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No More Secrets: Proposed Minnesota State Due Process Requirement that Law Enforcement Officers Electronically Record Custodial Interrogation and Confessions

Ingrid Kane

Note

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An elderly woman, left in the cold after being beaten and robbed of her purse, died from a combination of injuries and exposure.[1] Police suspected that John Francis Biron, eighteen years old, and his two juvenile companions committed the crime. The three boys were arrested. Although Biron admitted to taking sixty-four cents in an earlier, unreported robbery,[2] he steadfastly denied any participation in, or knowledge of, the woman's death. Why, then, after continually proclaiming his innocence during approximately six hours of police interrogation, did Biron finally confess to the crime?

This question is answerable, and Biron's case is unique, because the police officers who interrogated him tape recorded the sessions.[3] The officers created the tapes for their own purposes;[4] they did not intend to offer the tapes into evidence and not all of the interrogators were even aware of the recorder's presence.[5] Those tapes, however, created a public record of a criminal proceeding that would otherwise have remained secret.

The recordings reveal that no police officer harmed or

1. State v. Biron, 123 N.W.2d 392 (Minn. 1963).

2. *Id.* at 394.

3. Officers commonly record confessions. In *Biron*, however, they also recorded the interrogation itself, beginning with the first interrogator's initial remarks. Tape of Police Interrogation of John Francis Biron (March 16, 1962) (on file with University of Minnesota Law Library).

4. The officers expected Biron to "crack" quickly and they thought that playing his taped confession to his accomplices would induce them to confess quickly as well. As it turned out, Biron "held out" longer than expected. YALE KAMISAR, *Fred E. Inbau: "The Importance of Being Guilty", in* POLICE INTERROGATIONS AND CONFESSIONS 95, 98 n.2 (1980).

5. *Id.*

threatened to harm Biron in any way. Instead, officers relentlessly advised, urged, nagged, and pleaded with Biron to confess. The officers invoked everything from common sense to criminal procedure to religion.[6] Some of the officers' conduct—such as suggesting that Biron's case might be handled by the juvenile court even though he was eighteen years old—was improper, and ultimately resulted in a finding that the confession was involuntary, and therefore inadmissible.[7] Yet most of the

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6. The following is a representative sampling from the tapes:

> We can take you right into a courtroom then we can throw the key away because you're not smart enough to try and help yourself. . . . You're the boy that's going to be stuck with the story. This is your opportunity to help yourself. . . . The hole is getting bigger and you're digging it deeper. You're the fellow who's gonna determine how long you're gonna be buried. You and you alone. You're the only guy that's got the shovel. . . . I don't think that you fellows intentionally hurt that woman. I think that she had struggled for that purse. She struggled for it because she couldn't stand anything taken from her. That woman would save every little thing she got . . . . We know you didn't intentionally kill that lady. . . . You'll find it'll be a lot easier if you just get it off your chest. That's why I asked you if you wanted to see a priest. Let him advise you. . . . I'm Catholic too. I can appreciate that. . . . I think you realize you'll feel a lot better if you did do it and you tell about it. . . . It takes a lot of guts, I'll admit. I mean, you have to be a real man . . . . I think you'll find that *I* would respect you a lot more, and anybody else would, when you're man enough to tell the truth. A mistake was made. I mean, it's a bad deal. . . . You aren't dumb. You know what the score is. . . . I've got 20 years in this business and I've talked to many, many people who have committed a lot worse crimes than you have . . . ever thought of committing. And there isn't anything you can tell me that would shock me. . . . I do know this: A man is a lot better off if he tells the truth. No matter how terrible the thing is that might have been done. No matter how terrible it is. Even if you're real ashamed of it deep down inside of you—you just almost crawl when you think of it. . . . It ain't our job to try and put guys away. Our job is trying to straighten you out. . . . We're your only friends right now. We can't tell you that we can take you off the hook all together. All we can do is advise you to the proper thing that you gotta do. . . . You ain't the only guy who has ever made a mistake. . . . But don't think we haven't made a mistake too. . . . This ain't John the Baptist you're looking at here. I'm no angel. . . . People have to have the police to protect them. And right now, you need the protection of us. We're trying to advise you as to the proper thing to do. . . . It's a heck of a thing, but your intentions were to get a couple of bucks and nothing more. But we can't put words in your mouth. You've got to tell us what happened.

Tape of Police Interrogation of John Francis Biron, *supra* note 3.

7. State v. Biron, 123 N.W.2d 392, 399 (Minn. 1963). The officers told Biron:

> [A juvenile court judge] will look over the whole thing, and he will say "Well, here this boy is 18 but he's just not very much older than the other two. I will handle all three of them." You get the drift? But, this we can't do if you don't tell us. . . . So you are the 18-year-

techniques the officers used, such as keeping the suspect on the defensive, displaying confidence in the suspect's guilt, minimizing the moral seriousness of the offense, blaming the victim, and sympathizing with the suspect, are recommended in leading police manuals.[8] The tapes, therefore, vividly demonstrate approved interrogation tactics of psychological manipulation.

Any meaningful discussion of police interrogation requires an understanding of the true nature of such questioning.[9] Unfortunately, the secrecy with which the police shroud their interrogation procedures prevents judges, lawyers, and citizens from knowing with any certainty what actually occurs during custodial interrogation.[10] Limited information comes from police manuals, legal writers, and court opinions. These sources demonstrate that well-trained police interrogators manipulate every detail of a station house questioning and that each aspect of the interrogation is part of a carefully crafted plan calculated to induce the suspect to confess. Moreover, the accused person subjected to police interrogation usually feels confused, frightened, and vulnerable—in other words, highly susceptible to psychological manipulation. Police interrogation in the United States criminal justice system has shifted from a crude system in which law enforcement officers sometimes extracted confessions by means including physical deprivation and torture[11] to a practice dominated by subtle, but highly effective, techniques of psychological coercion.[12] An enormous power differential sepa-

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old. If you don't cooperate and tell us everything we won't even consider you going down and talking to the juvenile judge.

Id. at 396.

The court never suggested that the officers' incessant questioning may have been inherently coercive or that it may have violated Biron's constitutional rights to a lawyer and to remain silent.

8. *See generally* FRED INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 77-194 (1986) (discussing the nine steps to effective interrogation).

9. Discussing police interrogation without understanding the techniques commonly used "is playing Hamlet without the ghost." Bernard Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, *in* POLICE POWER AND INDIVIDUAL FREEDOM 153, 155 (Claude R. Sowle ed., 1962).

10. "Custodial interrogation" refers to explicit questioning by law enforcement officers of a suspect whom they hold in custody at a police station or other government office. Although most of the analysis applies with equal force to other forms of police questioning that occur outside police headquarters, this Note limits its scope to the clearest case of custodial interrogation.

11. See, e.g., Brown v. Mississippi, 297 U.S. 278 (1936), in which a sheriff and an angry mob of white men extracted confessions from black suspects after prolonged torture.

12. *See, e.g.*, Rhode Island v. Innis, 446 U.S. 291, 294-95 (1980) (quoting one police officer saying to another within earshot of the suspect: "God forbid one

rates the suspect and the police officers. The police systematically exploit that power differential during interrogation.

Under present law, to admit an incriminating statement made by a defendant while in police custody, the court must determine that the defendant knowingly, voluntarily, and intelligently waived her rights to a lawyer and to remain silent, and that police did not use impermissibly coercive means to obtain the statement. Usually the court has no independent record upon which to base that determination. Psychological manipulation, unlike physical coercion, leaves few visible marks. The court is assisted only by the biased testimony of interested parties. To make a fair determination of whether the products of the interrogation process are admissible, the court needs a complete, accurate, and objective record of that process.

This Note argues that the Minnesota Constitution's due process clause requires law enforcement officers to record electronically custodial interrogations. Any unexcused failure to record, as well as any unexcused interruption of the recording, renders a defendant's statements inadmissible. Part I surveys the interrogation practices law enforcement officers commonly employ, and highlights the incongruity between our generally open accusatory criminal procedure and the secrecy that surrounds custodial interrogation. Part II reviews federal interrogation and confession jurisprudence. Minnesota confession jurisprudence relies heavily on federal law, and the inadequate and confused state of federal law in this area creates a compelling need for state innovations. Part III of this Note looks at Minnesota state constitutional interpretation, focusing on the factors the Minnesota Supreme Court considers when independently interpreting the state constitution. Finally, Part IV demonstrates that the due process clause of the Minnesota Constitution should be read to require law enforcement officers to record custodial interrogations.

I. CUSTODIAL INTERROGATION AND CONFESSIONS

Police interrogation of a criminal suspect stands in stark contrast to the general openness of the American criminal jus-

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of [the disabled children] might find a weapon with shells and they might hurt themselves."); Brewer v. Williams, 430 U.S. 387, 392 (1977) (describing police officer who, while attempting to locate the victim's missing body and knowing that the defendant was a former mental patient and also deeply religious, gave the "Christian burial speech," expressing the view that the parents of the missing child were entitled to give their little girl a proper Christian burial).

tice system.[13] At the courthouse, the defendant's innocence is presumed; in the station house, skilled police interrogators display absolute confidence in the suspect's guilt.[14] During trial, the state presents its case against the accused before a judge and, usually, jury; during police questioning, the suspect faces her interrogator in private, usually over long periods of time, without the benefit of an impartial mediator.[15] In court, the defendant's lawyer guides her direct testimony and protects her from improper cross-examination by the state; in the interrogation room, the arrestee alone confronts interrogators trained to extract confessions using psychological tactics of trickery and deceit.[16] Finally, during trial, a court reporter takes down

13. *See* YALE KAMISAR, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, *in* POLICE INTERROGATIONS AND CONFESSIONS, *supra* note 4, at 27, 28-30 (juxtaposing the open proceedings in American courtrooms with the secret, closed proceedings in police interrogation rooms).

14. Once the interrogator develops a belief that a suspect is guilty, she should proceed to extract a confession according to a nine-step plan. INBAU ET AL., *supra* note 8, at 77-79. In the first, crucial step, the interrogator enters the interrogation room (after a calculated delay during which the suspect is kept anxiously waiting) and directly confronts the suspect with a statement like, "Joe, the results of our investigation clearly indicate that you broke into Jason's Jewelry Store last week." *See id.* at 87. Advocates for the practice justify inquisitorial confrontations—despite the potential harm to innocent persons—by claiming that but for interrogation and the opportunity to clear one's name, an innocent person might forever remain under a cloud of suspicion. *Id.* at 91.

15. The Supreme Court has observed that privacy is the principal psychological factor contributing to a successful interrogation. Miranda v. Arizona, 384 U.S. 436, 449 (1966). Today, police interrogators still go to extreme lengths to create the "right" atmosphere of privacy:

> The room should be quiet, with none of the usual "police" surroundings and with no distractions within the suspect's view. . . . The room should be as free as possible from outside noises and should also be a room into which no one will have occasion to enter or pass through during the interrogation. This will not only instill a sense of privacy, but also the less the surroundings suggest a police detention facility, the less difficult it will be for the suspect or arrestee who is really guilty to implicate himself. . . . Interrogation rooms should be plain of color, should have smooth walls, and should not contain ornaments, pictures, or other objects that would in any way distract the attention of the person being interviewed. Even small, loose objects, such as paper clips or pencils, should be out of the subject's reach so that he cannot pick up and fumble with anything during the course of the interrogation. Tension-relieving activities of this sort can [help] a guilty person . . . to suppress an urge to confess.

INBAU ET AL., *supra* note 8, at 29.

16. Trained police interrogators

> are opposed . . . to the use of force, threats of force, or promises of leniency—any one of which might well induce an innocent person to confess. *We do approve, however, of such psychological tactics and techniques as trickery and deceit that are not only helpful but fre-*

every spoken word to create an accurate and public record; during interrogation, law enforcement officers rarely make an objective record.

Proponents of police interrogation make a strong case for its necessity. Many criminal cases, even with proper investigation by law enforcement officers, lack witnesses, physical clues, or other evidence sufficient to establish guilt.[17] Without incriminating statements from involved parties, those crimes would go unpunished. Further, the argument goes, most criminal offenders will not admit their guilt unless prodded to do so.[18] Therefore interrogation, by whatever means necessary to extract an honest admission of guilt, serves a valuable societal function.[19] Only one stipulation modifies this general rule: "[N]othing shall be done or said to the suspect that will be apt to make an innocent person confess."[20]

The need to elicit incriminating evidence from suspected criminals in privacy may be satisfied while denying law enforcement officers the authority to shroud interrogation proceedings with a veil of secrecy. The courts must distinguish between "privacy" and "secrecy" because the two concepts carry strikingly different implications in the context of police interrogations.[21] Police officers do testify in court about what

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quently indispensable in order to secure incriminating information from the guilty, or to obtain investigative leads from otherwise uncooperative witnesses or informants.

INBAU ET AL., *supra* note 8, at xiv (emphasis added).

After the interrogator clearly posits the suspect's guilt, the next step in extracting a confession is to "establish the psychological foundation to achieve an implicit, if not explicit, early, general admission of guilt." *Id.* at 97. To create this foundation, the interrogator sympathizes with the suspect and suggests justifications or excuses for the act the interrogator believes the suspect committed. The interrogator explains that anyone under similar circumstances would do the same thing, minimizes the moral seriousness of the offense, and "offers an added incentive to obtain the greater degree of relief and comfort that would be provided by a confession." *Id.*

17. *Id.* at xiv.

18. *Id.* at xvi.

19. *Id.* at xvi-xvii.

20. *Id.* at xvii.

21. *Secrecy* refers to the state of being kept from the knowledge of others. *See* NEW WEBSTER'S DICTIONARY AND THESAURUS OF THE ENGLISH LANGUAGE 902 (1992). *Privacy* refers to the state of being hidden from, or undisturbed by, the observation or activities of other persons. *Id.* at 796. Thus, although an interrogator may question a suspect in privacy (i.e., alone in a quiet room), what transpires during the interview need not be secret (i.e., unknown to the court). "It is secrecy, not privacy, which accounts for the absence of a reliable record of interrogation proceedings in a police station. If the need for some pre-judicial questioning is assumed, privacy may be defended on grounds of ne-

occurred during an interrogation; but by refusing to record interrogations, police appear to champion a system in which only police themselves can effectively monitor interrogation.

II. FEDERAL INTERROGATION AND CONFESSION DECISIONS

Court determinations of the admissibility of criminal confessions implicate several distinct but complementary constitutional principles.[22] At the core of the inquiry lies the due process[23] prohibition against coerced confessions.[24] Due process is concerned with the methods police employ to extract incriminating statements. "Coerced" statements are inadmissible,[25] whereas a "knowing" and "voluntary" confession may be used against a defendant in court.[26] In addition to general due process concerns, courts have focused on the privilege against self-incrimination and the right to counsel guaranteed by the Fifth[27] and Sixth Amendments respectively.[28]

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cessity; secrecy cannot be defended on this or any other ground." Weisberg, *supra* note 9, at 180.

22. Cases sometimes conflate the distinct legal doctrines that govern confessions. For example, courts often run together the Fifth Amendment privilege against self-incrimination and the common law doctrine of voluntariness—a rule of evidence governing the admissibility of a confession at trial. *See* Laurence A. Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 92-101 (1989). Cases also reflect confusion between the common law voluntariness doctrine and the due process voluntariness test, developed by the Supreme Court to govern admissibility of confessions in state cases prior to the Court's incorporation of the Fifth Amendment privilege against self-incrimination into the Fourteenth Amendment. *Id.* at 93 n.147.

23. U.S. CONST. amend. V ("No Person . . . shall be compelled in any criminal case to be a witness against himself . . . ."); U.S. CONST. amend. XIV, § 1, ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

24. The Supreme Court "use[s] the terms 'coerced confession' and 'involuntary confession' interchangeably 'by way of convenient shorthand.'" Arizona v. Fulimante, 111 S. Ct. 1246, 1253 n.3 (1991) (quoting Blackburn v. Alabama, 361 U.S. 199, 207 (1960)).

25. *See* Haynes v. Washington, 373 U.S. 503 (1963) (holding that admission of written confession violated due process where police held suspect incommunicado for 16 hours and told suspect he could not call his wife or lawyer until he "cooperated" by signing the statement).

26. *See, e.g.*, Culombe v. Connecticut, 367 U.S. 568, 621 (1961).

27. In 1964, the Supreme Court held the Fifth Amendment privilege against self-incrimination applicable to the states through the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1 (1964).

28. In Escobedo v. Illinois, 378 U.S. 478 (1964), the Court held that a suspect, on whom a police investigation was "focused," and whom police took into custody, interrogated, denied requests to see his counsel and failed to inform

A. FEDERAL DUE PROCESS "VOLUNTARINESS" STANDARD

Prior to *Miranda v. Arizona*,[29] only the doctrine of voluntariness governed the admissibility of confessions in state courts.[30] Fourteenth Amendment due process principles require the exclusion at trial of involuntary confessions extracted by coercive police tactics.[31] Courts judge "voluntariness" under the totality of circumstances on a case-by-case basis,[32] making clear guidelines difficult to identify.[33] Some general themes, however, have developed over time.[34] The Supreme Court strongly disfavors police practices involving physical abuse; physical torture constitutes per se coercion.[35] In addition, the Court considers personal characteristics such as the age, intelligence,[36] and mental condition[37] of the accused, as well as the

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of his right to remain silent, had been denied the "Assistance of Counsel" in violation of the Sixth Amendment. *Id.* at 491. The Court prohibited the state from using the statements police obtained. *Id.* The Court later rejected this "focus" test in Beckwith v. United States, 425 U.S. 341, 347-48 (1976) (holding that the police need not inform a suspect of her rights until her freedom of action is curtailed to a degree associated with formal arrest).

29. 384 U.S. 436 (1966).

30. *See e.g.*, Brown v. Mississippi, 297 U.S. 278, 286 (1936). In 1908, the Supreme Court held that the Fifth Amendment privilege against self-incrimination did not apply to the states. Twining v. New Jersey, 211 U.S. 78, 94-95 (1908), *overruled by Malloy*, 378 U.S. 1. Thus, when the Court considered its first state confession case it looked to the Due Process Clause of the Fourteenth Amendment. *Brown*, 297 U.S. at 286. For detailed discussions of the due process voluntariness test, see YALE KAMISAR, *What is an "Involuntary" Confession?, in* POLICE INTERROGATIONS AND CONFESSIONS, *supra* note 4, at 1-25; Benner, *supra* note 22, at 92-117, 122-54; Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 891-919 (1979); Stephen Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 867-87 (1981).

31. The use of an involuntary confession for any purpose, including impeachment, constitutes a due process violation. Mincey v. Arizona, 437 U.S. 385, 401 (1978).

32. Fikes v. Alabama, 352 U.S. 191, 197 (1957).

33. KAMISAR, *supra* note 30, at 1-25.

34. For a comprehensive review of Supreme Court decisions under the voluntariness doctrine, see OTIS H. STEVENS, THE SUPREME COURT AND CONFESSIONS OF GUILT 90-119 (1973).

35. See Brown v. Mississippi, 297 U.S. 278 (1936), in which a group of white men, including the deputy sheriff, hanged and repeatedly whipped a black man until he made a false confession.

Subsequent cases provided the Court with the opportunity to define due process requirements in less violent situations. See, e.g., Chambers v. Florida, 309 U.S. 227, 239 (1940), in which four suspects were held uncharged and repeatedly questioned for five days under circumstances designed "to fill petitioners with terror and frightful misgivings."

36. The Court more often found police coercion in cases involving youthful and uneducated suspects. *See, e.g.*, Culombe v. Connecticut, 367 U.S. 568,

interrogation conditions.[38] The Court views no single fact, short of physical torture, as determinative of a finding of involuntariness.[39]

The early "voluntariness" standard suffered several crucial defects. First, because the Court had difficulty defining voluntariness with precision,[40] the standard failed to offer clear guidance to either law enforcement officers or lower courts.[41] Second, the test allowed law enforcement officers to exert considerable pressure during interrogation.[42] Third, application of the voluntariness test turned on a swearing contest between the defendant and her interrogators. Notably, even if the Court had specified more fully the components of an involuntary confession, application of the test would still have depended on a factual examination of events that took place in secret, without a full, objective record.

Recently, the Supreme Court articulated a "new voluntariness" standard to govern the admissibility of confessions.[43] This new standard narrows the focus of the "totality of the circumstances" inquiry to actual police coercion, and it ignores the

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620 (1961) ("thirty-three-year-old mental defective of the moron class"). Conversely, the Court tended to uphold confessions made by more educated and experienced persons. *See, e.g.*, Crooker v. California, 357 U.S. 433 (1958) (suspect had completed one year of law school); Stein v. New York, 346 U.S. 156, 185 (1953) ("not young, soft, ignorant or timid").

37. *See, e.g.*, Blackburn v. Alabama, 361 U.S. 199, 208 (1960) (suspect had been discharged from the armed forces as "permanently disabled by psychosis" and had been institutionalized up until time of the crime).

38. *See, e.g.*, Payne v. Arkansas, 356 U.S. 560 (1958) (police gave accused no food for over 24 hours); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (defendant not permitted to sleep for 36 hours).

39. "It is impossible for this Court, in enforcing the Fourteenth Amendment, to attempt precisely to delimit, or to surround with specific, all-inclusive restrictions, the power of interrogation allowed to state law enforcement officers in obtaining confessions." *Culombe*, 367 U.S. at 601 (plurality) (Frankfurter, J.).

40. Justice Frankfurter made one of the more concerted efforts to define "voluntariness" in the confessions context. He wrote: "The line of distinction [between a voluntary and an involuntary confession] is that at which *governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession.*" *Id.* at 602 (emphasis added).

41. STEPHAN A. SALTZBURG, AMERICAN CRIMINAL PROCEDURE 450-51 (1988); Schulhofer, *supra* note 30, at 869. Further, the fact that the Supreme Court reviewed only a few state confession cases, usually limiting certiorari to death penalty and other special cases, compounded the confusion. SALTZBURG, *supra*, at 451

42. *See* KAMISAR, *supra* note 13, at 31-40.

43. *See, e.g.*, Colorado v. Connelly, 479 U.S. 157 (1986); Moran v. Burbine, 475 U.S. 412 (1986); Oregon v. Elstad, 470 U.S. 298 (1985).

Miranda Court's attempt to impose greater restraints on police conduct.[44] In *Colorado v. Connelly*,[45] the Court held that a confession could not be involuntary absent police coercion.[46] The Court overruled the lower court's decision to exclude incriminating statements made to police officers by a man suffering from chronic paranoid schizophrenia and experiencing "command hallucinations."[47] The Court reasoned that because the police did not physically coerce Connelly into confessing, the government's taking down the confession, and admitting it into evidence, did not violate due process.[48]

B. THE FEDERAL RIGHT TO COUNSEL

By 1959, the Court showed signs of growing dissatisfaction with the voluntariness standard. In *Spano v. New York*,[49] a majority of the Court held the defendant's confession inadmissible under the traditional Fourteenth Amendment due process analysis.[50] Notably, however, four concurring Justices, in two separate opinions, stated that the Constitution required rever-

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44. Daniel W. Sasaki, *Guarding the Guardians: Police Trickery and Confessions*, 40 STAN. L. REV. 1593, 1605 (1988).

45. 479 U.S. 157 (1986). Connelly approached a police officer in Denver and confessed to the murder of a young girl. The officer immediately advised Connelly of his rights. Connelly said he understood them but wanted to talk about the crime. The officer took Connelly to police headquarters. There, Connelly told police that he had been a patient in several mental hospitals. *Id.* at 160. Connelly took officers to the scene and described the murder in detail. *Id.* at 160-61. Although officers claimed that Connelly showed no sign of mental illness, the next day at the public defender's office he became visibly disoriented and confused. *Id.* at 161. Connelly stated that "voices" had instructed him to fly to Denver and to confess to the murder. *Id.* When the court eventually found Connelly competent to assist in his own defense, a psychiatrist testified at the preliminary hearing as an expert witness. *Id.* The doctor stated that Connelly's psychotic condition interfered with his ability to make free and rational choices. *Id.* The doctor testified that the condition did not substantially impair Connelly's cognitive abilities. *Id.*

46. *Id.* at 167.

47. *Id.* at 161. The lower court had held that admission of the confession violated due process because the defendant's mental condition interfered with his "rational intellect" and "free will." *Id.* at 159.

48. *Id.* at 167. *See* Benner, *supra* note 22, at 66 ("[V]oluntariness simply entails the absence of official coercion, and does not otherwise require ethical conduct or fairness in dealing with the accused.").

49. 360 U.S. 315 (1959).

50. *Id.* at 323-24. In *Spano*, the defendant, a 25-year-old man, born in Italy, with a junior high school education level, confessed after an overnight, eight-hour long interrogation. *Id.* at 316-20. Police used an officer, a friend of the suspect from the same neighborhood, to misrepresent facts and encourage a confession. *Id.* at 318-19.

sal because authorities deliberately extracted the confession while depriving the defendant of his right to a lawyer's assistance.[51]

In 1964, the Court decided two major cases affirming a defendant's right to counsel during interrogation. First, in *Massiah v. United States*,[52] the Court held that the government violated the defendant's right to counsel by admitting incriminating, post-indictment statements that federal agents deliberately elicited in the absence of the defendant's lawyer.[53] Later that year, in *Escobedo v. Illinois*,[54] the Court held that prosecution use of a confession police obtained from an unindicted suspect in custody violated the defendant's Sixth Amendment right to counsel.[55] Although the Court carefully limited its holding to the facts of the case,[56] *Escobedo* is significant because it reflects the Court's disfavor of the totality of the circumstances test under the due process voluntariness standard,[57] and it explicitly recognizes the link between a defendant's right to counsel and her privilege against compelled self-incrimination.[58]

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51. *Id.* at 324-26 (Douglas, J., concurring). "Depriving a person, formally charged with a crime, of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." *Id.* at 325.

52. 377 U.S. 201 (1964). Massiah was indicted on federal drug charges. *Id.* at 202. He retained a lawyer, pleaded not guilty and was released on bail. *Id.* A conspirator-turned-government-informer elicited incriminating statements from the defendant and transmitted the information to government agents. *Id.* at 202-03. The court admitted evidence of the defendant's statements at trial. *Id.* at 203.

53. *Id.* at 206.

54. 378 U.S. 478 (1964).

55. *Id.* at 490-91.

56. *Id.*

57. *Escobedo* supports this proposition by negative inference. *See id.* at 491. Although the circumstances of Escobedo's interrogation probably were sufficient to bar his statements under the voluntariness standard, the Court did not apply that test.

Escobedo, a 22-year-old with no prior experience with the police, stood handcuffed during most of the interrogation. *Id.* at 481. He had not slept well in over a week. *Id.* One of his interrogators, who had grown up in Escobedo's neighborhood, knew his family, and spoke to him in Spanish, made assurances to him that he could go home as soon as he told what he knew about the crime. *Id.* at 482. The agent who took down the incriminating statements did so by asking carefully framed questions apparently designed to ensure the admissibility of the answers. *Id.* at 483. Police continually denied his repeated requests to speak to his lawyer. *Id.* at 481. Finally, no one ever informed Escobedo of his constitutional right to remain silent. *Id.* at 482-83.

58. *Id.* at 488. The majority explained that a system in which all persons exercise their rights cannot be undesirable:

No system worth preserving should have to *fear* that if an accused is

C. THE FEDERAL PRIVILEGE AGAINST SELF-INCRIMINATION

In the seminal decision *Miranda v. Arizona*,[59] the Supreme Court recognized that custodial interrogation by its nature coerces a suspect to speak.[60] Accordingly, the court extended the Fifth Amendment privilege against self-incrimination[61] into the police station.[62] The *Miranda* Court articulated the safeguards necessary to protect a suspect's rights,[63] absent equally effective legislative remedies.[64] According to the Court, before a custodial interrogation may occur law enforcement officers must warn the suspect of her rights to remain silent and to consult a lawyer.[65] If the suspect indicates a desire to remain silent or to consult with a lawyer, the questioning must cease.[66] If the sus-

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permitted to consult with a lawyer, he will become aware of, and exercise these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.

Id. at 490.

In contrast, the dissenting Justices took the position that the government may try to discourage persons from exercising their constitutional rights as long as the choice ultimately rests with the individual. *See id.* at 495-99 (White, J., dissenting).

59. 384 U.S. 436 (1966).

60. *Id.* at 467. The Court identified two interrelated aspects that create a coercive atmosphere and endanger suspects' Fifth Amendment rights. First, suspects inevitably feel powerless when taken into police custody and thrown into a hostile environment. *Id.* at 455-57, 461. The Court stressed that the "atmosphere [of custodial interrogation] carries its own badge of intimidation" and surrounds suspects with "antagonistic forces." *Id.* at 457, 461. Second, police interrogators employ tactics that seize upon and exploit suspects' feelings of helplessness. *Id.* at 448-55.

61. *Id.* at 468. In reaching its decision, the Court recognized the fundamental nature of the Fifth Amendment privilege. *Id.*

62. *Id.* at 461. Thus, the pivotal holding of *Miranda* is that:

> all principles embodied in the privilege [against self-incrimination] apply to informal compulsion exerted by law enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to [certain] techniques of persuasion . . . cannot be otherwise than under compulsion to speak . . . .

Id.

63. *Id.* at 444. Chief Justice Warren's opinion for the Court held "the prosecution may not use statements whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.*

64. *Id.* at 467. "We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws." *Id.*

65. *Id.* at 467-68.

66. *Id.* at 473-74. The suspect may invoke the privilege "in any manner, at any time prior to or during questioning." *Id.*

pect elects to speak, the state bears a "heavy burden" to demonstrate that the individual "knowingly and intelligently" waived the privilege against self-incrimination and the right to counsel.[67] Absent demonstrated police compliance with the procedures that *Miranda* established (or the use of equivalent safeguards), statements obtained from a suspect in custody are presumed coerced and are inadmissible as a matter of law.[68]

Miranda represented a compromise between the old voluntariness test and more extreme proposals that would have "killed" confessions.[69] Subsequent Court decisions have gradually diminished *Miranda*'s precedential importance. Significantly, the Court has developed a minimal definition of what

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67. *Id.* at 475 (re-asserting the standard for waiver of constitutional rights established by Johnson v. Zerbst, 304 U.S. 458 (1938)).

68. *Id.* at 467.

69. *See, e.g.*, YALE KAMISAR, *Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article, in* POLICE INTERROGATION AND CONFESSIONS, *supra* note 4, at 77, 87-89 (reviewing a proposal to replace police interrogation with a judicially supervised system in which a suspect, immediately after arrest, would appear before a judicial officer without the assistance of counsel).

Justice White, making a grim forecast of the effect *Miranda* would have on law enforcement, proclaimed: "In some unknown number of cases, the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will be not a gain, but a loss, in human dignity." *Miranda*, 384 U.S. at 542 (White, J., dissenting).

Proponents of defendants' rights argue that *Miranda*'s prophylactic rule provides insufficient protection against abuses of police power. *See, e.g.*, JAMES S. KUNEN, "HOW CAN YOU DEFEND THOSE PEOPLE?" 132 (1983):

> Police *love* the *Miranda* decision. They speed-read the suspect his rights and then tell him to fill in and sign a printed waiver form. He's frightened; he doesn't understand what was read to him; he's afraid he'll look guilty if he doesn't sign; he signs, and school's out. The signed waiver is almost impossible for the defense to overcome.

Impact studies conclude that *Miranda* has not reduced confessions or posed a barrier to effective law enforcement. *See* John Griffiths & Richard E. Ayres, *A Postscript to the* Miranda *Project: Interrogation of Draft Protesters*, 77 YALE L.J. 300, 310-11 (1967); Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of* Miranda, 47 DENV. L.J. 1, 16-26 (1970); Michael Wald et al., Special Project, *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1562-99 (1967); *see also* Stephen J. Schulhofer, *The Fifth Amendment at Justice: A Reply*, 54 U. CHI. L. REV. 950, 954-55 (1987); Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 455-60 (1987); Welsh S. White, *Defending* Miranda*: A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 14 (1986).

For a defense of the claim that the *Miranda* decision hurts law enforcement see Gerald M. Kaplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1458-67 (1985) and Stephen J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to Reconsidering* Miranda, 54 U. CHI. L. REV. 938, (1987).

constitutes an acceptable waiver.[70] Further, the Court has held that although the government may not use incriminating statements elicited in the absence of proper *Miranda* warnings and waivers as part of its case-in-chief against a defendant, it may offer such statements into evidence to impeach the defendant's credibility.[71] Most importantly, the Burger Court stressed that the warnings are not constitutional rights themselves, but only measures designed to safeguard Fifth Amendment rights; accordingly, violations of the procedure do not automatically render evidence derived from a suspect's statements inadmissible.[72] The Rehnquist Court, continuing the trend, created a "public safety" exception, obviating the need for *Miranda* warnings when police question a suspect at the scene of a crime in a situation that poses a threat to public safety.[73] Recently, the Court held that harmless error analysis applies to the improper admission of involuntary confessions.[74] Most significantly, the Court's new standard for voluntariness erodes *Miranda*'s definition of compulsion by focusing exclusively on police conduct.[75]

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70. Warnings need not duplicate the exact language of *Miranda*. *See Miranda*, 384 U.S. at 467; *see* California v. Prysock, 453 U.S. 355, 359 (1981) (per curiam) (no "talismanic incantation" is necessary to satisfy strictures of *Miranda*). The Court, however, has upheld confusing, misleading and incomplete warning language that provides little guarantee that a suspect hearing those warnings will fully understand the rights she waives. *See* Duckworth v. Eagan, 492 U.S. 195, 203-04 (1989) (holding that "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court" adequately advised defendant of *Miranda* rights).

71. Oregon v. Hass, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971); *see also* SALTZBURG, *supra* note 41, at 486 (explaining that *Harris* and *Hass* create a double bind for defendants who want to testify in their own defense at trial). In contrast, use of an "involuntary" confession, even for impeachment purposes, constitutes "a denial of due process of law." Mincey v. Arizona, 437 U.S. 385 (1978).

72. *See* Michigan v. Tucker, 417 U.S. 433, 443-46 (1974).

73. New York v. Quarles, 467 U.S. 649, 655-59 (1984).

74. Arizona v. Fulimante, 111 S. Ct. 1246 (1991). The Court first articulated the harmless error rule in Chapman v. California, 386 U.S. 18, 20-24 (1967). *Chapman* stated that the prohibition on involuntary confessions, as well as the right to counsel and the right to an impartial judge, are "constitutional rights so basic to a fair trial that their infraction can never be harmless error." *Id.* at 23 & n.8. In *Fulimante*, however, five Justices distinguished coerced confessions from the violations of the right to counsel and the right to an impartial judge by calling the admission of an involuntary confession a "classic 'trial error.' " 111 S. Ct. at 1264. Admission of an involuntary confession can be "quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless error beyond a reasonable doubt." *Id.*

75. *See* Colorado v. Connelly, 479 U.S. 157, 167 (1986).

D. THE STATE'S DUTY TO PRESERVE EVIDENCE

In *California v. Trombetta*,[76] the Supreme Court measured the state's duty to preserve evidence using the "constitutional materiality" test.[77] The test has three parts: the evidence must reasonably be expected to play a significant role in the suspect's defense; the exculpatory value must be apparent before the evidence is lost; and the defendant must not be able to obtain comparable evidence by other reasonable means.[78]

The failure to record a custodial interrogation should always fail the constitutional materiality test. Even if a court finds that the exculpatory value of the record satisfies the first prong of the test, a defendant always has an alternative means of obtaining and presenting that evidence: her own testimony about what occurred during the interrogation. The standard, therefore, as applied to police interrogations, gives federal judicial sanction to the "swearing contest" between the defendant and police.

III. STATE CONSTITUTIONAL INTERPRETATION

A. STATE COURT INNOVATIONS IN A FEDERALIST SYSTEM

A fundamental aspect of our federal system is that state and federal courts share the responsibility of protecting individuals' constitutional rights. The United States Supreme Court's interpretations of the Fourteenth Amendment establish a minimum level of protection from state action.[79] Conversely, as a matter of federal constitutional law, state courts cannot interpret federal law more expansively than the Supreme Court.[80] State courts may, however, properly use their *own* constitutions as authority to provide their citizens with more expansive protection than afforded under federal law.[81] Thus, a state may in-

76. 467 U.S. 479 (1984) (unanimous).

77. *See id.* at 486-90 (rejecting claim that state must preserve breath samples used in measuring a defendant's blood alcohol content).

78. *Id.* at 488-89; *cf.* United States v. Agurs, 427 U.S. 97 (1976) (imposing a similar requirement of materiality for prosecutorial disclosure).

79. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); Oregon v. Hass, 420 U.S. 714 (1975).

80. *Clover Leaf Creamery*, 449 U.S. at 461-62 n.6; *Hass*, 420 U.S. at 718.

81. The Supreme Court has long held that federal courts may not review state court decisions based on an independent and adequate state ground. *See, e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980); *Hass*, 420 U.S. at 719; Cooper v. California, 386 U.S. 58, 62 (1967); *see also* Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1156-80 (1985); Terrence J. Fleming & Jack

terpret its constitution to raise the threshold of protection for individual rights.

The emergence of a "new federalism"[82] has encouraged state supreme courts to experiment in the administration of criminal justice.[83] State courts should, and often do, function as significant constitutional law courts with judges interpreting their state constitutions, in addition to the Federal Constitution, to define defendants' rights in the state criminal justice system. State courts have developed a substantial body of state constitutional law around criminal procedure issues,[84] particularly in the area of searches and seizures. Some state courts have refused to limit state constitutional protection for subjects of interrogation to that provided under the Supreme Court's interpretation of the Federal Constitution.[85] Too many lawyers and judges, however, overlook or underestimate the potential of state constitutional law.[86]

Nordby, *The Minnesota Bill of Rights: "Wrapt in the Old Miasmal Mist,"* 7 HAMLINE L. REV. 51, 59-63 (1984); William W. Greenhalgh, *Independent and Adequate State Grounds: The Long and the Short of It, in* RECENT DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 15, 15-63 (Phylis S. Bamberger ed., 1985) (discussing state courts' reliance on state constitutions to maintain criminal procedural safeguards).

82. One state supreme court justice defines "new federalism" as "the willingness of state courts to assert themselves as final arbiters in questions of their citizens' individual rights by relying on their own law, especially their own state constitutions." Abrahamson, *supra* note 81, at 1144 n.6.

83. Justice Brandeis, in his dissenting opinion in New State Ice Co. v. Liebmann, 285 U.S. 262 (1932), explained the important function of state experimentation:

> There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. . . . It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

Id. at 311.

84. *See* Greenhalgh, *supra* note 81, at 47-62 (appendix listing numerous cases in which state courts construed their respective constitutions more expansively than the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments).

85. *See, e.g.*, People v. Arthur, 239 N.E.2d 537, 538-39 (N.Y. 1968) (holding, contrary to the federal rule established in Moran v. Burbine, 475 U.S. 412, 422 (1986), that once police have been informed that a suspect is represented by counsel or that a lawyer has communicated with the police for the purpose of representing the accused, the accused's right to counsel attaches).

86. *See* Fleming & Nordby, *supra* note 81, *passim*; Abrahamson, *supra* note 81, *passim*.

B. MINNESOTA'S RESPONSE TO FEDERAL CONFESSION AND INTERROGATION JURISPRUDENCE

The Minnesota Supreme Court's caselaw follows the United States Supreme Court's confession and interrogation decisions in virtual lock-step fashion. Minnesota courts employ the "voluntariness" test to judge the admissibility of confessions.[87] The State may use a defendant's incriminating statements against her at trial if she freely and voluntarily made the statements, meaning without compulsion or improper government inducement.[88] In addition, for the statements to be admissible, Minnesota courts require that the police issue *Miranda* warnings to suspects and that a suspect voluntarily, knowingly, and intelligently waive those rights.[89] The Minnesota Supreme Court also has held that Minnesota's constitutional privilege against self-incrimination is coextensive with the federal constitutional privilege.[90] Similarly, Minnesota applies the federal "public safety" exception to *Miranda*[91] and recognizes the doctrine of "constitutional materiality" as applied to the preservation of evidence under the Federal Constitution.[92]

To date, the Minnesota Supreme Court has offered ample rhetoric,[93] but no actual holdings that rely on the Minnesota

87. *See* State v. Orscanin, 283 N.W.2d 897 (Minn. 1979); State v. Biron, 123 N.W.2d 392 (Minn. 1963).

88. *Biron*, 123 N.W.2d at 398-99; *see* MINN. STAT. § 634.03 (1992) ("A confession of the defendant . . . [cannot] be given in evidence against him whether made in the course of judicial proceedings or to a private person, when made under the influence of fear produced by threats.").

89. State v. Willadson, 268 N.W.2d 546, 547 (Minn. 1978) (per curiam). As a preliminary matter, the prosecution must demonstrate that *Miranda* warnings were given, and that police obtained a valid waiver. *Id.* Absent other evidence indicating the lack of a voluntary, knowing and intelligent waiver, the confession is deemed valid. *Id.* In *Willadson*, the Minnesota Supreme Court reversed the trial court's "presumption" that because the defendant made the statements moments after the officer violently subdued him, his condition prevented him from intelligently waiving his rights. *Id.*

90. State v. Murphy, 380 N.W.2d 766, 770 (Minn. 1986) (citing State v. Fuller, 374 N.W.2d 722, 727 (Minn. 1985)).

91. *See* State v. Hazley, 428 N.W.2d 406, 410 (Minn. Ct. App. 1988) (citing New York v. Quarles, 467 U.S. 649 (1984)).

92. *See* Bielejeski v. Commissioner of Pub. Safety, 351 N.W.2d 664, 667 (Minn. Ct. App. 1984) (citing California v. Trombetta, 467 U.S. 479, 489 (1984)).

93. The Minnesota Supreme Court has observed, "the states 'are independently responsible for safeguarding the rights of their citizens.' " O'Connor v. Johnson, 287 N.W.2d 400, 405 (Minn. 1979) (quoting People v. Brisendine, 531 P.2d 1099, 1114 (Cal. 1975)). The court subsequently expanded on this principle:

Constitution as independent and adequate grounds for determining the admissibility of statements made during custodial interrogation. The Minnesota Supreme Court made its first tentative move in that direction in *State v. Robinson*.[94] In *Robinson*, the court noted that police frequently record the "actual interrogation,"[95] and reasoned that recording the entire "pre-statement" questioning would protect both the suspect and the police and would obviate disputes arising from an accused's claim that she was denied her constitutional rights during questioning.[96]

Several years later, in *State v. Pilcher*,[97] the Minnesota Supreme Court expressed frustration at police interrogators' failure to follow its recommendation in *Robinson*.[98] In *Pilcher*, the court ultimately accepted police officers' testimony that the defendant waived his rights after receiving *Miranda* warnings several different times,[99] although it had no objective record of

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> While a decision of the United States Supreme Court interpreting an identical provision of the federal constitution may be persuasive, it should not be automatically followed or our separate constitution will be of little value. . . . [W]e must remain independently responsible for safeguarding the rights of our own citizens and for insuring that the intent of the people of Minnesota in adopting our constitution is continued forward.

State v. Hamm, 423 N.W.2d 379, 382 (Minn. 1988); *see also* State v. Fuller, 374 N.W.2d 722, 726 (Minn. 1985) ("State courts are, and should be, the first line of defense for individual liberties within the federalist system."), *quoted in* State v. Gray, 413 N.W.2d 107, 111 (Minn. 1987).

94. 427 N.W.2d 217 (Minn. 1988).

95. *Id.* at 224 n.5. By "actual interrogation," the court apparently meant those final questions posed by police that yield inculpatory statements. The court did not deny that many long hours of questioning may take place prior to this "actual interrogation."

96. *Id.* The court concluded,

> [I]n the interest of assuring that the accused's rights have been observed as well as validating the integrity of the actual interrogation, recordation of all pre-statement conversations would afford the reviewing court an objective record . . . [not] one based upon self-serving or subjective assertions of the principals involved.

Id.

97. 472 N.W.2d 327 (Minn. 1991).

98. *Id.* at 333.

99. *Id.* at 332-33. Police arrested Pilcher on probable cause to believe he committed sexual assault and murder. *Id.* at 331-32. The first time the police read Pilcher the *Miranda* warnings he "equivocally" invoked his right to counsel by asking police, "Do you think I should have an attorney?" *Id.* at 331. The officer replied that Pilcher could have an attorney if he wanted one. *Id.* At the station Pilcher began talking to police. *Id.* One of the officers read Pilcher his rights a second time and reminded him that he did not have to speak; Pilcher then volunteered some incriminating statements. *Id.* Later, during interrogation by a Bureau of Criminal Apprehension agent who carried

the interrogation prior to Pilcher's taped confession. At the same time, the court expressed deep concern because police officers failed to record their initial conversations with the suspect,[100] and issued a clear warning: "In the future, we urge that law enforcement professionals use those technological means at their disposal to fully preserve those conversations and events preceding actual interrogation. *Law enforcement personnel and prosecutors may expect that this court will look with great disfavor upon any further refusal to heed these admonitions.*"[101] The Minnesota Supreme Court has yet to take the logical next step and require law enforcement officers to record both *Miranda* waivers and the entire custodial interrogation as a matter of state due process. In contrast, the State of Alaska requires,[102] and various model statutes and authorities recommend,[103] full recordings of custodial interrogations.

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a tape recorder, Pilcher responded to a re-reading of the *Miranda* warnings by stating that he thought he should have a lawyer. *Id.* The agent testified that he twice rose to leave, but Pilcher asserted that he wanted to "tell his side of the story." *Id.* Only then did the agent turn on the tape recorder and record Pilcher's statements. *Id.*

100. *Id.* at 332-33. "Nevertheless, we are troubled by conduct and judgment exercised by these law enforcement professionals. . . . The present case provides a stellar example of a dispute that could have been avoided had the law enforcement officers followed our recommendation in *Robinson*." *Id.*

101. *Id.* at 333 (emphasis added).

102. In Stephan v. State, 711 P.2d 1156 (Alaska 1985), the Supreme Court of Alaska held as a matter of state constitutional law that "an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's [state] right to due process." *Id.* at 1158. A general exclusionary rule excludes from evidence any statements taken in violation of the recording requirement. *Id.* at 1164. The court reasoned that a record of interrogation is reasonable and necessary to protect a suspect's right to counsel, privilege against self-incrimination, and due process guarantee of a fair trial. *Id.* at 1159-60. According to the Alaska court, in addition to safeguarding those individual rights, the rule protects judicial integrity by allowing courts to review an objective record rather than the testimony of interested parties only. *Id.* at 1164.

The Alaska Supreme Court expressly based its decision entirely on its state constitution to avoid unwarranted federal review. *Id.* at 1160; *see* Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) (announcing rule that the Supreme Court will presume reliance on federal law unless a state court makes a clear statement that a decision rests on independent and adequate state grounds).

103. *See* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 130.4 (1975) (requiring that law enforcement officers make full sound recordings of all custodial interrogations). The American Law Institute, author of the Model Code, reports:

> It is obvious that reliance upon oral testimony of the officer to establish the conditions of interrogation will often lead to a swearing contest between the police officer and the suspect, a contest which the suspect will rarely win, whether he is telling the truth or not. It

C. DETERMINING MINNESOTA CONSTITUTIONAL PROTECTION

Both courts[104] and commentators[105] urge thoughtful analysis before a state court raises state constitutional standards above those set by the United States Supreme Court under the Federal Constitution. The state court should provide a reasoned explanation for finding the federal interpretation unpersuasive or insufficient, giving the necessary weight to federal precedent and the constitutional rights at issue.[106] The standards state courts develop should also guide their citizens and government agents.[107]

As in other states, the Minnesota Supreme Court has articulated certain factors on which it bases a decision to interpret a state constitutional provision differently than a parallel federal provision. First, the court looks at whether textual similarities between the state and federal provisions reflect the framers' intention for similar interpretation.[108] Second, the court looks at Minnesota's constitutional history for an appropriate interpretation of a Minnesota constitutional provision.[109]

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should be noted that criticism of this system does not stem exclusively from fear of police abuse; the system is a demeaning one for the officer who is telling the truth as well, for in any case of conflicting testimony, the credibility of that officer will be called into question, even though his version may eventually be accepted. Sound recordings would relieve the officer of this pressure. In addition, in some cases it is possible that conflicts in the testimony concerning the interrogation period result not from lying on anyone's part, but rather from different recollections or interpretations of the events which transpired. Sound recordings would allow the court to make its own independent interpretation, based on an accurate picture of what really happened.

Id. commentary at 346; *see also* UNIF. R. CRIM. P. Rule 243 (1987) ("The information of rights, any waiver thereof, and any questioning shall be recorded whenever feasible and in any case where questioning occurs at a place of detention.").

104. *See, e.g.*, State v. Fuller, 374 N.W.2d 722, 726-27 (Minn. 1985); O'Connor v. Johnson, 287 N.W.2d 400, 405 (Minn. 1979).

105. *See* Abrahamson, *supra* note 81, at 1176 (arguing that the state court should always explain why the Supreme Court's reasoning is unpersuasive); Fleming & Nordby, *supra* note 81, at 63 (criticizing result-oriented state decisions).

106. Abrahamson, *supra* note 81, at 1176; William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

107. Fleming & Nordby, *supra* note 81, at 63-66.

108. *See Fuller*, 374 N.W.2d at 727 (stating that where a state constitutional provision is textually identical to a federal provision, the United States Supreme Court's interpretation of the federal provision carries "inherently persuasive, although not necessarily compelling, force").

109. *See* State v. Hamm, 423 N.W.2d 379, 382-83 (Minn. 1988) (explaining how state constitutional history supports holding that the state constitutional

Third, the court determines whether existing state law helps to define the scope of the state constitutional provision.[110] Fourth, the court considers whether matters of particular state or local concern justify an independent interpretation.[111] Finally, experimentation and a search for a "better rule of law," while susceptible to criticism if used as the sole basis for independent interpretation, may properly be considered as a ground for independent interpretation.[112]

IV. MINNESOTA LAW REQUIRES OFFICERS TO RECORD CUSTODIAL INTERROGATION

Applying the aforementioned criteria, the Minnesota Supreme Court should interpret article 1, section 7 of the Minnesota State Constitution, the state's due process clause, to require police officers to make and preserve an electronic record of the entire custodial interrogation. The electronic recording must contain no unexplained interruptions and must include the communication of rights, waivers, and all subsequent questions and answers.

A. STATE DUE PROCESS REQUIREMENTS

When defining its citizens' state constitutional rights, the Supreme Court of Minnesota compares the text of parallel state and federal provisions.[113] In so doing, the court attempts to fulfill the original intent of the state constitution's framers and to achieve consistent decision-making.[114] Although not a controlling presumption, by enacting a state constitutional pro-

provision granting the right to trial by jury implicitly confers the right to a 12-member jury).

110. *See* State v. Nordstrom, 331 N.W.2d 901, 904-05 (Minn. 1983) (citing state constitutional right-to-counsel precedent and state rules of criminal procedure to support holding that an uncounseled conviction on a guilty plea can only be used to enhance a subsequent sentence when the defendant validly waived her right to counsel on the record).

111. *See* State v. Murphy, 380 N.W.2d 766, 771 (Minn. 1986) (considering whether the "unique relationship between probationer and probation officer as seen in the light of the philosophy of the Minnesota criminal justice system" requires adoption of position on the privilege against self-incrimination contrary to the federal view).

112. *See* Fleming & Nordby, *supra* note 81, at 76.

113. *See* State v. Fuller, 374 N.W.2d 722, 727 (Minn. 1985).

114. One commentator describes this principle—that federal interpretation governs where state and federal constitutional provisions share identical language—as an "artificial canon of construction." David R. Keyser, *State Constitutions and Theories of Judicial Review: Some Variations on a Theme*, 63 TEX. L. REV. 1051, 1063 (1985).

vision textually identical to a parallel federal provision, the framers may have signaled their intention that the two provisions receive identical interpretation.[115] Even where the state and federal provisions have identical language, however, the state court need not accept a United States Supreme Court interpretation of the federal provision as a binding interpretation of the state constitutional provision.[116]

The argument that federal interpretation of a federal constitutional provision should govern state interpretation of a parallel state constitutional provision loses force where the framers of the state constitution used different language. Drafters of state constitutions, likely aware of a natural proclivity to interpret textually identical provisions identically,[117] could provide greater protection to their citizens by selecting different language than that contained in the Federal Constitution. Accordingly, where a state constitutional provision employs more expansive language than does its parallel federal counterpart, the state courts should find that its drafters intended that the state provision provide greater protection of individual rights than does its federal counterpart.

The drafters of the Minnesota Constitution envisioned that state due process would embody a more expansive set of rights than federal due process. The Minnesota Due Process Clause provides: "No person shall be held to answer for a criminal of-

115. This presumption applies equally where the state constitutional provision originated in a constitution from another jurisdiction. Ewers v. Thunderbird Aviation, Inc., 289 N.W.2d 94, 99 n.6 (Minn. 1979) ("[W]here a constitutional or statutory provision is taken from a neighboring state . . . the construction placed upon it by the court of that state is presumed to be adopted with the provision.").

116. *See, e.g.*, State v. Murphy, 380 N.W.2d 766, 773 (Minn. 1986) (Wahl, J., dissenting) ("[W]e are not obliged to adopt the United States Supreme Court's construction of a federal constitutional provision in interpreting our own constitution even if the language of a state constitutional privilege is identical.") (citation omitted); Fleming & Nordby, *supra* note 81, at 68 ("Identical meaning should not be implied merely because there is identical language."); Brennan, *supra* note 106, at 500 ("[E]xamples abound where state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, even where the state and federal constitutions are similarly or identically phrased.").

117. According to Professor Keyser, the canon of interpretation that identically worded texts will be treated as *in pari materia* "signal[s] to framers of future state constitutions that, if they wish to broaden rights under the state constitution beyond those guaranteed by the federal constitution, they must make that purpose clear within the text itself." Keyser, *supra* note 114, at 1064.

fense without due process of law, . . . nor be deprived of life, liberty, or property without due process of law."[118] The Federal Due Process Clause, in contrast, specifies simply that no person shall be deprived of life, liberty, or property without due process of law.[119] Unless superfluous, the additional language in Minnesota's due process clause explicitly guarantees more pre-trial protection than does the Federal Due Process Clause. The textual language of article I, section 7 of the Minnesota Constitution, therefore, provides strong support for a more expansive interpretation of pre-trial rights than under federal due process.[120] Given the express textual mandate in the state constitution, the Minnesota Supreme Court should hold that state due process requires law enforcement officers to record electronically custodial interrogations.

B. STATE CONSTITUTIONAL HISTORY

Minnesota has a unique constitutional history. Democratic and Republican delegates, refusing to meet together, held separate constitutional conventions.[121] Each party published its own record of the debates.[122] In 1857, with minimal debate,

118. MINN. CONST. art. I, § 7.

119. *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

120. Alaska, where state due process requires police to electronically record custodial interrogations, *see supra* note 102 and accompanying text, also has a state due process provision that affords its state citizens heightened pretrial protection. The Alaska Constitution provides: "No person shall be deprived of life, liberty or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed." ALASKA CONST. art. I, § 7. That the Alaska provision explicitly mentions executive investigations, whereas the Minnesota provision requires due process before a person is held to answer for a criminal offense, does not warrant dissimilar results. Both constitutions provide pre-trial protections beyond what the Federal Constitution provides.

Several states have declined to interpret their state constitutions in accordance with the rule of *Stephan*. *See, e.g.*, Williams v. State, 522 So.2d 201, 208 (Miss. 1988); Jimenez v. State, 755 P.2d 694, 696-97 (Nev. 1989); State v. Gorton, 548 A.2d 419, 421-22 (Vt. 1988); State v. Spurgeon, 820 P.2d 960, 961-62 (Wash. Ct. App. 1991). Those states' constitutional due process provisions, however, do not use language more expansive than the Federal Due Process Clause. *See* MISS. CONST. art. III, § 14; NEV. CONST. art. I, § 8; VT. CONST. ch. I, art. 10; WASH. CONST. art. I, § 3.

121. For a fascinating, detailed report of the Minnesota state constitutional conventions, see WILLIAM ANDERSON & ALBERT J. LOBB, A HISTORY OF THE CONSTITUTION OF MINNESOTA (1921). The two separate conventions met daily and debated, usually at the same hours, at opposite ends of the old capitol. *Id.* at 86.

122. The drafters printed transcripts of both the Democratic and Republican debates. THE DEBATES AND PROCEEDINGS OF THE MINNESOTA CONSTITU-

both parties ratified a compromise constitution drafted by a joint committee. The debates from the separate constitutional conventions inform the modern reader about the concerns of the framers, and they furnish a significant resource for the court, particularly for interpreting the Minnesota bill of rights.[123] Minnesota's constitutional history reveals that delegates recognized that the protections in the bill of rights are fundamental[124] and expressly wanted the state constitution to be interpreted independently of the Federal Constitution.[125]

Because they do not reflect the proceedings of the compromise committee that ultimately drafted the state constitution, however, the debates do relatively little to clarify the meaning of individual provisions. Furthermore, the constitutional debates shed limited light on the meaning of article I, section 7 because the state significantly amended this provision in 1904.[126] As originally ratified in 1857, article I, section 7 of the Minnesota Constitution read: "No person shall be held to answer for a criminal offence unless on the presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or

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TIONAL CONVENTION (Francis H. Smith ed., 1857) [hereinafter DEMOCRATIC CONVENTION]; DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION FOR THE TERRITORY OF MINNESOTA (T.F. Andrews ed., 1858) [hereinafter REPUBLICAN CONVENTION].

123. Fleming & Nordby, *supra* note 81, at 70. Perhaps more than any other article of the Minnesota Constitution, the bill of rights shows the fusion of Democratic and Republican materials. *See* ANDERSON & LOBB, *supra* note 121, at 117-18. Neither party can claim primary responsibility for the provisions. The general order of the provisions closely follows the Republican party's proposal, which drew heavily on the Wisconsin Constitution of 1848. *Id.* at 117. Thus, decisions construing the Wisconsin Constitution may also assist the Minnesota Supreme Court in interpreting the Minnesota Constitution. "This is significant because '[t]he Wisconsin Supreme Court has traditionally adhered to the notion that the state constitution reflects an individual commitment to the value of personal liberty, a commitment not constrained by the vicissitudes of contemporaneous federal doctrine.' " Fleming & Nordby, *supra* note 81, at 70 n.81 (quoting *Introduction: An Examination of the Wisconsin Constitution*, 62 MARQ. L. REV. 483, 483 (1979)).

124. *See, e.g.*, REPUBLICAN CONVENTION, *supra* note 122, at 101 (statement of Del. Perkins) ("The object [of the bill of rights], as I understand it, is to set forth to the world those fundamental ideas and principles which underlie our Constitution.").

125. The debates support the conclusion that drafters intended the Minnesota courts to protect strictly certain individual rights regardless of any diminution of those rights at the federal level. "While I would pay due regard to all other Constitutions, I am not willing to bind myself to follow their example in all respects. I am not afraid of adopting some new ideas, if they seem reasonable and proper. I believe we may well make some improvements." *Id.* at 97 (statement of Del. Colburn).

126. 1905 MINN. LAWS 4.

property, without due process of law."[127] In 1868, the legislature proposed an amendment to the due process clause that would have discontinued the grand jury requirement without affording any significant pre-trial protections in its place.[128] That amendment failed in a popular election. Dissatisfied with the grand jury requirement, yet concerned about its citizens' pre-trial rights, the state amended the due process clause in 1904, the language still in effect today. Thus, Minnesota's citizens ultimately adopted a rule of due process offering greater pre-trial rights to an accused than its federal counterpart.

C. STATE PRECEDENT

The Minnesota Supreme Court also looks at state law to define the scope of state constitutional protections.[129] Decisions construing the Minnesota bill of rights furnish a vital source of authority for independent interpretation. Early cases implementing article I give the court particular assistance with state constitutional interpretation.[130] For example, as part of its commitment to "zealously guard" the state privilege against self-incrimination,[131] the Minnesota Supreme Court developed state law that is independent of federal constitutional interpre-

127. MINN. CONST. art. I, § 7 (amended 1904).

128. 1868 MINN. GEN. LAWS ch. CVII. According to the proposed amendment, article I, § 7 would have read: "No person for the same offense shall be put twice in jeopardy of punishment, nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty or property without due process of law." *Id.*

129. *See* State v. Nordstrom, 331 N.W.2d 901, 904-05 (Minn. 1983). In *Nordstrom*, the court relied on the long-standing state constitutional rule that a defendant has the right to counsel in any case in which a finding of guilt could result in incarceration and the Minnesota Rules of Criminal Procedure as authority to hold that uncounseled misdemeanor convictions cannot be used to enhance a sentence for a subsequent offense unless the record reflects a valid waiver of counsel. *Id.* at 905.

130. *See, e.g.*, State v. Kelly, 15 N.W.2d 554, 560 (Minn. 1944) (stating that "fundamental rights," such as the presumption of innocence and proof beyond a reasonable doubt, although not expressly enumerated in the state constitution, "are as much a part of the constitution as though expressly set out"); Thiede v. Town of Scandia Valley, 14 N.W.2d 400, 405 (Minn. 1944) (declaring that the right to acquire and enjoy property and the right to establish a home and family relations, though not enumerated, are "fundamental maxims" protected by article I, § 8 of the state constitution); Fleming & Nordby, *supra* note 81, at 72 (reporting that early state constitutional decisions interpreted the Minnesota Bill of Rights in a surprisingly expansive manner).

131. MINN. CONST. art. I, § 7 ("No person shall be . . . compelled in any criminal case to be a witness against himself . . . ."); State v. Rixon, 231 N.W. 217, 218 (Minn. 1930).

tation on waiving that privilege.[132] Federal law presumes a lack of compulsion to speak,[133] whereas early Minnesota precedent required the state to show affirmatively that the defendant knowingly, voluntarily, and intelligently waived her privilege against self-incrimination.[134]

The more recent cases, however, shed less light on the scope of state constitutional rights because of the court's tendency to base its decisions on both federal and state constitutional guarantees rather than to rely exclusively on the state constitution. Although the Minnesota Supreme Court has lately relied less on independent state constitutional grounds to determine the rights of criminal defendants, the court should follow its earlier precedent and back up its continued rhetoric in favor of independent state constitutional interpretation.

D. PARTICULAR STATE CONCERNS

A state is often in a better position than the United States Supreme Court to determine matters of importance to its citizens. Matters of criminal procedure easily fall into this category for several reasons. The vast majority of criminal prosecutions occur at the state level.[135] Thus, state courts are the focus of pressure for interpretation and expansion of the rights of criminal defendants.[136] State courts may also feel

132. *See* State v. Iosue, 19 N.W.2d 735, 741 (Minn. 1945) (holding that waiver of privilege against self-incrimination by a witness testifying before the grand jury must be made in "a frame of mind wholly 'free from any sense of compulsion.' "); State v. Gardiner, 92 N.W. 529, 533 (Minn. 1902) (explaining that state privilege prohibits compelling of both direct testimony and circumstantial evidence); State v. Froiseth, 16 Minn. 296, 298 (1871) (holding that state constitution protects grand jury witnesses from self-incrimination 20 years before the Supreme Court reached the same conclusion under the Federal Constitution in Counselman v. Hitchcock, 142 U.S. 547 (1892)); *see also* State v. Berry, 214 N.W.2d 232, 234 (Minn. 1974) (allowing privilege to be waived orally, in writing, or by conduct); State v. Falcone, 195 N.W.2d 572, 577 (Minn. 1972) (prohibiting prosecutor from using devious means to obtain a waiver from a grand jury witness).

133. *See* Minnesota v. Murphy, 465 U.S. 420, 429 (1984) (considering defendant's response voluntary because "he was free to claim the privilege"); Schneckloth v. Bustamonte, 412 U.S. 218, 235 (1973) ("Our cases do not reflect an uncritical demand for a knowing and intelligent waiver in every situation where a person has failed to invoke a constitutional protection.").

134. *See supra* note 132.

135. "The state courts handle the vast bulk of all criminal litigation in this country. In 1982, more than 12 million criminal actions (excluding juvenile and traffic charges) were filed in the 50 state court systems and the District of Columbia." Michigan v. Long, 463 U.S. 1032, 1043 n.8 (1983) (citation omitted).

136. *See* Fleming & Nordby, *supra* note 81, at 74.

more justified in making independent decisions about matters of procedure than about more complex matters of substantive law.[137] Finally, the desire for national uniformity, which generally inhibits independent state decisions, more easily gives way to a state court's recognition that particular state concerns should independently govern the standards of essential fairness in state criminal procedure.[138]

These minimum standards may not adequately address concerns of abuse in Minnesota state courts. The methods local and state police use to interrogate criminal suspects, and the treatment state courts accord to the resultant confessions, have a direct impact on the integrity of the state judiciary. The credibility of the state judiciary depends on a fair determination of the voluntariness question, but the lack of a complete, objective record of custodial interrogation under our current system impedes that determination.

In addition to judicial integrity, Minnesota has a distinct interest in its state courts' efficiency. An objective record of police interrogation would avoid frivolous claims of police misconduct during questioning. Under the current system, litigation results every time a defendant claims that she did not understand or voluntarily waive her rights, or when she alleges police coercion during interrogation.

E. A BETTER RULE

To fully protect individual rights, the Minnesota Supreme Court should consider what the better rule of law is when it interprets its state constitution.[139] Justice Powell aptly articulated the concept:

> [O]ne of the more obvious merits of our federal system is the opportunity it affords each State, if its people so choose, to become a "laboratory" and to experiment with a range of trial and procedural alternatives. Although the need for the innovations that grow out of diversity has always been great, imagination unimpeded by unwarranted demands for national uniformity is of special importance at a time when serious doubt exists as to the adequacy of our criminal jus-

137. *Id.*

138. *Id.* at 74-75.

139. The court explicitly recognizes this approach in a procedural choice-of-law context. Under the better rule of law methodology, Minnesota recognizes its interest in ensuring that non-residents who litigate state claims in Minnesota have their disputes resolved according to rules and procedures consistent with Minnesota's concept of justice. *See* Hague v. Allstate Ins. Co., 289 N.W.2d 43, 49 (Minn. 1978), *aff'd*, 449 U.S. 302 (1981); Milkovich v. Saari, 203 N.W.2d 408, 416-17 (Minn. 1973).

tice system.[140]

Although Justice Powell issued this statement to support diverse state legislative innovations to improve state criminal procedure, the argument applies with equal force to innovative state constitutional interpretations.

State due process is a fluid, evolving concept that has yet to catch up with the evolution of police interrogation. Historically, police commonly extracted incriminating information from criminal suspects through physical torture. Today, police interrogators rely on more subtle tactics of psychological coercion and manipulation. The courts must monitor interrogation practices to guarantee that the government treats criminal suspects fairly. The courts cannot fulfill this obligation, however, without a complete, accurate, and objective record. Fairness and justice demand a record of custodial interrogation. In no other area of our criminal justice system does the constitution permit state agents so much freedom to confront an accused criminal.

The need to enable courts to review the interrogation process must be weighed against arguments opposing a recording requirement. As a preliminary matter, the feasibility of the rule is not in dispute in so far as police at the station house have easy access to the necessary equipment.[141] Opponents argue that privacy is essential to successful interrogation. Electronic recordation, however, eliminates secrecy, not privacy. Police also claim that recording interrogations has a negative impact on suspects' behavior, but available data from studies conducted in Britain[142] largely dispel concerns that tape recording inhibits suspects from talking[143] or that suspects falsify abuses for the record. Experiments with recorded interrogations revealed that while recordings had only a limited impact

140. Johnson v. Louisiana, 406 U.S. 356, 376 (1972) (Powell, J., concurring) (holding that a state statute permitting less-than-unanimous jury verdicts for criminal conviction does not violate federal due process).

141. *See generally* Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509, 510-14, 543-44 (1992) (discussing the increasing availability of electronic media and the feasibility of videotaping confessions).

142. *See* Michael McConville & Philip Morrell, *Recording the Interrogation: Have the Police Got It Taped?*, 1983 CRIM. L. REV. 158, 159-60.

143. *Id.* The recording rule announced by the Alaska Supreme Court permits an *excused failure* to record custodial interrogation. *See* Stephan v. State, 711 P.2d 1156, 1162 (Alaska 1985). If a suspect refused to speak on tape, police interrogators would be excused from the recording requirement. *Id.* In that case, however, the state would have the burden of persuading the court that recording was not feasible, and the failure to record should be viewed with distrust. *Id.* at 1162-63.

on suspects' behavior, they substantially affected police conduct.[144] Finally, opponents may argue that lay jurors and even judges may misunderstand or misuse the information in recorded interrogations because of their inability to appreciate how the dangers, pressures, and demands of police work affect law enforcement officers' treatment of criminal suspects during interrogation. American juries have, however, shown a willingness to accept the difficulties of police work as a justification for behavior that would seem brutal in almost any other context.[145]

Recognition that state due process mandates recordation of custodial interrogation would serve as an important first step in fashioning better confession jurisprudence. At last, the public could begin to understand interrogation and the role that the procedure plays in our accusatorial system. With that knowledge, the legislature could develop well-considered regulation of interrogation practices.

CONCLUSION

Due process under article I, section 7 of the Minnesota Constitution requires law enforcement officers to make a complete electronic record of custodial interrogation. Any unexcused failure by police to make such a record should render the confession inadmissible for any purpose. The text of the state due process provision, state constitutional history, early state precedents, and the highly localized nature of state criminal procedure all support this independent interpretation of state due process. Equally significant, the due process recordation requirement offers the state a better rule of law to govern police interrogation and the admissibility of confessions.

A complete, objective record of what happens in the interrogation room would provide the courts with a fair basis for review of confessions. Defendants would be afforded more protection from physical and psychological abuse. At the same time, the state would be spared the time and expense of litigating frivolous claims of police misconduct. Finally, recording

144. McConville & Morrell, *supra* note 142, at 161 ("[N]o doubt . . . the introduction of tape-recording, even on an experimental basis, quickly produced marked changes in the numbers, duration and content of police interrogations.").

145. *See, e.g.*, Richard A. Serrano & Tracy Wilkinson, *All 4 in King Beating Acquitted*, L.A. TIMES, Apr. 30, 1992, at A1 (reporting jury's acquittal of four white officers, accused of using unnecessary force during the arrest of a black man, after finding the officers' actions proper under the circumstances).

custodial interrogation would alert the general public to police tactics of psychological coercion. Thus, the recording requirement would mark a step toward better state confessions jurisprudence: Armed with an awareness of the reality of police interrogation, the people of Minnesota could decide how these procedures fit with our evolving concept of criminal justice.