The Case for Recording Interrogations

Daniel Donovan and John Rhodes

From wiretaps[1] to drug-sniffing dogs,[2] at the government's request, courts have ruled that numerous investigative techniques pass constitutional muster. Deploying technology to combat crime is already a hallmark of Attorney General John Ashcroft's tenure. At the same time, the Executive Branch and the courts resist using technology to preserve and promote constitutional rights. In particular, at the urging of the prosecution, courts have refused to require that defendant statements be recorded to admit the statements at trial.[3] Yet, where law enforcement records such statements, the courts have readily admitted the recordings at the prosecution's request.[4] Thus far, only two American jurisdictions require a defendant's entire custodial interrogation to be recorded in order to admit the statements.[5] Nonetheless, compelling policy and constitutional reasons support the requirement that the entire interrogation be recorded from start to finish.

Recording interrogations is becoming a mainstream issue. Earlier this year, then-NACDL President Irwin H. Schwartz devoted a *From the President* column to this "simple and inexpensive solution" to the plague of coerced confessions and abusive interrogation tactics.[6] Now, President Lawrence Goldman is urging the NACDL and its State Legislative Network to develop model legislation requiring recording. "Videotaping has to be mandatory,"[7] the *Chicago Tribune* editorialized in a headline. Just last June, *The Washington Post* published an op-ed entitled, "Eye On Interrogations: How videotaping serves the cause of justice."[8]

This article reviews the fundamental fairness and the constitutional necessity of recording interrogation statements. Our premise is that availability of a recording device, such as a video camera, is so inexpensive these days that recording should always be required for any and all custodial interrogations, whether in a police station or elsewhere. At the very least, audio recording should be required; video recording is even better. Indeed, much as with *Miranda* warnings, should a recording requirement be imposed, law enforcement could (and would) easily incorporate videorecording of statements into its procedures.

Current practices and inherent deficiencies

Currently, whether to admit a defendant's (government-claimed) custodial interrogation statement is resolved by *Miranda v. Arizona*[9] and related inquiries. *Dickerson v. United States*[10] confirms *Miranda's* authority.

In theory, *Miranda* assures the court that the defendant understood his rights when he made the custodial statements:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statements 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.[11]

As frequently dramatized by television and movies, 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,[12] 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."[13] 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, both of the nature of the right to be abandoned and consequences of the decision to abandon it.[14]

Thus, before admitting a statement, the court must ascertain that the defendant voluntarily, knowingly and intelligently waived his Fifth and Sixth Amendment rights.[15] The court must make a four-part inquiry. First, did the accused make any statements?[16] Second, was the defendant in custody at the time of the statements?[17] Third, were the statements made in response to interrogation by government agents?[18] And, finally, the court must determine whether the statements were voluntary.[19]

If a court is satisfied that each of these inquiries may be answered affirmatively, statements can be admitted.[20] Ultimately, that decision turns on the totality of the circumstances.[21] 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 accused help demonstrate the defendant's knowing waiver of rights. Written statements signed by the defendant certainly facilitate the fact-finder's determination of what the defendant said.

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 answers each of the above inquiries. It is the best tool for aiding the court's totality of the circumstance determination. Moreover, it preserves the context of the interrogation while preserving the substance of the statements themselves for evidence at trial. Thus, whether the issue is the admissibility of statements, the reliability of the statements, or what was said, recording will advance the truth-finding process and justice.

The benefits of recording

The advantages of recording suspect interrogations compel adopting such a requirement. Recording facilitates truth-finding, fairness, accountability, and consequently, the law's integrity. 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.[22]

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 incomplete information. As *Miranda* notes, "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."[23]

At the outset, a recording will greatly facilitate the *Miranda* and voluntariness analysis; 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 in any way coerced? What substantive questions were asked? How were they asked? And conversely, what answers were given and how were the responses made? How did the interrogator's demeanor (and appearance) contrast with the suspect's behavior (and appearance)? What is the fit between what the tape reveals and the testimony of the people on the tape? As the Eighth Circuit recognized, a tape will convey 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."[24]

Additionally, recording will help curb improper police tactics. If the interrogator knows he is on tape, he usually will act accordingly; otherwise, he will risk losing his case as well as his reputation. Police tactics are a real concern. Last year, an article in *The Champion* chronicled these practices and the defense bar's duty to remain familiar with them.[25] Professors Richard Leo and Richard Ofshe are well-known for highlighting the scourge of false confessions and championing recording as the remedy.[26]

Professor Charles D. Weisselberg has detailed the "outside *Miranda*" interrogation tactics promoted by California

law enforcement; his work is replete with examples of California law enforcement training materials advocating the circumvention of *Miranda*.[27] In a case litigated by Professor Weisselberg, the Ninth Circuit condemned outside-*Miranda* questioning in an opinion denying qualified immunity to officers who deploy such tactics.[28] If those tactics had not been revealed, the court could not have addressed law enforcement's deliberate violation of the Constitution. Recording will bring the interrogation room to the courtroom.

Conversely, recording will discourage defendants from raising frivolous pretrial challenges to confessions and will affect the accused's trial decision. A defendant faced with the cold recorded reality of his confession may be convinced to plead guilty rather than condemningly expose his admissions to a jury. For these reasons, many law enforcement agencies already selectively record confessions. Regardless of the stage of the proceeding, recording will facilitate justice and resolution of the case.

It is beyond cavil that unlike the courts, law enforcement and defendants have an agenda other than 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 recordation of the critical events. Rather, it is because we are entitled to assume that he is no less human – no less inclined to reconstruct and interpret past events in a light most favorable to himself – that we should not permit him be a "judge of his own cause." Defendants, undoubtedly, are equally fallible.[29]

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."[30]

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 for the FBI, which is (or was) considered the nation's best law enforcement agency and is a leader and trainer of local law enforcement, discourages recording.[31] As the Supreme Court noted, "There is the word of the accused against the police. But his voice has little persuasion."[32] Recording will not stack the deck against or in 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-serving 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, and ultimately, the law.

State of the law

Requiring suspect interviews to be tape-recorded has long been recognized as an advancement in criminal justice.[33] It is recommended by the National Conference of Commissioners on Uniform State Laws and by the American Law Institute.[34] 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). And most importantly, as argued below, recording is constitutionally required.

At least three other common-law countries have 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: "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."[35] Similarly, Canada now has a policy of mandatory videotaping of confessions.[36] 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.[37]

Thus far, two American jurisdictions have imposed an interrogation recording requirement.[38] 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."[39]

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 suspect's right to due process, under the Alaska Constitution, and that any statement thus obtained is generally inadmissible."[40] Persuaded by the policy reasons discussed above, the court ruled:

> 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."[41]

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.[42]

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."[43]

Neither Alaska nor Minnesota would have imposed the recording requirement without the diligent efforts of persistent defense counsel. Each of those courts evolved toward a recording requirement. In *Scales*, the Supreme Court of Minnesota noted that, "In previous cases, we have been concerned about the failure of law enforcement officers to record custodial interrogations." In those 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.'"[44] "[D]isturbed by the fact that law enforcement officials ignored [the court's] warnings", *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.'"[45]

Alaska experienced an evolution similar to that in Minnesota. Before the Supreme Court of Alaska adopted a recording requirement in *Stephan*, the court had strongly suggested that law enforcement record interrogations. *Stephan* chronicled this evolution.[46] Alaska first addressed the issue in *Mallott v. State*.[47] 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."[48]

The court addressed the issue again that same year in *S.B. v. State*.[49] 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."[50]

The court visited the issue for a third time in 1980. *McMahan v. State*[51] 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."[52] Ultimately, the Supreme Court of Alaska took the *Mallott* Rule to its logical conclusion and imposed the recording requirement in *Stephan*. Persistence pays off. Nonetheless, most jurisdictions have rejected a recording requirement.

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Due process and the rights against self-incrimination and to remain silent require recording

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.[53] Recordings, as a remedy for false confessions, ensure due process and further preserve and protect the rights against self-incrimination and to counsel.

Courts, however, are inclined to leave "the imposition of any such procedural [recording] requirement to the legislature and to individual law enforcement agencies."[54] The Ninth Circuit dismissed the recording argument as a legislative issue, "not for a court exercising an appellate function."[55] 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.[56] Indeed, such deference to law enforcement and the Legislative Branch arguably violates the separation of powers and represents an abdication of judicial duty where it is known that law enforcement discourages recording. Moreover, recording statements is more than a public policy issue, it is a question of fundamental fairness, otherwise known as due process, as well as a question of preserving the rights against self-incrimination and to counsel.

Constitutionality of prophylactic rules

Since its genesis, attackers have discounted *Miranda* and its invocation as establishing prophylactic rules not required by the Constitution. *Dickerson* reflects this school of thought. This position ignores the fact that "prophylactic" rules are "a central and necessary feature of constitutional law."[57]

"Prophylactic" rules have been constitutionally enshrined to compensate for fact-finding limitations. Such jurisprudence occurred in *North Carolina v. Pearce*,[58] 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."[59] Absent this demonstration, a "presumption of vindictiveness" dictates finding of a due process violation. The Court later clarified that the *Pearce* rule was prophylactic, analogous to *Miranda*, and designed to preserve the integrity of the criminal justice system.[60]

Similarly, *Edwards v. Arizona*[61] developed *Miranda* by establishing that when a suspect asserts his right to counsel, he may not be questioned further unless he initiates the conversation.[62] The Court has since referred to that principle as "the bright-line, prophylactic *Edwards* rule,"[63] explaining that, "[t]he 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."[64]

A recording rule would provide the same benefit, and although it may be labeled prophylactic, it is a 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."[65] Prophylactic yet constitutional rules abound in criminal procedure.[66] The Rehnquist Court has expressly recognized that prophylactic rules are necessary to vindicate the constitutional right to representation.[67]

Even the United States Department of Justice has recognized the constitutionality of *Miranda* specifically and prophylactic rules generally. Responding to the Fourth Circuit's *Dickerson* ruling that 18 U.S.C. § 3501 overruled *Miranda*,[68] the defendant petitioned the Supreme Court to confirm *Miranda's* primacy.[69] 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.[70] Quoting the Supreme Court, the United States noted that "'[p]rophylactic' though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards 'a fundamental trial right.'"[71] Finally, in detailing *Miranda's* constitutional stature, the United States canvassed the prevalence of prophylactic rules and their uncontroverted presence in constitutional jurisprudence.[72] As the government explained, "Prophylactic rules are now and have been for many years a feature of this Court's constitutional adjudication."[73] Given this analysis, federal and state governments will have difficulty dismissing the recording argument as an extraconstitutional rule.

The *Dickerson* majority danced around the prophylactic issue. The majority did say that "*Miranda* is constitutionally based," that *Miranda* has "constitutional underpinnings," that *Miranda* is "a constitutional decision," and that *Miranda* "announced a constitutional rule."[74] What it could not do was expressly admit that prophylactic rules, such as *Miranda*, are constitutional. The Supreme Court, however, did acknowledge that the court of appeals relied on the Court's characterization of *Miranda* as prophylactic to conclude that *Miranda* is not constitutionally required and thus subject to congressional review.[75] Principally relying on the fact that *Miranda's* rule has been applied to state prosecutions, the Court disagreed with the Fourth Circuit and confirmed "that *Miranda* announced a constitutional rule that Congress may not supercede legislatively."[76]

Justice Scalia's dissent spotlighted what the majority concealed: the majority decision only can mean "that this Court has the power, not merely to apply the Constitution but to expand it, imposing what it regards as useful 'prophylactic' restrictions upon Congress and the States."[77] Justice Scalia reiterated that, "what today's decision will stand for, whether the justices can bring themselves to say it or not, is the power of the Supreme Court to write a prophylactic, extraconstitutional Constitution, binding on Congress and the States."[78] What Justice Scalia refused to admit is that prophylactic rules are a bedrock of the Constitution. Now is the time for the recording requirement to be one of them.

Due process requires recording

Due process has frequently been referred to as an euphemism for fundamental fairness.[79] 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."[80] Put differently, "Whether the trial be federal or state, the concern of due process is with the fair administration of justice."[81]

As the Supreme Court emphasized in *Weeks v. United States, supra*, n. 56, the courts' role is integral to this process:

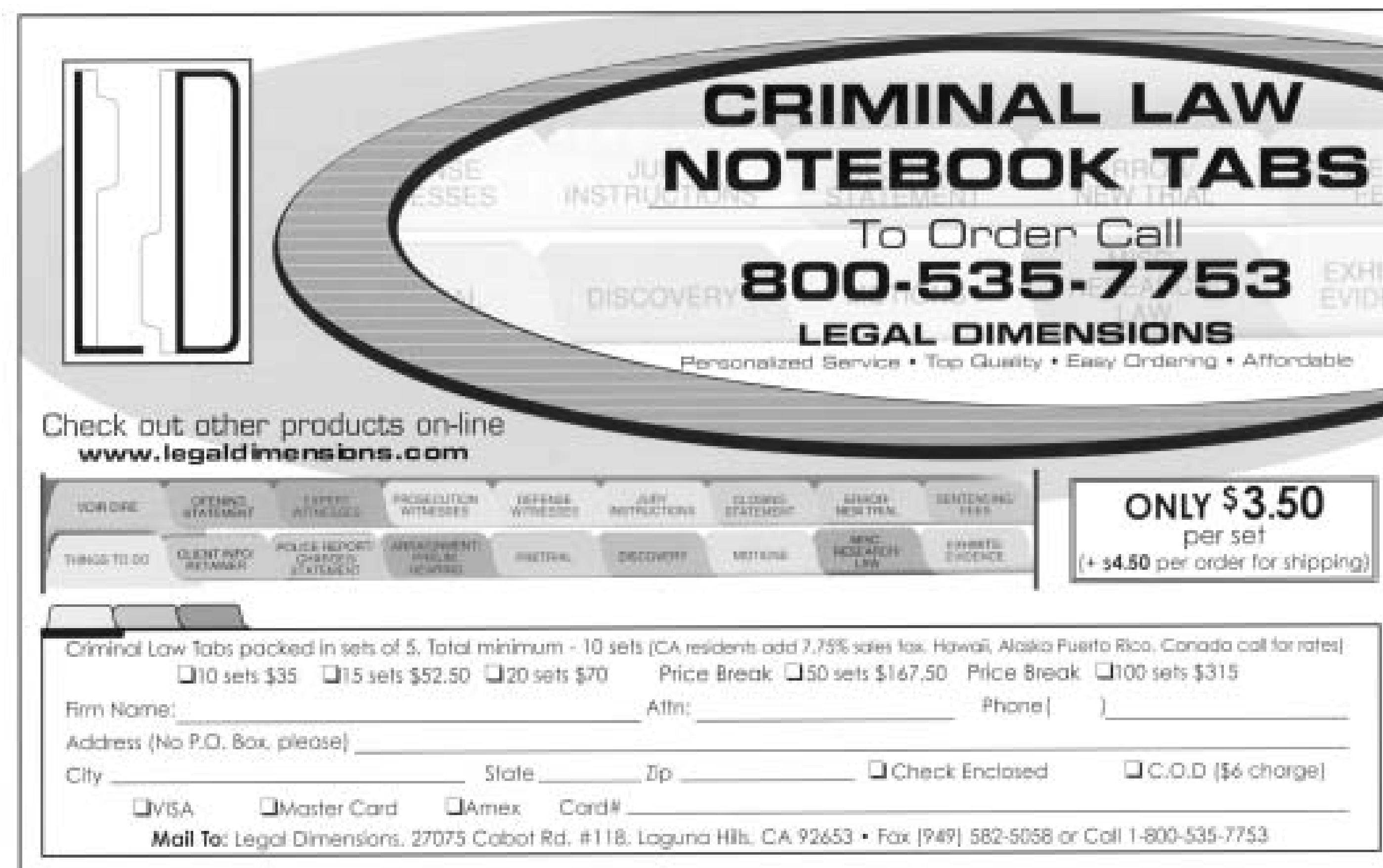
> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.[82]

More pointedly, recording provides what due process requires. For instance, Justice White noted that, "the right to an impartial decision-maker is required by due process."[83] As explained above, a recording and its objectivity heightens the impartiality of the decision-maker who, absent a recording, must subjectively rely on the testimony of interested parties to determine suppression and substantive issues. Without a recording requirement, the partiality of the fact provider and 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.

As Justice Harlan succinctly put it, "the appearance of evenhanded justice . . . is at the core of due process."[84] Furthermore, the Supreme Court has recognized that due process is a fluid concept that evolves with time and that the Supreme Court 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.[85]

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".[86] "[M]ore than an instrument of



justice and more than one wheel of the Constitution, it is the lamp that shows that freedom lives."[87] A recording requirement would certainly brighten that lamp. As this century begins, characterized by technological innovation and specifically the ready availability of recording devices throughout America, due process and fundamental fairness demand a recording requirement.

Final thoughts

"The concept of due process is not static; among other things, it must change to keep pace with new technological developments."[88] It cannot be denied that, "[j]udicial 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."[89] The Supreme Court has employed tape recordings to determine voluntariness.[90] Most jurisdictions now permit the introduction of taped confessions.[91] That government is quick to selectively exploit recorded confessions where it furthers convictions but resists an across-the-board recording requirement heightens the unfairness and distrust that result from not requiring recording of the entire interrogation.

Litigation can create the momentum for constitutionalizing recording. Perhaps, as happened in Minnesota and Alaska, the judiciary will tire of law enforcement's lame excuses and failure to heed the judicial warnings instructing 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 courts,[92] the Due Process Clauses in the Fifth and Fourteenth Amendments, the self-incrimination provisions of the Fifth Amendment, and the Sixth Amendment right to counsel (and their state counterparts). The synergy resulting from these multiple sources furthers the recording argument. Importantly, when considering these constitutional sources, it must be remembered that many states trumpet their prerogative to extend constitutional rights beyond those guaranteed by the United States Constitution.[93]

These constitutional bases, along with the policies and arguments reviewed in this article, should be utilized by defense counsel to urge a recording requirement. The requirement should contain the common-sense limitation that recording is mandated *only where* such preservation is practical (*i.e.*, an interrogation *at the police station*), where it *should* be, unless the investigating officers can show that all the recording equipment was broken and time was of the essence. Moreover, the recording rule should be applied to the entire interrogation, including the *Miranda* waiver, so that selective recording does not occur. At the least, defense attorneys should urge that the failure to record creates – *nota bene* – an adverse inference for suppression purposes and warrants a jury instruction that the unrecorded statements should be viewed with distrust.[94]

Unfortunately, the Executive Branch is keen to exploit technological advances that impinge our clients' constitutional rights and freedoms, but, in this instance, resists using technology to safeguard them. With the almost universal availability of recording technology, now is the time, as the 21st century dawns, to secure a recording requirement. If litigation fails, perhaps the defense bar and the people can convince legislatures to preserve the liberty and due process that our Constitution commands.

Notes

1. Olmstead v. United States, 277 U.S. 438 (1928).
2. United States v. Place, 462 U.S. 696 (1983).
3. *See, e.g.*, United States v. Coades, 549 F.2d 1303, 1305 (9th Cir. 1977).
4. *See, e.g.*, Diane M. Allen, *Admissibility of Visual Recording of Event or Matter Other Than That Giving Rise To Litigation or Prosecution*, 41 A.L.R.4th 877 (1985).
5. *See* State v. Stephan, 711 P.2d 1156 (Alaska 1985); State v. Scales, 518 N.W.2d 587 (Minn. 1994); *see also* Ragan v. State, 642 S.W.2d 489 (Tex. Crim. App. 1982). Previously, Texas statutorily limited the recording requirement to the impeachment context: a recording was required only when a defendant's statements are 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).
6. The Champion, March 2002 at 7.
7. Editorial, Chicago Tribune, November 29, 1999, § 1, at 16.
8. Amy Klobuchar, *Eye On Interrogations: How videotaping serves the cause of justice*, Washington Post, June 10, 2002, at A21.
9. 384 U.S. 436 (1966).
10. 530 U.S. 428 (2000).
11. Miranda v. Arizona, 384 U.S. 436, 444-45 (1966).
12. California v. Prysock, 453 U.S. 355, 359 (1981).
13. *Miranda*, 384 U.S. at 475.
14. Moran v. Burbine, 475 U.S. 412, 421 (1986).
15. *Miranda*, 384 U.S. at 444.
16. *See, e.g.*, Foe v. United States, 487 U.S. 201, 210 (1988).
17. *See, e.g.*, Illinois v. Perkins, 496 U.S. 292, 296 (1990).
18. *See, e.g.*, Rhode Island v. Innis, 446 U.S. 291, 297 (1980).
19. *See, e.g.*, Lego v. Twomey, 404 U.S. 477, 489 (1972).
20. *See, e.g.*, *Innis*, 446 U.S. at 298.
21. *See, e.g.*, Withrow v. Williams, 587 U.S. 680, 689 (1993) (quoting Haynes v. Washington, 373 U.S. 503, 513 (1963) (quoting Wilson v. United States, 162 U.S. 613, 623 (1896) and citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (discussing totality-of-circumstances approach) and 1 W. LaFave & J. Israel, Criminal Procedure § 6.2 (1984))).
22. *Stephan*, 711 P.2d at 1161.
23. *Miranda*, 384 U.S. at 448.
24. Hendricks v. Swenson, 456 F.2d 503, 506 (8th Cir. 1972) (concluding, "we feel that it is an advancement in the field of criminal procedure and a protection of defendant's rights. We suggest that to the extent possible, all statements of defendants should be so preserved.").
25. John T. Philipsborn, *Interrogation Tactics In The Post-Dickerson Era*, The Champion, January/February 2001 at 18.
26. *See, e.g.*, Richard Leo and Richard Ofshe, *The Decision To Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. U. L. Rev. 979, 1120 (1997).
27. *See, e.g.*, Charles D. Weisselberg, *Saving Miranda*, 84 Cornell L. Rev. 109 (1998); *Deterring Police From Deliberately Violating Miranda: In The Stationhouse After* Dickerson, 99 Mich. L. Rev. 1121 (2001).
28. California Attorneys For Criminal Justice v. Butts, 195 F.3d 1039 (9th Cir. 1999).
29. *Stephan*, 711 P.2d at 1161 (quoting Yale Kamisar, *Forward:* Brewer v. Williams — *A Hard Look at a Discomfiting Record*, 66 Geo. L. J. 209, 242-43 (1977-78)).
30. *Hendricks*, 456 F.2d at 507.
31. *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").
32. Reck v. Pate, 367 U.S. 433, 446 (1961).
33. *See, e.g.*, Roscoe Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. Am. Inst. Crim. L. & Criminology 1014, 1017 (1934).
34. *See* Uniform Rule of Criminal Procedure 243 (1974) ("The information of rights, any waiver thereof, and any questioning shall be recorded upon a sound recording device whenever feasible and in any case where questioning occurs at a place of detention.") and the Model Code of Pre-Arraignment Procedure § 130.4 at 37 (same) (1975).
35. Royal Comm'n on Criminal Justice, Report 26 (1993).
36. *See* Alan Grant, *The Audio-Visual Taping of Police Interviews with Suspects and Accused Persons by Halton Regional Police Force, Ontario, Canada - An Evaluation* 28 (1987).
37. McKinney v. R., 65 A.L.R. 241 (Austl. 1991).
38. 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) and note 5 *supra*.
39. State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994).
40. *Stephan*, 711 P.2d at 1158.
41. *Id.* at 1159-60.
42. *Id.* at 1164.
43. *Id.* at 1164 (footnote and citation omitted).
44. 518 N.W. 2d at 590.
45. *Id.* at 592 (*quoting Stephan*, 711 P.2d at 1150).
46. 711 P.2d at 1157-58.
47. 608 P.2d 737, 743 n.5 (1980).
48. *Id.*
49. 614 P.2d 786 (1980).
50. *Id.* at 789 n.9 (*citing* Mallott v. State, 608 P.2d 737, 743 n.5 (Alaska 1980)).
51. 617 P.2d 494, 499 n.11.
52. *Id.*
53. *See* Wayne T. Westling and Vicki Waye, *Videotaping Police Interrogations: Lessons From Australia*, 25 Am. J. Crim. L. 493, 502-03 (1998).
54. State v. Grey, 907 P.2d 951, 956 (1995).
55. United States v. Coades, 549 F.2d 1303, 1309 (9th Cir. 1977).
56. *See, e.g.*, Weeks v. United States, 232 U.S. 383 (1914).
57. David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. Chi. L. Rev. 190, 190 (1988).
58. 395 U.S. 711 (1969).
59. 395 U.S. at 726.
60. *See* Michigan v. Payne, 412 U.S. 47, 53 (1973).
61. 451 U.S. 477 (1981).
62. 451 U.S. at 484-85.
63. Arizona v. Roberson, 486 U.S. 675, 682 (1988).
64. *Id.* at 151.
65. *Strauss*, 55 U. Chi. L. Rev. at 195.
66. Susan R. Klein, *The Fate Of The Pre-Dickerson Exceptions To Miranda: Identifying And Reformulating Prophylactic Rules, Safe Harbors, And Incidental Rights In Constitutional Criminal Procedure*, 99 Mich. L. Rev. 1030 (2001). Professor Klein identifies numerous prophylactic rules, including the automobile inventory search exception to the warrant requirement, the *per se* warrant requirement (and its many exceptions), *Miranda* (and its permeations such as *Edwards*), and *Bruton. See id.* at 200-02.
67. Smith v. Robbins, 528 U.S. 259, 265, 273 (2000).
68. United States v. Dickerson, 166 F.3d 667 (4th Cir.), *cert. granted*, 528 U.S. 1045 (1999).
69. United States brief supporting petition for writ of *certiorari*, Dickerson v. United States, No. 99-5525, (U.S. Sup. Ct. No. 99-55-25).
70. *Id.* at 5 (citing City of Boerne v. Flores, 521 U.S. 516-529 (1997)).
71. *Id.* at 8 (quoting Withrow v. Williams, 507 U.S. 685, 691 (1991)).
72. *Id.* at 12 (citing Michigan v. Jackson, 475 U.S. 625, 636 (1986); Michigan v. Harvery, 494 U.S. 344 (1990); North Carolina v. Pearce, 395 U.S. 711 (1969); Wasman v. United States, 468 U.S. 559 (1984); United States v. Goodwin, 457 U.S. 368, 372-377 (1982); Colten v. Kentucky, 407 U.S. 104, 166 (1972); Bruton v. United States, 391 U.S. 123 (1968); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Freedman v. Maryland, 380 U.S. 51, 58 (1965)).
73. Brief for United States at 47.
74. *Dickerson*, 530 U.S. at 440, n. 5, 432, 444.
75. *Id.* at 438-39.
76. *Id.* at 444.
77. *Id.* at 446 (Scalia, J., dissenting).
78. *Id.* at 461.
79. *See, e.g.*, Wainwright v. Greenfield, 474 U.S. 284, 289-90 (1986) (characterizing a *Miranda* violation as fundamentally unfair and thus in violation of the Due Process Clause); Argersinger v. Hamlin, 407 U.S. 25, 47 (1972) (Burger, J., concurring) ("principle of due process [] requires fundamental fairness in criminal trials").
80. Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting).
81. Mayberry v. Pennsylvania, 400 U.S. 455, 464 (1971).
82. *Weeks*, 232 U.S. at 392.
83. Arnett v. Kentucky, 416 U.S. 134, 157 (1974) (White, J., concurring in part and dissenting in part).
84. Mayberry v. Pennsylvania, 400 U.S. 455, 469 (1971) (Harlan, J., concurring).
85. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).
86. Estes v. Texas, 381 U.S. 532, 540 (1965).
87. Duncan v. Louisana, 391 U.S. 145, 156 n. 23 (1968) (quoting P. Devlin, Trial by Jury 164 (1956) (internal quotes omitted.)).
88. *Stephan*, 711 P.2d at 1161.
89. David Rodstein, et al., Criminal Constitutional Law, 2nd vol., ¶ 4.01[2] (1998).
90. *See, e.g.*, California v. Prysock, 453 U.S. 355, 356-357, 361-362 (1981).
91. *See, e.g.*, n.4 *supra*.
92. *See* United States v. Hastings, 461 U.S. 499 (1983).
93. *See generally* William Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977).
94. *See, e.g.*, *Grey*, 907 P.2d at 956.

About the Authors

Daniel Donovan is a veteran of more than 25 years in civil and criminal practice with the focus on criminal defense. A Life Member of NACDL as well as the Montana Association of Criminal Defense Lawyers (MACDL), he was founder and first chair of the Criminal Defense Section of the Montana Bar Association. He was counsel of record in *Old Chief v. United States*.

Daniel Donovan
Thompson, Potts & Donovan, P.C.
600 Central Plaza, Suite 201
PO Box 2799
Great Falls, MT 59403
(406) 727-0500
Fax (406) 727-0560
E-MAIL tplaw@mcn.net

John Rhodes is a graduate of De-Pauw University (*summa cum laude*, 1987) and Harvard Law School (*cum laude*, 1990). He is an Assistant Federal Defender at the Federal Defenders of Montana. He is finishing six months as Special Counsel to the United States Sentencing Commission to be followed by six months as Assistant Federal Defender in Residence with the Defender Services Division of the Administrative Office of the United States Courts.

John Rhodes
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002
(202) 502-4522
Fax (202) 502-4699
E-MAIL jrhodes@ussc.gov