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Legislative Prerogative or Judicial Fiat: Mandating Electronic Recording of Stationhouse Interrogations in Tennessee

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Lance H. Selva & William L. Shulman***

Table of Contents

I. Introduction 388

II. The Problematic Nature of Confessions 391

 A. *The Voluntariness Test* 391

 B. *The Totality of the Circumstances Test* 395

 C. *Tennessee Decisions* 399

III. Recorded Interrogations 400

 A. *Overview*..... 400

 B. *The Benefits and Costs of Recording* 404

 C. *The State of the Law on Recording* 412

 D. *Tennessee's Legislative Proposal*..... 425

IV. The Tennessee Supreme Court's Supervisory Powers
Argument..... 432

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I. Introduction

The pendulum of credibility weighs heavily against a defendant who challenges the admissibility of his confession. If admitted, it will prove a virtual guarantee of conviction, as it is the most “potent of weapons for the prosecution.”¹ Although prosecutors lament the layers of constitutional rights in place to protect a defendant against coercive interrogation methods, most challenges to admissibility will come down to the detective’s word against that of the defendant. Absent a recording, the court will be called upon to decipher events that took place *in communicado* and will be consigned to speculate about what actually took place, weighing the relative credibility of witnesses. Where the court is left to speculate about what actually transpired, it is no secret that the defendant rarely prevails when a confession is in evidence. The entire set of rules governing the relationship between the suspect and interrogators is built on a house of cards whose major weakness resides in the premise that a court can accurately determine what transpired during the interrogation process.²

¹ Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the “Harmless Error” Rule*, 21 L. & HUM. BEHAV. 27 (1997); see also Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L. J. 719, 741-43 (1997); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 906-07 (1996).

² See Wayne T. Westling, *Something is Rotten in the Interrogation Room: Let’s Try Video Oversight*, 34 J. MARSHALL L. REV. 537 (2001).

The system now relies on DNA testing and widespread use of videotaping in DUI enforcement. Crime scenes and drug investigations are recorded on video cameras installed to monitor traffic and record license plates of people who violate traffic laws. New technology is employed on behalf of the State in enhancing prosecution proof, not to ensure or expand a defendant's right to a fair trial. Police and prosecutors find the use of videotaping cost-effective in many criminal justice activities, but not during interrogations.³ Unfortunately, too many interrogations are aimed at securing a confession without regard to securing reliable, fair, and objective indices of proof. Fundamental unfairness may arise not only because the confession may be unreliable, but also because no confession may have been forthcoming if the interrogation had been properly conducted. One irony of the failure to electronically record an interrogation is that when interrogators record such statements, courts readily admit them at the prosecutor's request.

The Tennessee Legislature recently embarked on an ambitious enterprise to render an accused's statements made during custodial interrogation inadmissible against the accused unless the entire interrogation were recorded.⁴ Any statement made during a prior custodial interrogation without being recorded in compliance with the bill's guidelines would be inadmissible for purposes other than

³ See Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois Problem of False Confessions*, 32 LOY. U. CHI. L. J. 337 (2001).

⁴ The bill targets only custodial interrogations in detention facilities. It would also require that *Miranda* rights and the accused's waiver of them be part of the recording.

impeachment.⁵ Coerced and involuntary confessions undermine both the integrity of our criminal justice system and the constitutional rights of defendants. One simple and expedient method of addressing that problem is to videotape the entire interrogation process. A videotape record would provide a more complete accounting from which a judge could make essential *Miranda* determinations such as voluntariness, the presence of warnings, and the waiver of rights.⁶ It would allow a judge to view a suspect's demeanor to help determine whether the suspect understood his rights. A videotape would also alleviate the problems of any contested confession by allowing a judge to view the exact dialogue between suspect and interrogator and determine whether that dialogue casts doubt on the voluntary nature of the confession. By viewing a recording of the entire interrogation process, a judge is able to see exactly what transpired in the interrogation room and further evaluate the confession in its own context.

This article assesses the feasibility, appropriateness and legal and political status of recording interrogations. Section II of this paper begins with a general discussion of the law of confessions, both from the United States Supreme Court and Tennessee courts. The current state of the law makes assessment of the voluntariness of confessions highly problematic. In that regard, we discuss the "voluntariness" and "totality of circumstances" tests and argue that both tests are inherently vague and rely extensively on the court

⁵ See generally S.B. 0343/H.B. 1138, (2003) (amending TENN. CODE ANN. § 40-14, *et seq.*, if enacted) [hereinafter "Tennessee proposal"].

⁶ See *Miranda v. Arizona*, 384 U.S. 436 (1966).

and jury to engage in specific fact-finding as to what took place in the interrogation room.

Section III deals with a variety of topics related to the current climate, both political and legal, regarding mandatory interrogations. Included in this section is an extensive survey of the costs and benefits of recording interrogations as well as a discussion of the current national state of the law regarding videotaping. In addition, we discuss Tennessee's legislative attempts at implementing recording requirements. In addition, this section examines the findings and recommendations of the Tennessee Law Enforcement Advisory Council.⁷

In Section IV we argue that the Tennessee Supreme Court could bring the current legislative impasse to an end if the court ordered mandatory videotaping of interrogations as a function of its inherent supervisory powers to regulate and administer a fair and reliable criminal justice system.

II. The Problematic Nature of Confessions

A. The Voluntariness Test

The traditional test for admissibility of a confession is the "voluntariness" test.⁸ A statement is "involuntary" and inadmissible if the defendant's was "overborne" or his "capacity for self-

⁷ Pursuant to H.R.J. Res. 862, 104th Gen. Assem., Reg. Sess. (Tenn. 2002), the Tennessee Law Enforcement Advisory Council was directed to report its study and evaluation of issues related to electronic recording of custodial interrogations in Tennessee to the Senate and House Judiciary Committees.

⁸ See *Schneekloth v. Bustamonte*, 412 U.S. 218, 224 (1973).

determination critically impaired when making the statement.”⁹ In order to make a determination of voluntariness, a court must examine the “totality of the circumstances,” including the characteristics of the individual suspect and details of the manner in which the interrogation was carried out. Without some improper state action such as coercive police tactics, there is little likelihood that a court will deem a confession involuntary. If involuntariness were found to exist, the prosecution would be precluded from using the statement for any purpose whatsoever.

Later, as established in *Miranda v. Arizona*,¹⁰ police were required to first tell a suspect of his rights and then obtain a waiver of those rights prior to a custodial interrogation.¹¹ Failure to satisfy any of the *Miranda* requirements would result in a suppression of the confession, even when a suspect had given a voluntary confession. The prosecution is precluded in its case-in-chief from using a defendant’s statement that was obtained in violation of *Miranda*. Unlike involuntary statements, however, statements obtained as a result of a *Miranda* violation may be used to impeach a testifying defendant who perjured himself at trial.¹²

As a result of *Miranda v. Arizona*, most litigation regarding confessions centers on the applicability of the Fifth Amendment. However, until the *Miranda* decision in 1966, the United States Supreme Court relied on other constitutional provisions for determining the admissibility of confessions, focusing largely on the voluntariness

⁹ *Id.*

¹⁰ 384 U.S. 436 (1966).

¹¹ *Id.* at 467-77.

¹² *Harris v. New York*, 401 U.S. 222 (1971).

of a suspect's confession in determining its validity and admissibility.¹³

In *Brown v. Mississippi*, the United States Supreme Court recognized Fourteenth Amendment due process principles as requiring the exclusion at trial of involuntary confessions extracted by coercive police methods.¹⁴ The case involved three suspects brutalized by sheriff's deputies. One of the suspects was hanged from the limb of a tree.¹⁵ He was later tied to a tree and beaten until he confessed.¹⁶ The other suspects were stripped and whipped with a leather strap in such a severe and atrocious manner that their backs were "cut to pieces."¹⁷ The United States Supreme Court described the techniques used by the deputies as "compulsion by torture" and revolting to the sense of fundamental fairness and justice.¹⁸ Ultimately, the Supreme Court of the United States found that the Due Process Clause of the Fourteenth Amendment prohibits the use of involuntary confessions or coerced confessions.¹⁹ The Tennessee Constitution provides the same protections.²⁰

Tennessee was not immune from review under the standard enunciated in the *Brown* decision. In the case of *Ashcraft v. Tennessee*,²¹ police interrogators carried out 36 hours of uninterrupted, incommunicado interrogation of a suspect using a

¹³ See, e.g., *Brown v. Mississippi*, 297 U.S. 278, 286 (1936).

¹⁴ See *Brown*, 297 U.S. 278.

¹⁵ *Id.* at 281.

¹⁶ *Id.*

¹⁷ *Id.* at 282.

¹⁸ *Id.* at 285.

¹⁹ See *Arizona v. Fulminate*, 499 U.S. 279, 287 (1991).

²⁰ TENN. CONST. art. I, § 8.

²¹ 322 U.S. 143 (1944).

string of replacement interrogators during which the interrogated individual was allowed virtually no sleep or other rest. In reviewing the interrogation procedure used, the United States Supreme Court held that the situation was “so inherently coercive” that, by its very nature, the interrogation was “irreconcilable with the possession of mental freedom by a suspect against whom [the] full coercive force [of the criminal justice system was] brought to bear.”²²

With the cases of *Massiah v. United States*²³ and *Escobedo v. Illinois*,²⁴ the focus of the Supreme Court shifted for a brief time from the voluntariness of a suspect’s confession under the Due Process Clause to a defendant’s right to assistance of counsel, as provided by the Sixth Amendment. However, two years later with the decision in *Miranda*, the Court directed that the Fifth Amendment be the guiding force behind inquiries into the admissibility of confessions.²⁵

The burden of proving the voluntariness of a suspect’s confession lies with the prosecution. It is the trial judge who determines whether or not that burden has been sufficiently met to admit the confession into evidence.²⁶ The standard under due process for determining the admissibility of a confession ultimately focuses on the issue of whether the behavior of state officials overcame the suspect’s will to resist, such that the suspect’s

²² *Id.* at 154.

²³ 377 U.S. 201 (1964).

²⁴ 378 U.S. 478 (1964).

²⁵ *See* 384 U.S. 436 (1966).

²⁶ *See State v. Pursley*, 550 S.W.2d 949 (Tenn. 1977).

confession was not freely given.²⁷ The dispositive question in each case is whether a suspect confessed because his “will was overborne.”²⁸

B. The Totality of the Circumstances Test

A court’s determination of “voluntariness” utilizes the totality of circumstances test. Voluntariness is assessed by looking at the totality of circumstances surrounding the process of interrogation including, but not limited to, a suspect’s age, education, and mental and physical condition.²⁹ Courts also consider the nature of the interrogation itself, including the location, duration, and methods used by the interrogators.³⁰ The totality of circumstances test, however, made the applicable guidelines to be followed less than clear. Under Supreme Court precedent, physical torture and abuse of suspects would constitute *per se* coerciveness.³¹ Perhaps the primary problem with the totality of circumstances tests is that no single factor, short of physical torture or abuse of the suspect, is determinative of a finding of involuntariness. There are no precise limiting factors restricting interrogators in obtaining confessions.

The factors a court must take into consideration include both internal attributes of the suspect and external factors affecting a suspect. The relevance

²⁷ See *State v. Kelly*, 603 S.W.2d 726, 728 (Tenn. 1980) (citing *Rogers v. Richmond*, 365 U.S. 534 (1961)).

²⁸ *Fulminate*, 499 U.S. at 287 n.3 (1991).

²⁹ See *Spano v. New York*, 360 U.S. 315 (1959).

³⁰ *Id.*

³¹ See, e.g., *Brown v. Mississippi*, 297 U.S. 278 (1936).

of both a suspect's personal attributes and external pressures exerted by a suspect's surroundings and methods of interrogation means that the amount of coercion needed to render a confession "involuntary" may vary from context to context. Courts have acknowledged that a person with a weaker mental framework might be much more prone to give an involuntary statement due to certain external factors which might be insufficient to render a confession involuntary if made by a suspect with a stronger internal make-up or character.³²

The failure by the courts to offer clear guidelines has made courts have to rely more on a factual examination of events that transpired between interrogators and suspects. The problem is that in situations where no full, objective record of the entire interrogation event exists, the application of the voluntariness test turns largely on a swearing contest between the suspect and his interrogators.

A major turning point in the use of the totality of circumstances test under the due process voluntariness standard took place in the case of *Escobedo v. Illinois*.³³ *Escobedo* was significant in the sense that it reflected the Court's disfavor of the voluntariness approach. It explicitly recognized the strong link between a defendant's right to counsel and his privilege against compelled self-incrimination. Rather than focusing its attention on the voluntariness issues of *Escobedo*'s confession, the Court turned its attention to the fact that police continually denied *Escobedo*'s repeated requests to

³² See, e.g., *State v. Benton*, 759 S.W.2d 427 (Tenn. Crim. App. 1988).

³³ 378 U.S. 478 (1964).

speak to his attorney.³⁴ In addition, the Court was mindful of the fact that no one ever informed the defendant of his right to remain silent.³⁵ The Court struck a poignant note with its comment that no system worth preserving should have to fear that a defendant permitted to consult with an attorney will exercise his rights even if the exercise of such rights will “thwart the effectiveness” of the interrogation process.³⁶

The Fifth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment and provides that “[n]o person...shall be compelled in any criminal case to be a witness against himself.”³⁷ The Tennessee Constitution also provides that a defendant cannot be compelled to give evidence against himself.³⁸ These privileges against self-incrimination appear to frame and limit police interrogation methods and the admissibility of confessions. In *Miranda v. Arizona*, the Court extended the Fifth Amendment privilege against self-incrimination by making it applicable to police interrogations of suspects in custody.³⁹ In that decision the Court delineated certain safeguards deemed necessary to protect a suspect’s rights.⁴⁰ The Court determined that no statements by a suspect, which stem from a custodial interrogation of the defendant, can be used in the criminal prosecution “unless [the State] demonstrates the use of procedural safeguards effective [in] secur[ing] a

³⁴ *Id.* at 481.

³⁵ *Id.* at 482-83.

³⁶ *Id.* at 490.

³⁷ U.S. CONST. amend. V.

³⁸ TENN. CONST. art. I § 9.

³⁹ 384 U.S. 436 (1966).

⁴⁰ *See id.*

suspect's] privilege against self-incrimination."⁴¹ According to the Court, before a custodial interrogation can take place law enforcement officers must advise a suspect of his rights to remain silent and to consult an attorney.⁴² If the suspect indicates either a desire to remain silent or requests an attorney, the questioning must cease.⁴³

The suspect can invoke these privileges "in any manner, at any time prior to or during questioning."⁴⁴ The state bears a heavy burden in demonstrating that a suspect "knowingly and intelligently" waived his privilege against self-incrimination and his right to counsel.⁴⁵ In the absence of demonstrated police compliance with the procedures articulated in *Miranda*, statements obtained from a suspect in custody are presumed to be coerced and are not admissible in a criminal prosecution as a matter of law.⁴⁶ As a result, the *Miranda* warnings and a valid waiver are prerequisites to the admissibility of any statement made by a suspect during custodial interrogation.⁴⁷

Subsequent decisions have gradually diminished *Miranda's* importance by expanding the types of words and actions constituting a waiver and recognizing that some statements in violation of the *Miranda* requirements may be introduced into evidence to impeach a defendant's credibility.⁴⁸ Moreover, the Supreme Court created a "public

⁴¹ *Id.* at 444.

⁴² *Id.* at 467, 470.

⁴³ *Id.* at 473-74.

⁴⁴ *Id.* at 473.

⁴⁵ *Id.* at 475.

⁴⁶ *Id.* at 478.

⁴⁷ *Id.* at 473-76.

⁴⁸ *See Harris v. New York*, 401 U.S. 222 (1971); *see also Oregon v. Haas*, 420 U.S. 714 (1975).

safety” exception, doing away with the need for *Miranda* warnings when police question a suspect at the scene of a crime that involves an imminent threat to public safety.⁴⁹ However, it is important to note that involuntary statements cannot be used for any purpose, including use of those statements for impeachment of the credibility of a defendant who takes the stand and perjures himself.⁵⁰

C. *Tennessee Decisions*

The Tennessee Supreme Court case law on confessions and interrogations has largely mirrored that of the Supreme Court. While Tennessee courts employ the “voluntariness” test to judge the admissibility of confessions, the test of voluntariness for confessions under Article I, Section 9 of the Tennessee Constitution is interpreted as being more protective of individual rights than the test of voluntariness under the Fifth Amendment.⁵¹ Further, the Tennessee Supreme Court does not recognize any authority requiring that interrogations be electronically recorded. Indeed, as the Supreme Court of Tennessee noted in *State v. Godsey*,⁵² neither the Tennessee Constitution nor the United States Constitution requires electronic recording of interrogations. The court noted that mandatory electronic recording of custodial interrogations would reduce court time

⁴⁹ See *New York v. Quarles*, 467 U.S. 649 (1984).

⁵⁰ See *Mincey v. Arizona*, 437 U.S. 385 (1978); *Harris v. New York*, 401 U.S. 222 (1971).

⁵¹ See generally *State v. Smith*, 933 S.W.2d 450, 455 (Tenn. 1996); *State v. Stephenson*, 878 S.W.2d 530 (Tenn. 1994). See also, V. Lakshmi Arimilli, *Confessions and the Tennessee Constitution*, 25 U. MEM. L. REV. 637 (1995).

⁵² 60 S.W. 3d 759 (Tenn. 2001).

required to resolve disputes over what took place during the interrogation process, and opined that sound policy considerations would support its adoption as a law enforcement practice.⁵³ The court stopped short of requiring electronic recording of interrogations as a constitutionally grounded prerequisite to the admissibility of statements by a defendant, while acknowledging that such recording could be beneficial. At the same time, as the court noted, “the issue of electronic recording of custodial interrogations ‘is one best suited to the direction of the General Assembly’ [of the Tennessee Legislature].”⁵⁴

III. Recorded Interrogations

A. Overview

The common characteristic of almost all unrecorded interrogations is that they take place *incommunicado*, totally closed to outside scrutiny. The content of statements can be controlled by how investigators choose to interrogate, and too often a suspect’s confession appears to be a doctored version of what the interrogator has suggested. Without the knowledge that an interrogation is being recorded, an interrogator’s dedication may become an unhealthy zeal, which may in turn lead to perjury or slanted testimony. An accurate recording of the entire interrogation would enable a fact-finder to ensure that witnesses testimony was based on genuine recall. A recording would also

⁵³ *Id.* at 771-72.

⁵⁴ *Id.* at 772 (citing *State v. Odom*, 928 S.W.2d 18, 23-24 (Tenn. 1996)).

assist the trier of fact in ascertaining the voluntariness of a suspect's confession and the context in which a particular statement was elicited. At the very least, it would be a step toward protecting suspects from coercive police tactics and the police from false claims of coercion. It would also instill some reliability into judicial determinations as to what went on during an interrogation in which a suspect made statements. Finally, recording the interrogation would reduce skepticism regarding the integrity of the process.

Given the well-publicized developments in the Central Park Jogger case, as well as the rampant use of coerced or otherwise improper confessions in Chicago, Illinois, the advantages and necessity of mandatory recording of interrogations should be self-evident.⁵⁵ The absence of a recording requirement hurts everyone except the police. Defendants questioning the voluntariness of their confessions, the adequacy of the *Miranda* admonitions, or their purported waivers must do so without the best evidence. Fact-finders must determine voluntariness, adequacy of rights admonitions and the validity of a waiver without the best evidence. Failure to record and preserve the best possible evidence undermines the legitimacy and credibility of the criminal justice process and opens the possibility of the abuse of power by the police.

⁵⁵ See Charles D. Weisselberg, *Deterring Police from Deliberately Violating Miranda: In the Stationhouse After Dickerson*, 99 MICH. L. REV. 1121 (2001). See also Drizen & Colgan, *supra* note 3; Stevan A. Drizen & Richard Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 893 (2004).

Mandating that interrogations be electronically recorded has long been recognized as a means of advancing our criminal justice system.⁵⁶ The American Law Institute's Model Code of Pre-Arrest Procedure and the Uniform Rules of Criminal Procedure require electronic recording of custodial interviews. In *Miranda*, the Court noted various forms of psychological pressure routinely employed by interrogators.⁵⁷ As Chief Justice Warren recognized, the only purpose of such techniques was to "subjugate the individual to the will of the examiner."⁵⁸

Little systematic reform of the interrogation process has taken place despite recognition that psychological pressures are often present in such encounters. In developing the *Miranda* rules, the Court likely believed that a suspect informed of her right to remain silent and the right to counsel would understand those rights and make appropriate decisions. That belief has turned out to be incorrect. *Miranda* was a small step toward confronting various forms of psychological pressure.⁵⁹ Trial judges who make determinations as to whether a suspect waived his rights during an

⁵⁶ James P. Barber & Philip R. Bates, *Videotape in Criminal Proceedings*, 25 HASTINGS L. J. 1017, 1020-26 (1974); Yale Kamisar, *Foreword: Brewer v. Williams—A Hard Look at a Discomfiting Record*, 60 GEO. L. J. 209, 238-43 (1977); See Roscoe Pound, *Legal Interrogation of Persons Accused or Suspected of Crimes* 24 J. AM. INST. CRIM. L. & CRIMINOLOGY 1014, 1017 (1934).

⁵⁷ *Miranda*, 384 U.S. at 446-54; see also Johnson, *supra* note 1 (providing an excellent exposition of the psychological games played by interrogators during interrogations).

⁵⁸ *Miranda*, 384 U.S. at 457.

⁵⁹ See Geoffrey R. Stone, *The Miranda Doctrine in the Supreme Court*, 1977 SUP. CT. REV. 99-169.

interrogation are hampered by the lack of objective, reliable evidence as to precisely what was said or done during an unrecorded interrogation.

As discussed more fully in this Section, there is cause for optimism. Currently three states – Alaska, Minnesota, and Texas – require the electronic recording of custodial interrogations. A fourth state, Illinois, recently enacted a more limited recording requirement requiring officers to tape interrogations of murder suspects.⁶⁰ In 1985, the Supreme Court of Alaska held that “an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect’s right to due process” under the Alaska Constitution, and that any statement thus obtained is generally inadmissible. The court mandated recording of station-house interrogations as a reasonable and necessary safeguard, essential to the adequate protection of a defendant’s right to counsel, his right against self-incrimination, and ultimately, his right to a fair trial.⁶¹ The court further reasoned that the integrity of the judicial system was at issue whenever a court determined the admissibility of a questionable confession based upon the testimony of interested parties. The Alaska Court recognized that a recording requirement would buttress judicial integrity merely by “the flip of a switch.”⁶²

In *State v. Scales*,⁶³ the Minnesota Supreme Court utilized its supervisory power and authority by mandating that all custodial interrogations of criminal suspects at a place of detention, including

⁶⁰ See 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2003).

⁶¹ *Stephan v. State*, 711 P. 2d 1156, 1159-60 (1985).

⁶² *Id.* at 1164.

⁶³ *State v. Scales*, 518 N.W.2d 587 (Minn. 1994).

any information concerning rights, waiver of those rights, or questioning, be electronically recorded where feasible. The court recognized that the process of *in communicado* interrogation and its perceived benefits by the police would be preserved while at the same time facilitating the judiciary's task of fact-finding since it would be based on reliable information.

The Texas Code of Criminal Procedure requires that custodial statements used against a defendant in a criminal proceeding be recorded.⁶⁴ Illinois will become the fourth state in the nation to require police to record interrogations.⁶⁵ The Illinois statute requires officers to tape interrogations of murder suspects only.⁶⁶ The statute was one of numerous reforms recommended by then-Governor George Ryan's Commission on Capital Cases. The commission was a response to 13 condemned men who had been exonerated, some due to allegations of police misconduct, including coerced confessions.⁶⁷

B. The Benefits and Costs of Recording

Every year, hundreds of innocent Americans are convicted of crimes because of false confessions. It

⁶⁴ TEX. CODE CRIM. PROC. ANN. Art. 38.22 §3 (1999). See also *Ragan v. State*, 642 S.W.2d 489, 490 (Tex. Crim. App. 1982).

⁶⁵ See 725 ILL. COMP. STAT. ANN. 5/103-21 (West 2003).

⁶⁶ This legislation was signed into law by the Governor on July 17, 2003, and takes effect in 2005. Steve Mills, *Law Mandates Taping of Police Interrogations*, CHI. TRIB., July 18, 2003, §1, at 1; see also, Leonard Post, *Illinois to Tape Questioning: It Gets Mostly Good Reviews in 2 States*, 25 NAT'L L.J. 46, P1 (2003).

⁶⁷ See Post, *supra* note 66.

is impossible to count how many people are charged based on false confessions and subsequently released after exonerating evidence comes to light.⁶⁸ Confessions obtained through coercion and intimidation are inherently untrustworthy; they obfuscate rather than illuminate the truth. The courts have to encourage practices that promote the truth, particularly in capital cases, in which the defendant's life is in jeopardy. Taking steps to ensure the integrity of our criminal justice system is of the utmost importance. Requiring electronic recordings as a prerequisite to the admissibility of a confession would significantly aid courts by presenting accurate facts to a jury for deliberation.

Electronic recordings of police interrogations facilitate a number of desirable goals. A recording provides an objective record and prevents a police officer from unfairly intimidating a suspect to obtain a statement before actually recording it. An interrogator who is aware that he is on tape would most probably act appropriately rather than risk his credibility. Moreover, law enforcement agencies that videotape interrogations find that it improves the ability of police to assess the guilt or innocence of a suspect.⁶⁹ Videotaping allows detectives to review the entire interrogation as the case unfolds in light of subsequent evidence. It also preserves the details of a suspect's statement that may not have been initially recorded in an interrogator's notes but subsequently become important. Furthermore,

⁶⁸ See Drizin & Leo, *supra* note 55 (documenting and analyzing over 125 false confessions).

⁶⁹ See William A. Gellar, *Police Videotaping of Suspect Interrogations and Confessions: A Preliminary Examination of Issues and Practices*, in NATIONAL INSTITUTE OF JUSTICE (1992).

videotaping permits other officers to evaluate the plausibility of suspects' statements.⁷⁰

In addition to aiding police in their assessment of guilt and innocence, videotaped admissions may be used against co-conspirators more effectively than written statements. Such recordings are especially effective against suspects who are familiar with deceptive physical evidence ploys. Police departments already using videotaping reported that videotaped interrogations and confessions led to more guilty pleas by suspects.⁷¹

Prosecutors have noted that by catching details that would otherwise remain missing from written interview notes or reports, videotaped interrogations provide a more complete record with which to better assess the state's case against an accused. They found that such taping enabled them to better prepare for trial. Because videotaped interrogations provided them with better knowledge of the case, including the demeanor and sophistication of the suspect, prosecutors found that videotaping assisted them in negotiating a higher percentage of guilty pleas and obtaining longer sentences.⁷² Judges and juries found that videotaping allowed them to determine more accurately a defendant's state of mind, as well as the sincerity of the defendant's remorse for any wrongdoing.⁷³

Recording would also conserve judicial resources by reducing the number of frivolous pre-trial challenges to confessions, which often involve

⁷⁰ *Id.* at 5.

⁷¹ *Id.* at 5, 6 and 10.

⁷² Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 409 (1996).

⁷³ See Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621 (1996).

a “he said, she said” contest. A recording speaks for itself, literally, on the issue of what was said and the manner in which it was said. It would facilitate the resolution of a case in most instances because, in many cases, recording would eliminate debate over the circumstances surrounding such confessions. Issues of compliance with *Miranda*, voluntariness, and allegations of physical abuse and psychological overbearing would be minimized because a trial judge could make a determination based on objective and reliable information. Recording would serve as the best method for aiding the court’s determination of voluntariness in light of the totality of the circumstances.

A variety of objections have been raised about videotaping the interrogation process. It has been suggested that videotaping is not feasible, for example, because of space, personnel and funding limitations. Also, videotaping of suspects puts an unfair burden on law enforcement and would significantly lower the successful clearance rate in investigations of serious crimes.⁷⁴ In the early stages of an investigation, the police often do not have a clear idea of what happened, let alone who the suspects are. To require that all questioning of suspects be videotaped might significantly slow the course of many investigations and create an unacceptable risk for public safety. The main objection raised by police and prosecutors against recording is that it would prove to be impractical and costly to record all stationhouse interrogations. Specifically, such an objection centers on limited resources, including the price of videotape copies

⁷⁴ *Id.*

and the number of hours involved in recording and storage.⁷⁵

However, the cost of video or audio-electronic recording machines and tapes is relatively small compared to the cost incurred by investigation time, attorney time, and court time in conducting pre-trial hearings regarding the admissibility of a confession.⁷⁶ Cost-saving considerations may include reducing interrogation time. Recording could alleviate the need for detailed note taking. Additionally, increases in the number of guilty pleas and decreases in the number of suppression hearings involving defense challenges to the admissibility of an unrecorded interview could decrease the expenditure of judicial resources. Not only could the criminal justice process see savings, but the ancillary costs of civil litigation over false and problematic confessions could be reduced as well.

Ironically, police and prosecutors view videotaping to be cost-effective in other aspects of the criminal justice process, but not in the context of the interrogation process. Anyone familiar with DUI cases knows that most patrol cars are equipped with video cameras. The ultimate cost-benefit determination in favor of recording is the enhancement of the integrity of the judicial system. Any objective method of determining the credibility

⁷⁵ See Drizin & Colgan, *supra* note 3, at 408-10; Memorandum from David Jennings, Deputy Director, TBI, to Curtis Person, Chairman Senate Judiciary Committee and Joe Fowlkes, Chairman, House Judiciary Committee, on The Report of the Tennessee Law Enforcement Advisory Council on Recording Custodial Interrogations 2 (May 6, 2003) (on file with authors).

⁷⁶ GellAr, *supra* note 69 at 47-49.

of the respective parties enhances integrity.⁷⁷ State recording would open the door to the interrogation room and shine light on the process. Given the overriding importance of systemic integrity, it seems odd that the issue needs debate. Indeed, as the United States Supreme Court recently made clear, the reliability of evidence involving statements taken by police must be assessed “by testing in the crucible of cross-examination.”⁷⁸ The Court’s decision reflects not only the desire for reliable evidence, but also a means to determine reliability.⁷⁹ If out-of-court statements elicited in interrogations were important enough to require cross-examination for admissibility, then surely the procedural mandate of recording an interrogation would be conducive to the goal of reliability.

A 1992 study for the National Institute of Justice found that a number of police agencies throughout the United States regularly videotaped all or portions of the interrogation process.⁸⁰ Furthermore, over half of the nation’s police agencies use video technology for other purposes, even if not necessarily the recording of interrogations.⁸¹ Those who implemented electronic recording for interrogations expressed widespread satisfaction. According to the study, video technology has taken hold as one of the important administrative and operational tools of modern criminal justice agencies. The researchers found that of police departments that videotape interrogations, 65.8 percent found the procedure

⁷⁷ See *Stephan v. State*, 711 P.2d 1156 (1985).

⁷⁸ *Crawford v. Washington*, 541 U.S. 36 (2004).

⁷⁹ *Id.*

⁸⁰ Gellar, *supra* note 69, at 94.

⁸¹ *Id.* at 91-94.

“very useful” and another 31.3 percent found the procedure “somewhat useful.”⁸² Given the technology, the general sentiment expressed by departments using videotaping was that it was appropriate. Not using video is like not using state-of-the-art fingerprint analysis equipment. The larger the department, the more likely they are using videotaping. The study found that 97 percent of all departments in the nation that are videotaping either confessions or full interrogations find such videotaping, on balance, to be useful.⁸³

The broad findings of the 1992 study indicate that videotaping has fostered improvement in the quality of police interrogations. Desirable changes in interrogations included: (1) better investigator preparation for interview by forcing investigators to think out their questions and the sequence of questions in advance; (2) the ability to interrogate a suspect without the distractions of a typewriter, notebooks, statement forms, or court reporters; (3) the ability of other police and prosecutorial personnel to monitor the interrogation live via closed-circuit television and to send suggested questions into the interview room; and (4) the opportunity for interrogators to view the videotape in order to evaluate the suspect’s earlier statements and demeanor and to formulate further questions for any continuation of the interview. Taping would also allow for training new detectives and for providing advanced training to experienced detectives.⁸⁴

One important finding was the distinction between agencies videotaping the entire

⁸² *Id.* at 152.

⁸³ *Id.*

⁸⁴ *Id.* at 110-11.

stationhouse interrogation, including preliminaries such as the admonitions and waivers required by *Miranda*, and those videotaping only the “recapitulation”—a statement recited by the suspect only after some prior “softening up” or unrecorded questioning of the suspect by police personnel. The distinction is important with regard to the reactions of the various groups surveyed. Generally, all participants supported recording of the entire interview whereas recapitulation tapes were criticized for neglecting to record the most critical portion of the questioning process.⁸⁵

The Texas Court of Criminal Appeals has provided anecdotal support for the recording of the entire interrogation session. In *Zimmerman v. State*,⁸⁶ the trial court overruled the defendant’s motion to suppress his confession despite his testimony that he was physically mistreated. Following his conviction for capital murder, a federal investigation into the interrogating officer’s conduct resulted in discovery of a recording of the officer’s conversation with the defendant in which the defendant inquired whether he would be beaten. The officer answered in the negative, adding that the defendant would not have been beaten in the first instance had he not been lying. Ruling on a motion for a new trial, the trial judge acknowledged his error in overruling the motion to suppress the confession.

All participants in the survey agreed that videotaping saved time and promoted greater respect for police procedures. There were fewer allegations of improper police conduct and those

⁸⁵ *Id.* at 133-34.

⁸⁶ *Zimmerman v. State*, 750 S.W.2d 194 (Tex. Crim. App. 1988).

made were easier to resolve. Participants involved in the criminal justice process agreed with the merits of videotaping. Importantly, in jurisdictions in which interrogations were recorded, there was greater confidence in the judicial determination of the admissibility of a suspect's statements, as well as a higher degree of credibility afforded the verdict.⁸⁷

The issue for our system, as the study began by noting, is not whether video technology presents an *ideal* tool to fix all existing problems, but whether it is more reliable and efficient than traditional documentation methods and does not present offsetting complications or costs.⁸⁸ Despite variations, such as taping full interrogations versus recaptulations only, and taping overtly versus covertly, the videotaping of suspects' statements is a practical, efficient, and affordable step towards a more reliable, objective and legitimate criminal justice system. Electronic recording might require law enforcement officers to alter their interrogation tactics and could force states to budget for audio and video equipment. Notwithstanding these costs, however, a suspect's constitutional rights ought to be the underlying rationale for requiring electronic recording of interrogations.

C. The State of the Law on Recording

During the past four decades of interrogation monitoring, it has become obvious that recorded interrogations can significantly buttress judicial review of a process to which the police and a suspect are often the only witnesses. The inherent

⁸⁷ Gellar, *supra* note 69, at 133.

⁸⁸ *Id.* at 28.

difficulty of determining what actually transpired during an interrogation together with the importance of enforcing a suspect's right against self-incrimination provided much of the motivation for the Supreme Court's decision in *Miranda v. Arizona*.⁸⁹ The decision mandated that, prior to any interrogation, police officers admonish suspects in custody of certain constitutional protections they possess. As a result, judges and legal scholars began calling for routine tape recording of stationhouse interrogations.⁹⁰

The arguments for reform have remained consistent in their rationale that a recording would best assist a court in deciphering what actually took place in the interrogation room. An electronic recording would provide the most efficient and effective means for a court to reconstruct the actual conditions of the interrogation in order to discern whether constitutional procedural safeguards had been followed. The ability to resolve a "swearing contest" on the basis of an objective and reliable record would minimize the speculative, fact-finding function of the court in determining who is telling the truth, a decision usually deferring to the police officer.

Notwithstanding the recognized advantages of electronic recording, only four states require electronic recording of interrogations: Alaska and Minnesota mandate recording through court

⁸⁹ *Miranda*, 384 U.S. at 436.

⁹⁰ See, e.g., Barber & Bates, *supra* note 56; Leo, *supra* note 73; Pound, *supra* note 56; Daniel Donovan & John Rhodes, *Comes a Time: The Case for Recording Interrogations*, 61 MONT. L. REV. 223 (2000); Drizen & Colgan, *supra* note 3; Westling, *supra* note 2.

decisions;⁹¹ Texas imposed a more narrow requirement via a state statute that prohibits the admission of an unrecorded oral confession;⁹² and Illinois implemented the videotaping of interrogations in homicide prosecutions.⁹³ The question remains why many, if not most, stationhouse interrogations in the United States remain unrecorded. The fact that courts have undertaken little reform in this area is confusing in light of the fact that the Supreme Court seemed to go out of its way in *Miranda* to encourage such innovation. “Congress and the States are free to develop their own safeguards for the privilege against self-incrimination, as long as those safeguards are as effective as those devised by the Court.”⁹⁴ Given the rather straightforward arguments for mandatory recording, such as having an accurate, objective record of what occurred during the interrogation, one can only surmise that critics of recording are threatened by the unveiling of the interrogation process itself.⁹⁵

The Tennessee Supreme Court, considering the issue in *State v. Godsey*,⁹⁶ declined to require taping, noting that neither the Tennessee State Constitution nor the Federal Constitution requires such recording.⁹⁷ Although the court in *Godsey* provided a long list of states that have similarly

⁹¹ *Stephan*, 711 P.2d at 1156; *Scales*, 518 N.W.2d at 587.

⁹² George E. Dix, *Texas “Confession” Law and Oral Self-Incriminating Statements*, 41 BAYLOR L. REV. 1 (1989).

⁹³ Post, *supra* note 66; Mills, *supra* note 66.

⁹⁴ *Miranda*, 384 U.S. at 490.

⁹⁵ Leo, *supra* note 73, at 687; Drizen & Colgan, *supra* note 3, at 392-93.

⁹⁶ *State v. Godsey*, 60 S.W.3d 759 (Tenn. 2001).

⁹⁷ *Id.* at 771.

declined to impose such a requirement,⁹⁸ the court nevertheless recognized the minimal inconvenience and expense associated with recording interrogations and the sound policy considerations that support its adoption as a law enforcement practice.⁹⁹ It seems the court's justification for rejecting a recording requirement was based solely on the fact that it is not recognized as a constitutional due process requirement.

The *Godsey* court ended its discussion of electronic recording by stating that the issue was more appropriate for legislative consideration.¹⁰⁰ One legal commentator astutely pointed out that in reading opinions such as *Godsey* it is easy to conclude that courts are reluctant to be perceived as acting as super legislative bodies. This reluctance is due primarily to the fact that taking a stand on constitutional grounds would demand some type of affirmative action by the court that would force the government to create a quasi-right with "financial implications."¹⁰¹

Other courts have commented little about why tape recording of confessions is not constitutionally required, and further, why, even in the absence of a constitutional imperative, such a requirement should not be mandated under a court's supervisory power. As Sklansky points out, most courts have relied on the United States Supreme Court decisions of *California v. Trombetta*¹⁰² and *Arizona v.*

⁹⁸ *Id.* at 772, n.7.

⁹⁹ *Id.* at 772.

¹⁰⁰ *Id.*

¹⁰¹ David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1269-70 (2002).

¹⁰² 467 U.S. 479 (1984).

*Youngblood*¹⁰³ in holding that the Due Process Clause of the Fourteenth Amendment does not require the police to preserve evidence solely on the basis that it might later prove exculpatory.¹⁰⁴ However, those cases were construed as such because of the federal guarantee of due process and did not impose restrictions on the application of parallel guarantees within state constitutions, nor did they restrict a state appellate court's right to exercise its supervisory power in implementing such a requirement.

The Tennessee Supreme Court has restrained from establishing a recording requirement, either out of unwillingness to interpret the Tennessee Constitution in a different sense than the Federal Constitution or perhaps out of deference to the state legislature. Although recognizing the value that such a rule would have in terms of conserving judicial resources in resolving disputes over interrogations, the Tennessee Supreme Court continues to decline to adopt such a rule on due process grounds.¹⁰⁵ Tennessee judges seem to be reluctant to act as gatekeepers for the jury except in cases of overt and manifest abuse, particularly in the absence of a reliable means of establishing allegations of illegality and impropriety.

While a number of common law countries including Great Britain, Canada, and Australia¹⁰⁶ have adopted a requirement that police tape record

¹⁰³ 488 U.S. 51 (1988).

¹⁰⁴ See Sklansky, *supra* note 101, at 1267-68.

¹⁰⁵ See *Godsey*, 60 S.W.3d at 771-72.

¹⁰⁶ See generally Donovan & Rhodes, *supra* note 90; Wayne T. Westling & Vicki Waye, *Videotaping Police Interrogations: Lesson from Australia*, 25 AM. J. CRIM. L. 493 (1998).

interviews with suspects, only two state courts have mandated a similar requirement. In the landmark case of *Stephan v. State*,¹⁰⁷ the Alaska Supreme Court held that the Due Process Clause of the Alaska Constitution requires electronic recording of custodial interrogation conducted in a place of detention.¹⁰⁸ Any statement obtained in violation of that due process right is generally inadmissible in a proceeding against the defendant.¹⁰⁹ *Stephan* involved conflicting testimony about what occurred during the unrecorded portions of the interrogation. Stephan claimed that his confession was the product of promises of leniency and was obtained in the absence of an attorney after his request for one. The officer testified to the contrary, leaving the trial court to resolve the conflict and evaluate the credibility of the witnesses. Without a full recording, the court chose to believe the officer's recollections in making a determination that the confession was voluntary and, thus, admissible at the defendant's trial.

Of course, courts faced with conflicting testimony from defendants and officers tend to defer to an officer's recollection of what took place during the interrogation process at the expense of the defendant's account. In most instances, in the absence of a tape recording, the officer invariably wins the swearing contest.¹¹⁰

The *Stephan* court was convinced that recording "is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self-incrimination

¹⁰⁷ 711 P.2d 1156.

¹⁰⁸ *Id.* at 1158.

¹⁰⁹ *Id.* at 1159-60.

¹¹⁰ See *Harris v. State*, 678 P.2d 397 (Alaska App. 1984).

and, ultimately, his right to a fair trial.”¹¹¹ The court emphasized that its holding was based solely upon the requirements of Article I, §7 of the Alaska Constitution. While recognizing that custodial interrogations need not be recorded in order to satisfy the due process requirements of the Federal Constitution, the court felt obliged to adopt a more rigorous safeguard for the admissibility of evidence under the Due Process Clause of the Alaska Constitution, thus construing Alaska’s constitutional provision as affording rights beyond the framework of those guaranteed by the United States Constitution.¹¹²

It is interesting to note the *Stephan* court’s emphasis on the need to ensure that the voluntariness of a confession is confirmed by reference to an objective and complete record is at least as important as the need to ensure the validity of a breath alcohol test that is tested independently. The court felt that given the relative ease with which such confirmation could be provided, there was no legitimate reason not to require it.¹¹³

The *Stephan* court also noted the heavy burden upon the state to show that a defendant knowingly and intelligently waived his privilege against self-incrimination and his right to counsel. It found that the contents of an interrogation are material to determining the voluntariness of a confession. It recognized that the trial court must resolve the typical “swearing contest” between the officer and defendant from a situation in which the interrogation is conducted largely *in communicado*. Private interrogations result in a “gap in our

¹¹¹ *Stephan*, 711 P.2d at 1159-60.

¹¹² *Id.* at 1160.

¹¹³ *Id.*

knowledge as to what in fact goes on in the interrogation room.”¹¹⁴ The *Stephan* court justified its recording mandate on the basis that a tape recording would provide the most objective means for evaluating exactly what took place during an interrogation.

In adopting the recording requirement, the *Stephan* court held that the recording must clearly indicate that it recounts the entire interview process, including the admonition of the *Miranda* rights and any waiver of them, so that the court is not left to speculate about what transpired from the very beginning of the interview. It further held that anytime a full recording is not made, the state was under a duty to provide proof by a preponderance of the evidence that recording was not feasible under the circumstances. However, in such cases, the failure to record would be viewed with distrust.¹¹⁵ In those instances in which the court determined that a recording of the interrogation was not feasible despite the good faith efforts of the officers involved, the state would have the burden of proving the defendant’s confession was knowing and voluntary.¹¹⁶

In forging a clear mandate regarding recording, the *Stephan* court adopted a general rule of exclusion recognizing that while other approaches have merit, an exclusionary rule would strike the best balance of protecting a suspect’s rights, providing clear and definite direction to officers, and preserving the integrity of the justice system.¹¹⁷ The Alaska court sought to achieve two purposes in

¹¹⁴ *Id.* at 1161.

¹¹⁵ *Id.* at 1162-63.

¹¹⁶ *Id.* at 1163.

¹¹⁷ *Id.*

utilizing a general exclusionary rule: deterring illegal methods of law enforcement, and ensuring judicial integrity by preventing courts from becoming parties to the invasion of a suspect's constitutional rights.¹¹⁸

The importance of the Alaska court's opinion is its pointed intent to ensure and enhance the integrity of the judicial system, which it felt to be in question whenever a court ruled upon the admissibility of a questionable confession. This was particularly the case when such a confession was based solely upon a court's acceptance of the testimony of an interested party, the interrogating officer, or the suspect. The Alaska Supreme Court deemed trial courts to have even greater responsibility when objective evidence of a confession could have been preserved by the "mere flip of a switch."¹¹⁹ Requiring recording of the custodial interrogation process would provide objective, reliable evidence and would go far in avoiding any suggestion that a court was biased in favor of either party.

Ultimately, the Alaska court sought to further the protection of individual constitutional rights through a general exclusionary rule. As the court noted, "[S]trong protection is needed to ensure that a suspect's right to counsel, his privilege against self-incrimination, and due process guarantees are protected."¹²⁰ Recognizing that a confession is generally considered conclusive evidence of guilt, the court found that such a rule of exclusion was justified in any circumstance where the state, without excuse, failed to preserve evidence of the interaction between interrogator and interrogated

¹¹⁸ *Id.* at 1163, n.25.

¹¹⁹ *Id.* at 1164.

¹²⁰ *Id.*

leading up to the formal statement. Again, the court noted that the arbitrary failure to preserve the entire interrogation directly affected a defendant's ability to present his defense, either at trial or at a suppression hearing regarding the admissibility of the confession.¹²¹ The court went on to recognize exclusion of the confession as the only appropriate remedy for unexcused failure to electronically record the interrogation when a recording was feasible.¹²²

In almost two decades since the Supreme Court of Alaska mandated the recording of stationhouse interrogations whenever feasible, only one other court has followed suit. Expressly endorsing the reasoning of the Alaska court, the Minnesota Supreme Court exercised its supervisory power in holding that interrogators must record, whenever feasible, all custodial interrogations of criminal suspects when questioning takes place at a place of detention.¹²³ The court further held that violation of this requirement could lead to suppression of any evidence obtained from the interrogation.¹²⁴ The *Scales* court chose not to determine at that time whether a criminal suspect had a due process right under the Minnesota Constitution to have his custodial interrogation recorded.¹²⁵ Instead, the court based its holding on its "supervisory power to ensure the fair administration of justice."¹²⁶

The Minnesota court had admonished law enforcement officers on two prior occasions for

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Scales*, 518 N.W.2d at 587.

¹²⁴ *Id.* at 592.

¹²⁵ *Id.*

¹²⁶ *Id.*

their failure to electronically record the custodial interrogations of criminal suspects.¹²⁷ The Minnesota court noted in *State v. Robinson*¹²⁸ that many factual disputes arising from a suspect's claim of a violation of his constitutional rights could be prevented if interrogations were recorded. Similarly, in *State v. Pilcher*,¹²⁹ the court criticized officers for their failure to use technological means at their disposal to fully record those conversations and events transpiring before the actual questioning itself. The court issued the warning that it would look with great disfavor upon further disregard of its warnings.¹³⁰ The *Scales* case was the consequence and, in essence, the result of law enforcement's failure to heed the court's admonitions.

The Minnesota court, in a finding similar to that of the Alaska Supreme Court, noted the benefits that a recording requirement would provide by citing the resulting reduction in the number of disputes over adherence to the *Miranda* requirements and the voluntariness of purported waivers of those *Miranda* rights. The benefits of such recordings would facilitate a defendant's challenge to an officer's misleading or false testimony while protecting the state against meritless claims by a defendant.¹³¹

Whereas the *Stephan* court adopted the exclusionary rule as a sanction for violating its recording requirement, the *Scales* court's reasoning

¹²⁷ See *State v. Pilcher*, 472 N.W.2d 327, 333 (Minn. 1991); *State v. Robinson*, 427 N.W.2d 217, 224, n.5 (Minn. 1988).

¹²⁸ *Robinson*, 427 N.W.2d at 224, n.5.

¹²⁹ *Pilcher*, 472 N.W. at 333.

¹³⁰ *Id.*

¹³¹ *Scales*, 518 N.W.2d at 591.

was different. Although it utilized the same sort of exclusionary rule for violating its recording mandate, the *Scales* court noted that application of the exclusionary rule to an interrogation statement that was obtained in violation of its recording rule would be decided on a case-by-case basis and excluded only in the event that a statement was obtained because of a “substantial” violation.¹³²

Texas is the third state that presently has a recording requirement, but that requirement is much more limited than in either Alaska or Minnesota. Pursuant to the Texas Code of Criminal Procedure Art.38.22, Section 2, the interrogator must only record the confession, but not the interrogation preceding the confession.¹³³ Dix¹³⁴ provides a review of how Texas confession law developed legislatively, noting that Texas courts have traditionally adhered to the general rule prohibiting the use of oral, out of court confessions against a defendant.¹³⁵ It appears that the premise of the Texas statute is that oral confessions made by suspects in custody are inherently unreliable and, consequently, inadmissible for any purpose.¹³⁶

Dix notes that the Texas legislature’s decision to allow the evidentiary use of recorded oral statements was widely viewed as a major modification of the Texas prohibition against use of oral, out of court confessions.¹³⁷ In legislating such a modification, the state legislature exhibited a

¹³² *Id.* at 592.

¹³³ TEX. CODE CRIM. PROC. ANN. art. 38.22, §3 (1999).

¹³⁴ See generally Dix, *supra* note 92.

¹³⁵ *Id.* at 5.

¹³⁶ See *Butler v. State*, 493 S.W.2d 190 (Tex. Crim. App. 1973).

¹³⁷ See Dix, *supra* note 92, at 71.

concern for the interests of the reliability and accuracy of the in-court representations of what a defendant had orally admitted prior to trial. The legislature seemed to manifest a desire to prevent or deter unacceptable police behavior by requiring an objective record of what transpired in the interrogation and confession process.¹³⁸ While the thrust of the Texas statute focuses on the reliability aspects of recording, there is no right on the part of a defendant to a visual recording as opposed to an audio recording.¹³⁹

Illinois became the fourth state in the nation to require police to tape interrogations. Beginning in 2005, under a new state law, officers are required to tape interrogations of murder suspects or risk suppression of the suspect's confession as evidence.¹⁴⁰ The Illinois statute, which was signed into law by Governor Rod Blagojevich on July 17, 2003, is an outgrowth of reforms recommended by former Governor Ryan's Commission on Capital Cases. The Commission's recommendations were a consequence of alleged widespread police misconduct, including coerced confessions, in obtaining convictions against a number of individuals sentenced to death and ultimately freed.

The statute contains a number of exceptions, including one allowing use of untaped statements in court if electronic recording was not feasible. Other exceptions allow the admission of out-of-state interrogations and spontaneous statements if not made in response to questioning by officers.¹⁴¹ The

¹³⁸ *Id.*

¹³⁹ *Id.* at 73, n. 256.

¹⁴⁰ See generally Post, *supra* note 66; Mills, *supra* note 66.

¹⁴¹ See Post, *supra* note 66, at 18.

Illinois directive recognizes that in certain circumstances it is neither practical nor possible to obtain contemporaneous recordings. At the same time, it recognizes the necessity of a recorded statement when a suspect in a stationhouse gives a formal confession.

Although only a few courts and legislatures have enacted mandatory recording requirements concerning interrogations, it is likely that more will follow in the future. Tennessee recently considered such a mandate through legislation. The following section examines the Tennessee legislative proposal that renders inadmissible any statement made by an accused during an unrecorded custodial interrogation.

D. Tennessee's Legislative Proposal

Although a strong argument could be made that the mandatory recording of interrogations involves a due process issue and is therefore a constitutional issue necessitating judicial protection, the first move for reform was initiated by the Tennessee legislature.¹⁴² As noted previously, compelling policy reasons supported such a move. Indeed, the Tennessee Supreme Court has recognized the value of such a rule in terms of conserving judicial resources by reducing the amount of court time spent resolving disputes over what took place

¹⁴² The legislature's first proposal to adopt a mandatory recording requirement was contained in SB0343/HB1138. Tennessee Proposal, *supra* note 5. Note that additional versions of a mandatory recording bill were introduced in the most recent Legislative session. See SB1679/HB204. These versions are substantially similar to the original bills and do not raise materially different issues regarding the discussion in this article.

during an interrogation, but has nonetheless declined to adopt a rule requiring such recording.¹⁴³ As the court commented in *State v. Odom*, the issue of electronic recording of custodial interrogations “is one more properly directed to the General Assembly.”¹⁴⁴ Such legislation, if adopted, would allow state courts to sidestep the question of whether such recording is a constitutional prerequisite for the admissibility of confessions.

The Tennessee proposal would require electronic recording, by video or audio, of the entire interrogation, including that which preceded the confession. The bill would essentially prohibit the “softening up” of a suspect, then capturing the admonishments, waiver, and confession in a subsequent session. The proposed recording requirement was limited to a custodial interrogation conducted at a place of detention. Both the *Miranda* rights and any waiver of those rights would have to be captured on the recording. All voices would have to be identified and, upon motion, defense counsel would receive a copy of the interrogation prior to any hearing requiring the recorded confessions or waivers.

Further, the proposed bill would also apply to written statements made during the course of custodial interrogations, which would be inadmissible as evidence unless the defendant voluntarily and knowingly waived her or his *Miranda* rights. Any statements made by a suspect during custodial interrogation which are not recorded in compliance with the proposal would be admissible for impeachment purposes only. The

¹⁴³ See *Godsey*, 60 S.W.3d 759 at 772.

¹⁴⁴ *Odom*, 928 S.W.2d at 23-24.

preponderance of the evidence burden in that situation would be upon the suspect to show that he was subjected to a custodial interrogation that was not recorded, and later subjected to a recorded interrogation involving the same offense.

Moreover, the bill required electronic recording of the entire police interview before a particular admission became admissible. For maximum objective value, the entire interrogation session needs recording, beginning with the first introduction of the parties. It is extremely important that all preliminaries be recorded because they are often a breeding ground for claims of physical and psychological pressure and could undermine the reliability of any subsequent recording. Merely capturing the defendant's incriminating comments without also recording the police "lead-in" would give an imbalanced picture of the entire event. Frequently, what takes place in the beginning of an interrogation dictates the outcome.¹⁴⁵ It is clear that a recording of properly trained officers eliciting a confession from a suspect could withstand legal challenges. A recording lacking the initial contact between interrogator and suspect fails to accomplish the primary objective of a recording requirement: creating an accurate, detailed, and complete record of an interrogation.

The exclusionary requirement of the proposal was tempered by certain exceptions. These exceptions included statements made by a suspect in open court during a trial, before a grand jury, or at preliminary hearing; *res gestae* statements¹⁴⁶;

¹⁴⁵ See, e.g., *Stephan*, 711 P.2d at 1164 (quoting *Harris*, 678 P.2d at 413-14).

¹⁴⁶ The term *res gestae* is commonly confused with the excited utterance hearsay exception. NEAL COHEN, SARAH

statements not produced during custodial interrogation; statements made in circumstances in which videotaping was not feasible; and statements made under other exigent circumstances. If the State sought to demonstrate that any of the exceptions should apply, it would have to do so by a preponderance of the evidence. The numerous exceptions contained in the bill adequately addressed feasibility concerns likely to be voiced by law enforcement. Apart from the exigent circumstances exception, the general feasibility exceptions would have allowed officers to show that it was not possible for them to record the particular interrogation.

One drawback of the legislation was that it would have allowed an audio recording in lieu of videotaping. An audio recording would obviously not capture the physical nuances of the parties nor would it show the physical environs. Much as DUI enforcement utilizes videotape to capture a person's actions, a videotape would more reliably record the entire context of an encounter. The parties' actions and demeanor, which are of paramount importance in an interrogation setting, would be largely ignored by use of a sound recording.

Moreover, there would be difficulty in indicating when multiple interrogators were present; an audio recording alone may not always clearly indicate which person was talking. If the interviewer and interviewee consistently talk over each other, neither may be understood. Perhaps

SHEPPEARD & DONALD PAINE, TENNESSEE LAW OF EVIDENCE, 532 (1995). The proposal does not define the term or distinguish it from the spontaneous statement exception under section (g) (6) of the Tennessee Proposal.

most important, however, is that descriptions of head, eye, facial, or hand movements would not be conveyed to a listener without a verbal clarification. In short, a sound recording by itself simply cannot convey the entire context within which the words are conveyed.

The House and Senate Judiciary Committees directed the Tennessee Law Enforcement Advisory Council to study and evaluate issues related to electronic recording of custodial interrogations of suspects and to report its final findings or recommendations following the convening of the 103rd General Assembly.¹⁴⁷ The purpose of the Advisory Council¹⁴⁸ is to monitor and evaluate the status of technological developments and related issues to Tennessee law enforcement, and to submit its findings to the governor and legislative judiciary committees.

The Comptroller's Office of Research developed a survey for all Tennessee law enforcement agencies in November, 2002. Tennessee law enforcement personnel from 400 agencies responded to the survey.¹⁴⁹ 43 percent of agencies that responded electronically record custodial interrogations.¹⁵⁰ The primary reasons cited for not recording interrogations included the following: sufficiency of a written statement; unwillingness of suspects to speak if they are recorded; prohibitive equipment cost; and concerns

¹⁴⁷ H.R.J. Res. 862, 102nd Gen. Assem., Reg. Sess. (Tenn. 2002).

¹⁴⁸ Delineated in TENN. CODE ANN. §38-13-101 et. seq.

¹⁴⁹ TENNESSEE LAW ENFORCEMENT ADVISORY COUNCIL CUSTODIAL INTERROGATION SURVEY, TENNESSEE COMPTROLLER'S OFFICE OF RESEARCH (2002).

¹⁵⁰ *Id.* at 2.

about equipment malfunctions.¹⁵¹ Agencies utilizing recording report that it provides numerous benefits including enhanced law enforcement credibility, availability of tapes for training, reduced officer time in court, and ease of demonstrating that the suspect has been treated fairly.¹⁵² The major drawback cited by those using recording was the expense associated with recording custodial interrogations.¹⁵³ Only 23.3 percent of agencies using electronic recording recorded *all* custodial interrogations. Of the agencies reporting that they recorded some custodial interrogations, the decision to record was based primarily on the severity of the offense.¹⁵⁴

The Council identified several concerns regarding electronic recording of custodial interrogations. The most significant concern centered on the costs associated with such recording,¹⁵⁵ specifically costs associated with recording *all* custodial interrogations. The proposal mandated the recording of custodial interrogations *at a place of detention*. Because some interrogations undoubtedly occur outside of the stationhouse, cost concerns could be lessened.

There was also a concern that recording would not serve the interest of judicial economy because confessions encourage plea bargains.¹⁵⁶ Common sense would seem to indicate, however, that a tape evidencing a voluntary confession would make a

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 3.

¹⁵⁵ See Jennings, *supra* note 75, at 2.

¹⁵⁶ *Id.* at 3.

defendant less likely to challenge the admissibility of the statement. Moreover, recordings would most certainly lead to fewer allegations of improper, abusive, or coercive interrogation procedures that could result in civil litigation and involve judicial resources beyond the criminal justice system.

The cost of failing to implement the recording program would far outweigh the cost of recording when the increased cost of criminal and civil litigation due to allegations of improper police conduct is figured in. The cost of the recording equipment and videotapes is minuscule compared to the cost of going to trial with tainted evidence and the resulting lawsuits involving police accused of unethical conduct.

DNA technology has cleared scores of defendants years after their convictions, including some who were on death row, many of whom had confessed to crimes they did not commit. DNA technology is costly, but its benefits are considered invaluable. What price is too high to bolster the truth-finding function of the law? Effectively using electronic recordings of interrogations would likely result in significant cost savings to the criminal justice system as a whole.

In this society, with its advanced technology and almost universal availability of recording technology, there is no reason not to increase the reliability of the criminal justice system as much as possible by requiring recording. Resisting the use of inexpensive technology to safeguard due process and fairness is unjustifiable. The interrogation event should speak for itself. The fact-finder should not be required to filter through inferences drawn from a "he-said, she-said" drama involving the

disparate perceptions of individuals, each with their own perceptual biases or shortcomings.

This Tennessee legislature's recording proposal was tabled in spring 2004. If this proposal is not implemented, reliability and accuracy will continue to be sacrificed in the name of efficiency and expediency. In the absence of legislative action on recording, it falls to the judiciary to take the lead in addressing the issue.

IV. The Tennessee Supreme Court's Supervisory Powers Argument

The obvious judicial response given the Tennessee Supreme Court's history is to adopt a due process approach and find that the Tennessee Constitution requires mandatory videotaping to ensure a criminal defendant's basic rights to fairness. The court has a history of interpreting constitutional rights, both procedural and substantive, more broadly than the United States Supreme Court.¹⁵⁷

In addition, the state's due process approach has found legal support in one other state. The Alaska Supreme Court in *Stephan v. State*¹⁵⁸ held under its state constitution that due process required electronic recording of stationhouse interrogations. This approach has the added attraction of operating as an extension of the United States Supreme Court's *Miranda* decision, which is firmly entrenched in this country's criminal process.¹⁵⁹

¹⁵⁷ See *State v. Jacumin*, 778 S.W.2d 430 (Tenn. 1989); *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000).

¹⁵⁸ *Stephan*, 711 P.2d at 1156.

¹⁵⁹ *Miranda*, 384 U.S. at 436.

Since *Miranda* was given a firm constitutional grounding in the Supreme Court's *Dickerson* decision,¹⁶⁰ what began as a prophylactic rule made by judicial fiat has been strengthened. Videotaped interrogations could share a similar lineage and become enshrined as constitutional doctrine.

The court addressed this constitutional approach, albeit in a cursory fashion, in *State v. Godsey*.¹⁶¹ In *Godsey*, the court considered but did not ultimately apply due process and other constitutional considerations in support of mandatory videotaping. Rather, the court elected to leave the matter to legislative consideration.¹⁶²

However, the *Godsey* case does not end the inquiry into the court's possible involvement in this matter. There is another compelling argument that the court has not specifically addressed: the court has the power and duty, under both statutory and case law, in its supervision and administration of the criminal justice system, to order videotaped interrogations when significant public interest demands it. This "supervisory powers" argument has been the basis for court action in a number of important areas in the criminal justice system specifically and the judicial system generally.¹⁶³

The basis for the Tennessee Supreme Court's supervisory powers is perhaps best summarized in *Cantor v. Brading*:

The supreme judicial and judicial supervisory power [of the Supreme Court]

¹⁶⁰ *Dickerson v. United States*, 530 U.S. 428 (2000).

¹⁶¹ 60 S.W.3d 759.

¹⁶² *Id.*

¹⁶³ See *infra* notes 168, 169, 171-73.

is an inherent power of the Supreme Court and has been so recognized by the legislative branch of our government. T.C.A. §16-331 recognized that the Supreme Court has power to take all actions as may be necessary to the orderly administration of justice within the State, whether enumerated in that Code section or elsewhere. T.C.A. §16-332 declares that the power is of common law origin as it existed at the time of our Constitution.¹⁶⁴

The court's supervisory or plenary powers are clearly endorsed by the current statutory schemes in T.C.A. §16-3-503 and -504. This power is in addition to the court's ability to make specific rules, either by drafting rules of court or court opinions.

An example of the court's supervisory power is found in Rule 13 of the Supreme Court Rules. Rule 13 adopts a broad scheme of appointing attorneys and resources to indigent defendants, setting out elaborate procedures, standards and fees for the appointment of counsel in capital and non-capital cases. Section 3 in particular sets out standards of experience and training that specifically govern who may and may not sit as counsel in a capital case. There is nothing in either the federal or Tennessee constitutions, nor in case law decided under them, specifically calling for these procedures. In fact, the constitutional requirements related to the right to assistance of counsel are generally couched in terms of competency and effectiveness, and the United States Supreme Court's standards for competency of counsel are couched in broad terms requiring

¹⁶⁴ Cantor v. Brading, 494 S.W.2d 139, 142 (Tenn. App. 1973).

counsel to meet minimal standards of performance.¹⁶⁵

Rule 13, at least as it applies to capital counsel, goes well beyond the minimal standards demanded by constitutional considerations. It appears to enhance and embellish the specific rights to counsel found in both the federal and Tennessee constitutions. Furthermore, Rule 13 also comes with a price tag. Experienced attorneys handling death penalty cases will spend more time and resources on the case than inexperienced attorneys, and since attorneys bill the state for their fees in appointed cases, the bills submitted by Rule 13 attorneys cost the taxpayers more.

Another example of the court using its plenary powers to make rules that embellish and enhance constitutional rights is in Section VII of Rule 11 of the Tennessee Supreme Court Rules. The purpose of this rule, which sets out detailed procedures for appointing substitute judges in the absence of a presiding trial judge, is to empower the state constitution's guarantee of open proceedings.¹⁶⁶

These examples illustrate the court's willingness to address a problem, overlooked by the legislature, in the administration of the criminal justice system, as well as a willingness to promulgate rules of conduct that ensure constitutional rights in spite of potential financial impact. The court does not accept the argument that it should refrain from addressing a problem when legislative action is not forthcoming. The language in *Cary v. Cary* is compelling:

¹⁶⁵ See *Strickland v. Washington*, 466 U.S. 668 (1984).

¹⁶⁶ TENN. CONST. art. I, § 7.

It is primarily for the Legislature to determine the public policy of this state; however, where there is no declaration in the constitution or statutes and the area is governed by common law doctrines, it is the province of the courts to consider the public policy of the state as reflected in old, court-made rules.¹⁶⁷

Many other examples of the Tennessee Supreme Court's rulemaking fall into a second category: adopting a procedure or rule under the plenary powers as part of a court decision to deal with a specific issue before it. *State v. Reid*¹⁶⁸ is an example of such a decision in which a "rule" is announced as part of the court's opinion. The *Reid* court approved of the trial court's adoption of a rule establishing a notice requirement for the defense when mental health evidence was to be admitted at the sentencing phase of a case. This procedure was adopted to standardize a response to a recurring problem and was approved by the court despite the defense argument that the court could not create a statutory procedure when none was in place. The absence of legislative activity is not the end of the inquiry; rather, in some areas, it is the beginning.

In a similar area, the Tennessee Supreme Court, in *Van Tran v. State*,¹⁶⁹ used its plenary powers to establish a procedure to be applied by lower courts when a death row inmate asserted a competency defense to application of the death penalty. *Van Tran* is another example of the court intervening where it felt it necessary to protect a defendant's

¹⁶⁷ *Cary v. Cary*, 937 S.W.2d 777 (Tenn. 1996).

¹⁶⁸ *State v. Reid*, 981 S.W.2d 166 (Tenn. 1998).

¹⁶⁹ *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999).

basic constitutional rights.¹⁷⁰ Again, the court did not hesitate to address an area of the law in which the legislature had not set forth any rules or procedures to ensure fairness and consistency.

Other examples of the court's exercise of its supervisory powers specifically involve evidentiary problems. For example, in *Mathis v. State*,¹⁷¹ the court reversed a murder conviction by applying a rule requiring that convictions based on the testimony of an accomplice be corroborated by independent evidence.¹⁷² There is nothing in either the federal or Tennessee Constitutions requiring corroboration of accomplice testimony. In fact, neither constitution says much about the types of evidence that are admissible in a criminal trial. The court's action suggests, however, that this corroboration "rule" helps to ensure that convictions are based upon reliable evidence. Similar to the rule regarding the appointment of counsel, the corroboration rule has potential costs to law enforcement and prosecutors in the handling of criminal cases. The costs associated with finding and bringing to court corroboration witnesses necessary to support a conviction are real.

In *State v. Smith*,¹⁷³ the court had the opportunity to address another evidentiary issue. The issue, a potential nightmare for the prosecution, involved the introduction of hearsay testimony that another person committed the crime for which the defendant was being tried. The court set forth

¹⁷⁰ See *Ford v. Wainwright*, 477 U.S. 399 (1986).

¹⁷¹ *Mathis v. State*, 590 S.W.2d 449 (Tenn. 1979).

¹⁷² See *Proctor v. State*, 565 S.W.2d 909 (Tenn. Crim. App. 1978).

¹⁷³ *Smith*, 933 S.W.2d 450.

standards that must be met before the introduction of a third party's admission of guilt. Although this case would seem to limit the scope of evidence offered by a defendant, it nonetheless indicates the court's concern with reliability of evidence.

It might be argued that the above examples are distinguishable from the issue of videotaped interrogations in that the above examples show the court's exercise of its supervisory powers in implementing procedures to be followed by the lower courts. The videotaping issue, on the other hand potentially involves the court's imposition of rules on another branch of government, namely, law enforcement.

A strong argument exists for the court to act in the areas directly related to the supervision of the lower courts of this state. The high court is the repository of judicial power in the state, and without question has the ultimate power to supervise the practice of attorneys and lower courts. However, this distinction should not bar rule-making in this area.

First, the clear language of the Tennessee Supreme Court indicates that its plenary power extends broadly to the "administration of justice" in Tennessee.¹⁷⁴ Moreover, as previously noted, the court has adopted other rules that impose costs on police, the prosecution and the public. Certainly, the court's establishment of rules or guidelines for admissibility of evidence is related to the administration of justice, especially when compelling public policy reasons require the court's involvement. As such, one of the most important

¹⁷⁴ Belmont v. Bd. of Law Exam'rs, 511 S.W.2d 461 (Tenn. 1974).

functions of any court is ensuring the reliability of evidence in a criminal case.¹⁷⁵

Further, the Tennessee Supreme Court expressly adopted the United States Supreme Court's dictates in the *Miranda*,¹⁷⁶ *Weeks*,¹⁷⁷ *McNabb*,¹⁷⁸ and *Mallory*¹⁷⁹ cases, all of which involved United States Supreme Court rule-making. The Tennessee Supreme Court has never found the rules announced in these cases unenforceable because they were promulgated by the judicial system in the absence of a legislative mandate. Moreover, the rules in the above cases involved potential costs imposed on law enforcement. Even before *Dickerson*,¹⁸⁰ which shows *Miranda* to be rooted in the federal Constitution, the Tennessee Supreme Court approved *Miranda* as a prophylactic rule to protect a defendant's constitutional rights. In fact, the court has intimated that its view of the self-incrimination privilege is broader and more expansive than the privilege in the federal Constitution.¹⁸¹ Rule-making in the area of interrogations, thus, has been a fixed part of the law in this state for years.

The final, and perhaps most compelling, reason for judicial rule-making in this area is that the defendant's rights are central to the notion of a fair trial. The right against self-incrimination, the right to confront witnesses and evidence, and the right to the assistance of counsel are all fundamental and necessary. The notion that videotaping of

¹⁷⁵ See *Crawford*, 541 U.S. at 61.

¹⁷⁶ *Miranda*, 384 U.S. at 436.

¹⁷⁷ *Weeks v. United States*, 232 U.S. 383 (1914).

¹⁷⁸ *McNabb v. United States*, 318 U.S. 332 (1943).

¹⁷⁹ *Mallory v. United States*, 354 U.S. 449 (1957).

¹⁸⁰ *Dickerson*, 530 U.S. at 428.

¹⁸¹ See *Smith*, 933 S.W.2d at 455.

interrogations is necessary to protect those important constitutional rights is compelling. Rights are substantially enhanced by the videotaping requirement in the ways thoroughly explored above.¹⁸²

The supervisory powers approach to this problem has been adopted by one state's high court. The Minnesota Supreme Court was asked in *State v. Scales*¹⁸³ to follow the Alaska Supreme Court's holding in *Stephan v. State*,¹⁸⁴ and hold that the Minnesota Constitution requires mandatory videotaping. The *Scales* court instead mandated the taping based on its inherent supervisory powers to insure the fair administration of justice. The *Scales* court held that recording of interrogations at a place of detention was a "reasonable and necessary safeguard" essential to preserving valuable constitutional rights.¹⁸⁵

The voluntariness jurisprudence of the United State Supreme Court developed initially in part to ensure that the product of police interrogations is reliable. As a general principle, then, it is reasonable to demand that a court admit the most reliable evidence available. Frequently that means assessing the admissibility of a defendant's statement.

Videotaping interrogations also touches on the issue of reliability. All trial courts routinely deal with this issue. Matters involving introduction of hearsay evidence, the application of the best evidence rule, and admission of expert testimony all

¹⁸² See *supra* pp. 404-07.

¹⁸³ *Scales*, 518 N.W.2d at 587.

¹⁸⁴ *Stephan*, 711 P.2d at 1156.

¹⁸⁵ 518 N.W.2d at 592.

require courts to serve as gate-keepers.¹⁸⁶ At common law, courts served a similar function. In the absence of formal rules of evidence, an even greater responsibility was placed on the court to evaluate evidence. Professor Jones perhaps states it best: "It has been broadly stated that the best evidence that is obtainable under the circumstances of the case must be adduced to prove any disputed fact."¹⁸⁷

It seems clear that the Tennessee Supreme Court had the common law power to make rules related to the determination of the reliability of evidence. As seen in *Smith*¹⁸⁸ and *Proctor*,¹⁸⁹ the court has embraced this common law power in recent times. By adopting a mandatory videotaping rule, the Tennessee Supreme Court would simply continue a tradition of intervening in evidentiary matters that influence the "administration of justice" in this state and for which there are no legislative solutions.

A major argument in support of videotaping a defendant's interrogation is that by preserving the entire context of the encounter, as well as the exact words spoken by the parties, the court would allow a more reliable version of the evidence to come before the fact finder. The benefits to the fact finder, as well as to the public's assurance that the

¹⁸⁶ See, e.g. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993)(rejecting Frye's "general acceptance" test for admissibility of scientific evidence and placing burden on trial judge under Federal Rules of Evidence to make important preliminary assessments of reliability of scientific methodology).

¹⁸⁷ 1 BURR W. JONES, *THE LAW OF EVIDENCE: CIVIL AND CRIMINAL*, §231,444 (1958).

¹⁸⁸ *Smith*, 933 S.W.2d at 450.

¹⁸⁹ *Proctor*, 565 S.W.2d at 909.

trial procedure is fair, are clear.¹⁹⁰ The question is not whether the court is constitutionally required to resolve this problem, although as discussed in Section III.C., several state courts have found constitutional grounding for their decisions requiring mandatory taping. The argument is that the court should use its plenary power as it has in other areas in the criminal justice system when to do so comes at little price to the government and provides a compelling service to the adversarial system.

Indeed, if the Tennessee Supreme Court began as a general trial court that routinely dealt with problems of reliability of evidence, then the modern court, which derives much of its plenary power from that era, clearly has the power to intervene in this area where the legislature has not. Requiring the videotaping of interrogations is surely no more of an intrusion in police affairs than *Miranda*, *McNabb*, and *Mallory*. All of these rules have one thing in common: they ensure that justice is administered more fairly than would be the case in the absence of the rules.

By exercising its plenary power over the issue of recording interrogations, the court would actually accomplish two things. In addition to giving vitality to important constitutional rights, it would also ensure the fair administration of justice. Moreover, videotaping is beneficial to all citizens. A videotape of the interrogation event ensures the availability of a more objective form of evidence for courts to use in ruling on the propriety of the police conduct. This will lead to fairer rulings as to whether the evidence should be admitted in criminal

¹⁹⁰ See *supra* notes 55, 73 and 87.

proceedings. With better rulings, the public will be assured that verdicts are based on more reliable proof and are worthy of public support.

