{111}\) That perspective mimicked the Ninth Circuit's ruling in United States v. Coades.\(^{112}\) There, the federal appellate court dismissed the recording argument as a legislative issue, "not for a court exercising an appellate function."\(^{113}\) That 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.\(^{114}\) Moreover, recording statements is more than a public policy issue, it is a question of fundamental fairness, otherwise known as due process.

110. Id. at 451, 976 P.2d at 977 (emphasis added).
111. 274 Mont. 206, 214, 907 P.2d 950, 956 (1995). Such deference arguably violates the Separation of Powers and represents an abdication of judicial duty where it is known that law enforcement discourages recording. See supra note 32.
112. 549 F.2d 1303, 1305 (9th Cir. 1977) (holding that testimony as to the defendant's confession was not subject to suppression merely because it was unrecorded).
113. Id.
114. See, e.g., Weeks v. United States, 232 U.S. 383 (1914) (affirming the court's power under the Fourth Amendment to place limitations on federal law enforcement searches and seizures).
A. The Constitutionality Of Prophylactic Rules

Since its genesis, its attackers have discounted *Miranda* and its invocation as establishing prophylactic rules not required by the Constitution.\(^{115}\) This position ignores the fact that "prophylactic" rules are "a central and necessary feature of constitutional law."\(^{116}\)

As this article advocates, "prophylactic" rules have been constitutionally enshrined to compensate for fact-finding limitations. Such jurisprudence occurred in *North Carolina v. Pearce*,\(^{117}\) where the United States Supreme Court held that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons [for] doing so must affirmatively appear [and] must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing."\(^{118}\) Absent this demonstration, a "presumption of vindictiveness" dictates a due process violation. The Court later clarified that the *Pearce* rule was prophylactic, analogous to *Miranda*, and designed to preserve the integrity of criminal justice.\(^{119}\) Similarly, *Edwards v. Arizona* \(^{120}\) developed *Miranda* by establishing that when a suspect asserts his right to counsel, the suspect may not be questioned further unless he initiates the conversation.\(^{121}\) The Court has since referred to that principle as "the bright-line, prophylactic Edwards rule,"\(^{122}\) explaining that, "The rule ensures that any statement is not the result of coercive pressures. Edwards conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness."\(^{123}\) A recording rule would provide the same benefit, and although it may be labeled prophylactic, it is a

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\(^{118}\) *Id.* at 726.

\(^{119}\) See *Michigan v. Payne*, 412 U.S. 47, 50-53 (1973) (holding that Pearce's prophylactic rules were not retroactively applicable to a post-sentencing hearing).

\(^{120}\) 451 U.S. 477 (1981) (holding that once a defendant has invoked his Fifth Amendment right to counsel, a valid waiver of that right cannot be established by showing only that he responded to police-initiated interrogation after another Miranda warning).

\(^{121}\) *See id.* at 484-85.


\(^{123}\) *Id.* at 151.
constitutional measure. As noted by Professor David Strauss, "'Prophylactic' rules are, in an important sense, the norm, not the exception. Constitutional law is filled with rules that are justified in ways that are analytically indistinguishable from the justifications for the Miranda rules." 124

Even the United States Department of Justice has recognized the constitutionality of Miranda specifically and prophylactic rules generally. Responding to the Fourth Circuit's ruling that 18 U.S.C. § 3501 overrules Miranda, 125 the United States petitioned the Supreme Court to reinstate Miranda's primacy. 126 In its brief in support of its petition, the United States argued that Miranda and its progeny implement and effectuate constitutional rights and as such are binding on Congress. 127 The Justice Department based its analysis on the fact that the Supreme Court "has consistently applied Miranda to the States" and on "federal habeas review of state convictions - a holding that can be explained only on the premise that Miranda states a rule of constitutional law." 128 The United States further noted that the Court "regularly described the Miranda holding, and subsequent extensions of that holding, as resting on constitutional grounds." 129 Quoting the Supreme Court, the United States noted "'[p]rophylactic' though it may be, in protecting a defendant’s Fifth Amendment privilege against self-incrimination, Miranda safeguards 'a fundamental trial right.'" 130 Finally, in detailing Miranda's constitutional stature, the United States canvassed the prevalence of

127. See id. at 6 (citing City of Boerne v. Flores, 521 U.S. 507, 516-29 (1997)).
128. Id. at 8.
130. Id. at 25 (quoting Withrow v. Williams, 507 U.S. 685, 691 (1991)).
prophylactic rules and their uncontroverted presence in constitutional jurisprudence.\textsuperscript{131} Given this analysis, federal and state governments will have difficulty dismissing the recording argument as an extra-constitutional prophylactic rule.\textsuperscript{132}

\textbf{B. Due Process Requires Recording}

Due process has frequently been reworded as fundamental fairness.\textsuperscript{133} That is the core of the argument for recording. It is simply fair. "Due Process is that which comports with the deepest notions of what is fair and right and just."\textsuperscript{134} Put differently, "Whether the trial be federal or state, the concern of due process is with the fair administration of justice."\textsuperscript{135} Recording is a question of due process.

More pointedly, recording provides what due process requires. For instance, Justice White has noted that "the right to an impartial decision-maker is required by due process."\textsuperscript{136} As argued above, a recording and its objectivity heightens the impartiality of the decision-maker who, absent a recording, must rely on the subjective testimony of interested parties to determine suppression and substantive issues. Without a recording requirement, the partiality of the fact finder taints the criminal justice system. Consequently, a recording requirement would enhance the appearance of justice, which courts have repeatedly highlighted as central to due process.

\begin{itemize}
\item \textsuperscript{132} The Ninth Circuit appears to agree with the United States that \textit{Miranda} has developed into a Constitutional doctrine. See California Attorneys For Criminal Justice v. Butts, 195 F.3d 1039, 1045 (9th Cir. 1999) (amended 2000 WL 1639 January 3, 2000). The Supreme Court may address this issue, as well as prophylactic rules, self-incrimination rights, and due process generally, in \textit{Dickerson}.
\item \textsuperscript{134} Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting).
\item \textsuperscript{135} Mayberry v. Pennsylvania, 400 U.S. 455, 464 (1971).
\item \textsuperscript{136} Arnett v. Kennedy, 416 U.S. 134, 197 (1974) (White, J., concurring in part and dissenting in part).
\end{itemize}
As Justice Harlan succinctly put it, "the appearance of evenhanded justice [ ] is at the core of due process." Furthermore, Justice Frankfurter explained that due process is a fluid concept that evolves with time and that the courts must develop to ensure fundamental fairness:

But "due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process. Fully aware of the enormous powers thus given to the judiciary and especially to its Supreme Court, those who founded this Nation put their trust in a judiciary truly independent—in judges not subject to the fears or allurements of a limited tenure and by the very nature of their function detached from passing and partisan influences.

Finally, recording furthers the fundamental, absolute right to a fair trial guaranteed by the Fifth Amendment's Due Process clause. The right to a fair trial "is the most fundamental of all freedoms." More than an instrument of justice and more than one wheel of the Constitution[,] it is the lamp that shows that freedom lives." A recording requirement would certainly brighten that lamp. As this century nears its end, characterized by technological innovation and particularly the ready availability of recording devices throughout America, due process and fundamental fairness demand a recording

VI. FINAL THOUGHTS

Grey should be reconsidered. "The concept of due process is not static; among other things, it must change to keep pace with new technological developments." It cannot be denied that, "Judicial solutions to problems of constitutional dimension have evolved decade by decade. As courts have been presented with the need to enforce constitutional rights, they have found means of doing so." The United States Supreme Court has employed tape recordings to determine voluntariness. Furthermore, many jurisdictions permit the introduction of taped confessions. That government is quick to exploit recorded confessions where it furthers convictions but resists an across-the-board-police-station requirement heightens the unfairness and distrust that result from not requiring recording.

In Montana, the momentum for constitutionalizing recording may be in place. Perhaps, as happened in Minnesota and Alaska, the judiciary will tire of law enforcement's lame excuses and failure to heed the judicial warnings advocating recording and determine that nothing short of a firm requirement will ensure the justice that recording provides. The constitutional bases for such a requirement are available in the supervisory authority of the Supreme Court of Montana, the Due Process Clauses in the Federal Fifth and Fourteenth Amendments, the self-incrimination provisions of Federal Fifth Amendment, the Due Process Clause in article II, section 17 of the Montana Constitution, the self-incrimination protection afforded by section 25 of that same article, the Sixth Amendment right to counsel and Montana's guarantee of the same right in article II, section 24 of the Montana Constitution. The synergy resulting from these multiple sources furthers the recording argument.

141. At the least, if the courts reject a recording requirement, all of the arguments in support of recording alternatively support a jury instruction that, if the statement was not recorded, such failure, where recording was feasible, should result in the jury viewing the statement with distrust. See State v. Grey, 274 Mont. 206, 214, 907 P.2d 951, 956 (1995).
145. See supra note 5.
146. See MONT. CONST. art. VII, § 2.
Importantly, when considering these constitutional sources, it must be remembered that Montana trumpets its prerogative to extend constitutional rights beyond those guaranteed by the United States Constitution,\(^1\) that is the Montana Supreme Court has recognized that, "As long as we guarantee the minimum rights guaranteed by the United States Constitution, we are not compelled to march lock-step with pronouncements of the United States Supreme Court if our own constitutional provisions call for more individual rights protection than that guaranteed by the United States Constitution."\(^2\)

Unfortunately, with respect to self-incrimination, the Supreme Court has held that Montana's Constitution provides no greater protection than the Fifth Amendment.\(^3\) That interpretation has been repeatedly attacked,\(^4\) and may be subject to revision.\(^5\) Furthermore, while the Supreme Court has interpreted the Self-Incrimination Clause of Article II, Section 25 to mirror the application of the Fifth Amendment, it has not similarly limited Montana's Due Process Clause nor the State's constitutional guarantee of counsel. Thus, Montana may interpret these rights more broadly than the United States Supreme Court interprets their federal counterparts because "[s]tates are free to grant citizens greater protections based on state constitutional provisions than the United States Supreme Court divines from the United States Constitution."\(^6\) As the Court stated, identical language does not necessitate identical interpretation: "We have chosen not to 'march lock-step' with the United States Supreme Court, even when applying nearly identical language."\(^7\)

These sources, along with the policies and arguments

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151. See generally James H. Goetz, *Interpretations of the Montana Constitution: Sometimes Socratic, Sometimes Erratic*, 51 Mont. L. Rev. 289 (1990). It is peculiarly idiosyncratic that the judiciary has limited Montana's self-incrimination clause because of the similarity between its wording and that of the Fifth Amendment yet Montana simultaneously recognizes that the clauses of the Montana Constitution provide greater fundamental rights than their federal counterparts.


153. Id. at 384, 901 P.2d at 75.
reviewed in this article, should be utilized by defense counsel, and perhaps even by prosecutors, to urge a recording requirement. The requirement should contain the commonsense limitation that recording is mandated only where such preservation is practical (i.e. a statement taken at the police station). Moreover, the recording rule should be applied to the entire interrogation, including the Miranda waiver, so that the selective recording that tarnished Cassell does not reoccur. Unfortunately, the state is keen to exploit technological advances that impinge our Constitutional rights and freedom, but, in this instance, resists using technology to safeguard them. With the almost universal availability of recording technology, now is the time, as we near the 21st century, to secure a recording requirement. If litigation fails, legislatures should be urged to preserve the liberty that our Constitutions command.