PALMER, J., concurring. I disagree with the majority's refusal to exercise this court's inherent supervisory authority over the administration of justice[1] to establish a rule that, whenever reasonably feasible, police station interrogations of suspects shall be recorded electronically.[2] The reasons favoring such a recording requirement are truly compelling,[3] whereas the arguments against it are wholly unpersuasive. Indeed, each and every substantive argument that the state and the majority raise against a recording requirement has been discredited by the experience of those police departments, in this state and across the country, that record interrogations as a matter of policy.[4] Contrary to the majority's assertion that a rule requiring the recording of interrogations "could . . . have negative repercussions for the administration of justice"; footnote 17 of the majority opinion; there is no question that such a rule would promote the fair and impartial administration of justice in this state. Simply put, in this day and age, there is no legitimate justification to refuse to adopt the requirement under this court's supervisory powers.[5] Because, however, the failure of the police to record the interrogation of the defendant in the present case was harmless, I concur in the result that the majority reaches.[6]

I

The value in recording interrogations is so obvious as to require little discussion. When a confession[7] is memorialized in such a manner, the fact finder need not rely exclusively, or even primarily, on the recollections and testimony of those present at the interrogation in order to determine precisely what occurred when the confession allegedly was obtained. As the United States Supreme Court has observed, the interrogation of suspects by the police generally takes place in secret; the suspect is isolated, incommunicado, from everyone but his interrogators, a scenario that necessarily "results in a gap in our knowledge as to what in fact goes on in the interrogation rooms." *Miranda* v. *Arizona*, 384 U.S. 436, 448, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Courts and juries nevertheless are required to decide whether a confession represents the suspect's free and voluntary decision to acknowledge criminal wrongdoing, free from coercion by the police. Sometimes, however, the issue is not so much whether the confession was the product of police coercion but, rather, whether the interrogation methods used by the police, which often include sophisticated psychological ploys and techniques, caused the suspect to admit to a crime that he did not commit. See, e.g., B. Garrett, "The Substance of False Confessions," 62 Stan. L. Rev. 1051, 1060 (2010) ("People have long falsely confessed not just in cases involving police torture or the 'third degree' but also

in cases involving psychological techniques commonly used in modern police interrogations. Over the past two decades, scholars, social scientists, and writers have identified at least 250 cases in which they determined that people likely falsely confessed to crimes. New cases are regularly identified."). In all cases, a recording of the interrogation provides the fact finder with an objectively accurate picture of what transpired during the questioning, thereby greatly enhancing the fact finder's ability to evaluate the voluntariness and validity of the confession. For that reason alone, the value of recording interrogations is immeasurable.

In recent years, the critical importance of recording interrogations has become even clearer due to an increasing awareness of the phenomenon of false confessions. According to the Innocence Project, a national litigation and public policy organization affiliated with the Benjamin N. Cardozo School of Law of Yeshiva University, "[f]or many reasons—including mental health issues and aggressive law enforcement tactics—innocent people sometimes confess to crimes they did not commit." Innocence Project, "False Confessions and Mandatory Recording of Interrogations," available at http://www.innocenceproject.org/fix/False-Confessions.php (last visited September 27, 2010). "While it can be hard to understand why someone would falsely confess to a crime, psychological research has provided some answers—and DNA exonerations have proven that the problem is more widespread than many people think. In approximately 25 [percent] of the [cases involving] wrongful convictions overturned [through the use of] DNA evidence, defendants made false confessions, admissions or statements to law enforcement officials."[8] Id.; see also id. (concluding that "[t]he electronic recording of interrogations, from the reading of *Miranda* rights onward, is the single best reform available to stem the tide of false confessions").

Although falsely confessing to a crime seems highly counterintuitive to most people, "[a] variety of factors can contribute to a false confession during a police interrogation." Innocence Project, "False Confessions," available at http://www.innocenceproject.org/understand/False-Confessions.php (last visited September 27, 2010). They include duress, coercion, intoxication, diminished capacity, mental impairment, ignorance of the law, fear of violence, the actual infliction of harm, the threat of a harsh sentence, and a misunderstanding of the situation. Id. "Confessions obtained from juveniles are often unreliable—children can be easy to manipulate and are not always fully aware of their situation. [Sometimes] [c]hildren and adults both are . . . convinced that that they can 'go home' as soon as they admit guilt." Id. "People with mental disabilities . . . often falsely [confess] because they are tempted to accommodate and agree with authority figures." Id. "Regardless of the age, capacity or state of the confes-

sor, what they often have in common is a decision—at some point during the interrogation process—that confessing will be more beneficial to them than continuing to maintain their innocence." Id. In one recent study involving forty proven cases of false confession, "innocent people not only falsely confessed, but they also offered surprisingly rich, detailed, and accurate information. . . . Often those details included reportedly 'inside information' that only the rapist or murderer could have known. We now know that each of these people was innocent and was not at the crime scene. Where did those details, recounted at length at trial and recorded in confession statements, come from? . . . In many cases . . . police likely disclosed those details during the interrogations by telling exonerees how the crime happened." B. Garrett, supra, 62 Stan. L. Rev. 1054.

"One of the most publicized examples of the system's failure to protect innocent confessors is the [New York City] Central Park jogger case. Five young men between the ages of fourteen and sixteen were convicted of the 1989 beating and rape that left the twenty-eight-year-old victim hospitalized for six weeks. Because the victim was incapable of identifying her attackers, the prosecution's case relied primarily on the youths' confessions . . . . [I]n January of 2002, Matias Reyes, while serving time for another 1989 rape and murder, confessed to the brutal attack, and DNA testing confirmed his story.

"So why, one might ask, did five innocent teenagers confess to a crime they didn't commit? Perhaps twenty-eight hours of custodial detention, coupled with a host of interrogation techniques were at the root of the teenagers' decision to confess."[9] N. Soree, comment, "When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony," 32 Am. J. Crim. L. 191, 194 (2005).

Thus, as one authoritative source has explained, "[s]ocial psychologists, criminologists, sociologists, legal scholars, and independent writers have documented so many examples of interrogation-induced false confession in recent years that there is no longer any dispute about their occurrence. Nevertheless, there is good reason to believe that the documented cases of interrogation-induced false confession understate the true nature and extent of the phenomenon. Most false confessions are not easily discovered and are rarely publicized: they are likely to go unnoticed by researchers, unacknowledged by police and prosecutors, and unreported by the media. As many have pointed out, the documented cases of interrogation-induced false confession are therefore likely to represent only the tip of a much larger iceberg.

"Indeed, the data . . . suggest that interrogation-induced false confession may be a bigger problem for

the American criminal justice system than ever before. Although we do not presently know the frequency with which police elicit confessions from the innocent, researchers have discovered and documented far more cases of false confession in recent years than in any previous time period." S. Drizin & R. Leo, "The Problem of False Confessions in the Post-DNA World," 82 N.C. L. Rev. 891, 921 (2004); see id., 891–92 (analyzing "demographic, legal, and case-specific descriptive data from . . . 125 [documented] cases" of interrogation induced false confessions and recommending mandatory electronic recording of police interrogations, among other policy reforms, as way to minimize number of false confessions).

It is apparent, therefore, that a recording requirement would dramatically reduce the number of wrongful convictions due to false confessions, and it also would protect against the use of confessions that are involuntary and, therefore, inherently unreliable. Because a confession constitutes such persuasive evidence of guilt, the value of having a recording of that confession and the interrogation that leads to it cannot be overstated.

II

The majority makes several arguments in support of its rejection of the defendant's claim that this court should adopt a recording requirement under its supervisory powers. They are: (1) this court's supervisory authority is reserved for issues of the " 'utmost seriousness,' "[10] and the issue of whether confessions should be recorded does not rise to that level of importance; (2) the proposed recording requirement falls outside the purview of this court's supervisory authority because it purports to regulate the conduct of nonjudicial officers, namely, the police; (3) the cost associated with recording confessions; (4) the chilling effect that the recording requirement would have on the manner in which the police obtain confessions; (5) the difficulty in establishing the precise parameters of the requirement; and (6) the legislature is better suited than this court to gather and evaluate the facts necessary for determining whether such a recording requirement is warranted. These arguments provide no legitimate basis for rejecting a recording requirement under this court's supervisory authority, and they certainly do not outweigh the overriding benefits to be derived from such a requirement.

The majority's first assertion, namely, that the issue presented is not sufficiently serious to warrant this court's use of its supervisory powers, cannot withstand even the most cursory examination. Indeed, I submit that there are few issues of greater importance to the perceived fairness and integrity of our criminal justice system than the voluntariness and reliability of confessions. As this court has observed, confessions represent

"the most damaging evidence of guilt . . . ." (Citation omitted.) *State* v. *Ruth*, 181 Conn. 187, 199, 435 A.2d 3 (1980); see also *State* v. *Patterson*, 276 Conn. 452, 473, 886 A.2d 777 (2005) ("evidence regarding an accused's admission of guilt generally is extremely important to the state and damaging to the accused"); *Commonwealth* v. *DiGiambattista*, 442 Mass. 423, 446, 813 N.E.2d 516 (2004) ("[t]here is no dispute that the evidence of a defendant's alleged statement or confession is one of the most significant pieces of evidence in any criminal trial"); B. Garrett, supra, 62 Stan. L. Rev. 1054–57, 1068–90 (discussing numerous cases of false confessions that represented central evidence at trial, which resulted in conviction). "Studies suggest that police-induced false confessions appear to occur primarily in the more serious cases, especially homicides and other high-profile felonies . . . ." (Internal quotation marks omitted.) B. Garrett, supra, 1065. It therefore is critically important, both to the state and to the defendant, that the fact finder be provided with an accurate depiction of all of the relevant circumstances surrounding the confession. "When there is a complete recording of the entire interrogation that produced such a statement or confession, the fact finder can evaluate its precise contents and any alleged coercive influences that may have produced it." *Commonwealth* v. *DiGiambattista*, supra, 446.

As I discussed previously; see part I of this opinion; this is particularly true in light of the many documented cases of suspects confessing to crimes that they did not commit, for "[i]t is now beyond dispute that the use of psychological interrogation practices, with alarming frequency, has contributed to many false confessions." S. Drizin & M. Reich, "Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions," 52 Drake L. Rev. 619, 634 (2004). "Because confessions are such powerful forms of evidence, the recognition that certain law enforcement strategies can create false confessions should translate into a duty on the part of police to preserve a record of what transpired behind the closed door of the interrogation room." G. Johnson, "False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations," 6 B.U. Pub. Int. L.J. 719, 743 (1997); see also B. Garrett, supra, 62 Stan. L. Rev. 1059, 1066 (concluding that, "unless interrogations are recorded in their entirety," courts may not discern police practices that lead suspects to confess falsely, such as when police intentionally or unintentionally "contaminate a confession by feeding or leaking crucial facts"); E. Sackman, "False Confessions: Rethinking a Contemporary Problem," 16 Kan. J.L. & Pub. Policy 208, 209 (2006–2007) ("[t]he bulk of the scholarship calls for some sort of mandatory electronic recording of the interrogation procedure" to counteract problem of

wrongful convictions based on false confessions). Moreover, it is apparent that Connecticut is not immune from the reality of false confessions. See, e.g., G. Johnson, supra, 722–32 (discussing several suspected cases of false confessions, including some Connecticut cases).

The dismissive view of the majority notwithstanding, it is impossible to ignore the seriousness of the issue. As the Alaska Supreme Court has explained, "[t]he [prosecutor] usually attempts to show [that a confession was voluntary] through the interrogating officer's testimony that the defendant's constitutional rights were protected. The defendant, on the other hand, often testifies to the contrary. The result, then, is a swearing match between the law enforcement official and the defendant, which the courts must resolve. . . .

"Although there are undoubtedly cases [in which] the testimony on one side or the other is intentionally false, dishonesty is not our main concern. Human memory is often faulty—people forget specific facts, or reconstruct and interpret past events differently.

"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 to be a judge of his own cause. [Y. Kamisar, "Forward: *Brewer* v. *Williams*—A Hard Look at a Discomfiting Record," 66 Geo. L.J. 209, 242–43 (1977).] . . .

"In the absence of an accurate record, the accused may suffer an infringement [on] his right to remain silent and to have counsel present during the interrogation. Also, his right to a fair trial may be violated, if an illegally obtained, and possibly false, confession is subsequently admitted. An electronic recording, thus, protects the defendant's constitutional rights, by providing an objective means for him to corroborate his testimony concerning the circumstances of the confession." (Citations omitted; internal quotation marks omitted.) *Stephan* v. *State*, 711 P.2d 1156, 1161 (Alaska 1985). Furthermore, "[w]ithout a contemporaneous record of the interrogation, judges are forced to rely on the recollections of interested parties to reconstruct what occurred [in the interrogation room]. The result is often a credibility contest between law enforcement officials and the [accused], which law enforcement officials invariably win."[11] *In re Jerrell C.J.*, 283 Wis. 2d 145, 170–71, 699 N.W.2d 110 (2005); see also *State* v. *Scales*, 518 N.W.2d 587, 591 (Minn. 1994) (recognizing that trial courts "consistently credit the recollections of police officers regarding the events that take place in an unrecorded interview" and that "[a] recording requirement . . . will reduce the number of disputes

over the validity of *Miranda* warnings and the voluntariness of purported waivers"); *State* v. *Cassell*, 280 Mont. 397, 405, 932 P.2d 478 (1996) (Trieweiler, J., concurring) (When police fail to record interrogation, "[t]he trial court, and [the reviewing] [c]ourt, are required to speculate about [the circumstances surrounding the confession and] to weigh the relative credibility of the people involved in the interrogation. Such an unreliable process is inexcusable when it is unnecessary because a means of absolute verification [is] readily available."); D. Donovan & J. Rhodes, "Comes a Time: The Case for Recording Interrogations," 61 Mont. L. Rev. 223, 229–30 (2000) ("A recording minimizes the swearing match between law enforcement and the accused over what actually happened. Experience teaches who wins that match. . . . As [the United States Supreme Court] noted, '[t]here is the word of the accused against the police. But his voice has little persuasion.' [*Reck* v. *Pate*, 367 U.S. 433, 446, 81 S. Ct. 1541, 6 L. Ed. 2d 948 (1961) (Douglas, J., concurring).] Recording will not stack the deck against or favor the defendant. It will make the process fairer. An objective recording cures the effect of the human tendency to recollect events in a self-promoting manner.").

Of course, recordings do not 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." *Stephan* v. *State*, supra, 711 P.2d 1161; see also *Gasper* v. *State*, 833 N.E.2d 1036, 1041 (Ind. App.) ("[t]here can be little doubt that the electronic recording of a custodial interrogation benefits all parties involved"), transfer denied, 841 N.E.2d 190 (Ind. 2005); R. Leo, "The Impact of *Miranda* Revisited," 86 J. Crim. L. & Criminology 621, 692 (1996) ("[E]lectronically recording custodial interrogations promotes the goals of truth-finding, fair treatment, and accountability in the legal process. By creating an objective and reviewable record of police questioning, [it] further[s] the policy objectives that underlie [the] dual concerns for crime control and due process.").

It is readily apparent, therefore, that the important issue presented by the defendant's claim is precisely the kind of issue that warrants the invocation of this court's supervisory powers. "We ordinarily invoke our supervisory powers to enunciate a rule that is not constitutionally required but that we think is preferable as a matter of policy." *State* v. *Ledbetter*, 275 Conn. 534, 578, 881 A.2d 290 (2005), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006). "Under our supervisory authority, we have adopted rules intended

to guide the lower courts in the administration of justice in all aspects of the criminal process"; (internal quotation marks omitted) *State* v. *Valedon*, 261 Conn. 381, 386, 802 A.2d 836 (2002); and on the civil side, as well. Thus, this court has exercised its supervisory authority over a wide variety of matters,[12] many of which implicate considerably less significant issues than the issue presented in this case. Consequently, there is no merit to the majority's assertion that ensuring the voluntariness and reliability of confessions is not an important enough matter to justify the exercise of this court's supervisory authority.

The majority next asserts that, because a recording requirement would affect the conduct of nonjudicial actors, that is, the police, adopting such a rule might exceed the proper scope of this court's supervisory powers. This claim also lacks merit. As the Supreme Judicial Court of Massachusetts has explained, "[t]hose opposing the imposition of any requirement that interrogations be recorded contend that, whatever the benefits of recording, it is beyond [a] court's power to regulate the activities of law enforcement [officials], and that attempts to do so would violate the separation of powers. . . . The issue, however, is not what we 'require' of law enforcement [officials], but how and on what conditions evidence will be admitted in . . . [court]. [The court] retain[s] as part of [its] superintendence power the authority to regulate the presentation of evidence in court proceedings. The question . . . is whether and how [the court] should exercise that power with respect to the introduction of evidence concerning interrogations." (Citation omitted.) *Commonwealth* v. *DiGiambattista*, supra, 442 Mass. 444–45; see also *In re Jerrell C.J.*, supra, 283 Wis. 2d 168 ("[The petitioner] is not asking [the] court to regulate police practice. Rather, he is requesting a rule governing the admissibility of a . . . confession into evidence. This would not make it illegal for [the] police to interrogate [suspects] without a recording. Instead, it would render the unrecorded interrogations and any resultant written confession inadmissible as evidence in court [under certain circumstances]."). Indeed, as the Minnesota Supreme Court recently observed in mandating a recording requirement, such a requirement affords appropriate protection to a defendant's constitutional rights and represents "a historical and constitutional function of the judicial branch." *State* v. *Chauvin*, 723 N.W.2d 20, 26 (Minn. 2006); see also *State* v. *Cook*, 179 N.J. 533, 561–62, 847 A.2d 530 (2004) ("The judiciary bears the responsibility to guarantee the proper administration of justice . . . and, particularly, the administration of criminal justice. . . . [The] courts thus have the independent obligation . . . to take all appropriate measures to ensure the fair and proper administration of a criminal trial. . . . [When] such appropriate measures are available, they should be employed to the fullest

extent feasible to enhance the fairness of proceedings." [Citations omitted; internal quotation marks omitted.]). Furthermore, "[t]he integrity of [the] judicial system is subject to question whenever a court rules on the admissibility of a questionable confession, based solely [on] 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.[13] Routine and systematic recording of custodial interrogations [would] provide such evidence, and avoid any suggestion that the court is biased in favor of either party." *Stephan* v. *State*, supra, 711 P.2d 1164.

In light of the nature of the interests involved, the fact that a recording requirement will affect the conduct of the police in no way militates against adopting such a requirement. Indeed, a judicially imposed requirement that is designed to enhance the fairness of our justice system by encouraging certain police practices is hardly unprecedented; although constitutionally mandated, the *Miranda* requirement and our suppression rules also are intended to affect the conduct of the police. Moreover, as I noted previously, a recording requirement will aid both the police and the state by promoting confidence in the reliability of the confessions that the state seeks to introduce into evidence. Finally, as I discuss more fully hereinafter, it has been demonstrated that a recording requirement has no adverse effect on the way in which the police question suspects, and it will not impair their ability to obtain confessions. It reasonably cannot be maintained, therefore, that we should refrain from imposing a recording requirement merely because doing so will affect the way in which the police go about their business.

The majority further asserts that its refusal to adopt a recording requirement is justified due to the financial costs of "purchasing, installing and maintaining [the necessary] electronic equipment" and "training officers on the proper use of [that] equipment . . . ." This contention also is meritless. Many police departments already have the necessary recording equipment but choose to use it only selectively. With respect to those departments that would have to purchase recording equipment, however, the cost of doing so would be extremely modest, and when that cost is considered in light of the substantial benefits, both quantifiable and otherwise, that result from a recording requirement, it is de minimis. "The issue of financial cost . . . has not been identified as a significant obstacle to recording interrogations. To the extent that there are some police departments or law enforcement agencies that do not already have recording equipment, the cost of the equipment is minimal, and that cost is dwarfed by . . . the costs of having officers spend countless hours testifying at hearings and trials in an attempt to reconstruct the

details of unrecorded interrogations." *Commonwealth* v. *DiGiambattista*, supra, 442 Mass. 444 n.21. "Experiences in Minnesota, Alaska, and [many] other jurisdictions that now voluntarily record [custodial interrogations] demonstrate that the benefits of such practice greatly outweigh the costs, both real and perceived. [A survey of] 238 law enforcement agencies nationwide . . . [revealed] that '[a] contemporaneous electronic record of suspect interviews has proven to be an efficient and powerful law enforcement tool. Audio is good, video is better. . . . Recordings prevent disputes about officers' conduct, the treatment of suspects and statements they made.' " *In re Jerrell C.J.*, supra, 283 Wis. 2d 168–69. "As is all too often the case, the lack of any recording has resulted in the expenditure of significant judicial resources . . . all in an attempt to reconstruct what transpired during several hours of interrogation conducted [months or years beforehand] and to perform an analysis of the constitutional ramifications of that incomplete reconstruction." *Commonwealth* v. *DiGiambattista*, supra, 440. Indeed, "[t]ens of thousands of hours are spent each year during suppression hearings and trials relating to defense claims of coercion and false confessions." T. Sullivan, Center on Wrongful Convictions, Northwestern University School of Law, "Police Experiences with Recording Custodial Interrogations" (2004) p. 23 n.24, available at http://www.innocenceproject.org/docs/Police Experiences Recording Interrogations.pdf (last visited September 27, 2010). Fewer hearings and trials—a demonstrated consequence of the practice of recording confessions—translate into immediate fiscal savings for law enforcement agencies and courts alike.[14]

Approximately twenty-five years ago, the Alaska Supreme Court observed that "the [taking] of breath samples was previously impractical. Now that this procedure is technologically feasible, many states require it, either as a matter of due process or by resort to reasoning akin to a due process analysis. The use of audio and video tapes is even more commonplace in today's society. The police already make use of recording devices . . . when it is to their advantage to do so. Examples would be the routine video recording of suspect behavior in drunk driving cases and . . . the recording of formal confessions." *Stephan* v. *State*, supra, 711 P.2d 1161–62.

If the use of audio and video recording equipment was commonplace in Alaska in 1985, it is positively ubiquitous in Connecticut today. Indeed, there is hardly a teenager who does not have some type of electronic recording device available to him or her at virtually every moment of the day.[15] One need only look to the Internet to see that we have become a nation of amateur filmmakers, and this is made possible by the existence of inexpensive and easy-to-use video recording technology. The widespread use of such technology eviscerates

any assertion that a recording requirement is technologically or financially infeasible. See D. Donovan & J. Rhodes, "The Case for Recording Interrogations," Champion, December, 2002, p. 12 ("[the] 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"), available at http://www.nacdl.org/public.nsf/championarticles/l0210p12/$File/pg12.pdf (last visited September 27, 2010); T. Sullivan, Center on Wrongful Convictions, supra, p. 24 ("very few [law enforcement agencies that were interviewed in a particular study had] mentioned cost as a burden, and none suggested that cost warranted abandoning recordings"). Indeed, "[w]ith the proliferation of video cameras in [cell] phones and MP3 players, capturing an event on video has never been easier." R. Roy, "Videotape Your Next Traffic Stop: A Good Idea?" (July 13, 2010), available at http://autos.aol.com/article/cops-on-video/ (last visited September 27, 2010). "The tools are now pocket sized, creating a new wrinkle in how we're interacting with everything around us . . . ." Id. This is not to suggest that police interrogations should be recorded on cell phones or MP3 players, although they certainly could be in exigent circumstances. The point simply is that, in light of technological advances, the majority blinks at reality in concluding that the cost associated with a recording requirement is prohibitive.[16] On the contrary, insofar as some police departments may not already have adequate recording equipment, the costs associated with obtaining it would be very small.

The majority also contends that "[r]equiring the police to record all confessions and interrogations in places of detention *might* severely inhibit the police in pursuing, by constitutionally valid methods, confession evidence"; (emphasis added; internal quotation marks omitted); including the use of trickery and deceit when necessary to induce a confession.[17] This purely speculative argument, which the majority accepts uncritically solely on the basis of the state's unsubstantiated concerns,[18] also is unfounded. In fact, "[a]lthough police officers and prosecutors may fear that [judges and] jurors will condemn many of the psychological ploys caught on tape, this has not proven to be the case."[19] M. Thurlow, "Lights, Camera, Action: Video Cameras as Tools of Justice," 23 J. Marshall J. Computer & Info. L. 771, 800–801 (2005). Experience demonstrates, rather, that, "[s]hort of physical abuse or prolonged psychological coercion, jurors are likely to accept most police interrogation techniques as standard operating procedure." Id., 801 n.248.

Thus, "[d]espite initial reluctance on the part of law enforcement personnel, actual experience with recording of interrogations has confirmed that the benefits expected from the procedure have indeed materialized, and most of those benefits ultimately inure to the prose-

cution, not to the defendant." *Commonwealth* v. *DiGiambattista*, supra, 442 Mass. 443. Indeed, "studies reflect that, notwithstanding initial apprehension and skepticism, law enforcement agencies overwhelmingly endorse the practice of recording interrogations once they have gained experience with it." Id., 443–44 n.20. Thus, as one practitioner with particular expertise in the field has explained, "[o]f the hundreds of experienced detectives to whom we have spoken who have given custodial recording a fair try, we have yet to speak with one who wants to revert to non-recording. They enthusiastically endorse the practice. The words they use vary, but their reasons are so repetitious they seem rehearsed. Over and over we have been told that recordings protect officers from claims of misconduct, and practically eliminate motions to suppress based on alleged police use of overbearing, unlawful tactics; remove the need for testimony about what was said and done during interviews; allow officers to concentrate on the suspects' responses without the distraction of note taking; permit fellow officers to view interviews by remote hookup and [to] make suggestions to those conducting the interview; disclose previously overlooked clues and leads during later viewings; protect suspects who are innocent; make strong, often invincible cases against guilty suspects who confess or make guilty admissions by act or conduct; [and] increase guilty pleas . . . ." T. Sullivan, "The Time Has Come for Law Enforcement Recordings of Custodial Interviews, Start to Finish," 37 Golden Gate U. L. Rev. 175, 178–79 (2006).

Indeed, "[t]he law enforcement personnel who oppose recording custodial interviews are almost invariably those who have never attempted to do so. They speculate about potential, hypothetical problems, whereas those who have recorded for years do not express similar misgivings.[20] The [response] . . . from experienced officers in all parts of the United States [is] heavily weighted (almost unanimously) in support of recording custodial interrogations in felony investigations from the time the *Miranda* warnings are given until the suspect leaves the room." T. Sullivan, Center on Wrongful Convictions, supra, p. 18; see also B. Garrett, supra, 62 Stan. L. Rev. 1114 n.364 (citing to recent survey of 631 investigators in which 81 percent of investigators surveyed "believed that interrogations should be recorded"). In fact, experience indicates that "the majority of agencies that videotape found that they were able to get *more* incriminating information from suspects on tape than [that obtained during] traditional interrogations."[21] (Emphasis added; internal quotation marks omitted.) T. Sullivan, Center on Wrongful Convictions, supra, p. 22; see also B. Garrett, supra, 1115 ("most commentators view video [recording] as advantageous to law enforcement, capable of rendering confessions more convincing . . . assisting prosecutors in negotiating more acceptable plea bargains . . . and

helping in securing convictions" [internal quotation marks omitted]); M. Thurlow, supra, 23 J. Marshall J. Computer & Info. L. 811 ("[p]rosecutors have found that [video recording] interrogations and confessions results in more guilty pleas and more severe sentences"); M. Thurlow, supra, 810 (citing finding of study that electronic recording did not interfere with police officer's use of standard interrogation techniques); L. Oliver, note, "Mandatory Recording of Custodial Interrogations Nationwide: Recommending a New Model Code," 39 Suffolk U. L. Rev. 263, 263 (2005) ("[c]ontrary to stated concerns, in jurisdictions that routinely record interrogations, recording has not led to a decrease in confessions or productivity"). The experience of Connecticut police officers is no different. Among those who participated in this state's recent recording pilot program,[22] *100 percent* reported that the use of recording equipment did not interfere *in any way* with their questioning of suspects or the outcome of interrogations.[23]

Finally, even if there were some factual or experiential basis for the majority's assertion that a recording requirement might inhibit police with respect to the techniques they use in obtaining confessions, "[t]his is an unacceptable objection. . . . [L]aw enforcement personnel [are expected] to give complete and truthful testimony, including candid descriptions of what occurred during custodial interrogations. Surely [it is] not suggest[ed] [that police] should be free to modify or omit facts when testifying under oath about what happened during unrecorded interviews." T. Sullivan, Center on Wrongful Convictions, supra, pp. 22–23. Furthermore, to the extent that the state may be concerned that, in any particular case, the jury might not appreciate that the interrogation techniques used by the police were legitimate and permissible, the state presumably would be free to elicit testimony that those techniques are commonly employed by the police and to request an instruction advising the jury that the police properly may employ such techniques as long as those techniques do not render the confession involuntary.

The majority further contends that this court should refrain from adopting a recording requirement because of the purported difficulty in establishing the parameters of any such rule. Of course, not all states that mandate the recording of interrogations take precisely the same approach with respect to the requirements of the rule, including which portions of the interrogation procedure must be recorded[24] and the consequences when the police fail to comply with the rule.[25] In contrast to the majority, I would not describe these different approaches as representing a "panoply of options" illustrating "the complexity of this issue," nor would I conclude, as the majority does, that these relatively minor differences justify doing nothing. Certain approaches appear to be more consistent with the purposes of the

rule and therefore advance those purposes to a greater degree than others. Thus, it seems clear that the entire interrogation, including the advisement of rights, should be recorded, primarily to avoid any dispute about that issue. See, e.g., *State* v. *Cook*, supra, 179 N.J. 558 ("[A]dvocates of recording stress that the entire interrogation session must be recorded to achieve the positive benefits of recordings. . . . To create a detailed and complete record . . . recording must begin with the initial contact, including the *Miranda* warnings and any waiver of *Miranda* rights." [Citation omitted.]). It also is apparent that the failure of the police to comply with the recording requirement should result in the exclusion of the confession, with exceptions, of course, when equipment fails or the suspect refuses to be recorded. To conclude otherwise would enable the police to avoid the recording requirement without any real disincentive for doing so; in such circumstances, the state merely would have to establish that the confession was not involuntary, the same standard that presently applies to the admission of confessions.

Finally, the majority argues that the legislature, not this court, should decide whether to adopt a recording requirement in this state. Of course, the legislature has every right to make that decision, and, in fact, it has considered proposals for such a requirement since at least 1996.[26] Because the important issue presented by this case implicates the admissibility of evidence in our trial courts, this court, no less than the legislature, has the expertise and the authority to decide whether such a recording requirement should be adopted in the interests of justice. See, e.g., *State* v. *DeJesus*, 288 Conn. 418, 451, 953 A.2d 45 (2008) (noting that this court has "inherent authority to change and develop the law of evidence through case-by-case common-law adjudication"); id., 462 ("[b]ecause the rules of evidence facilitate the court's core judicial truth-seeking function, they necessarily are, and always have been, subject to the oversight and supervision of this court both under the common law and under article fifth, § 1, of the state constitution"). Indeed, in the absence of any express direction from the legislature, we have a constitutional responsibility to address and resolve the issue. On the merits of the question, the answer is crystal clear: there is no basis for rejecting a recording requirement, and there are overriding reasons to adopt one.[27]

III

Despite the majority's unwillingness to do so, it is time for this court to impose a recording requirement with respect to police interrogations of suspects that occur at a police station.[28] It is unacceptable, if not unconscionable, to continue to permit the police to choose when they will record an interrogation. As I have explained, a recording requirement would greatly enhance the ability of the fact finder to evaluate the

voluntariness and reliability of a confession, thereby guarding against the use of false and coerced confessions and promoting public trust and confidence in the justice system.[29] Thus, there is a great deal to be gained by a recording requirement, with no adverse consequences to law enforcement.

Nevertheless, in the present case, the failure of the police to record the defendant's interrogation was harmless; as the record makes clear, the evidence of the defendant's guilt was overwhelming and included the testimony of two eyewitnesses who observed the defendant commit the crimes of which he was convicted. Accordingly, I respectfully concur insofar as the majority affirms the judgment of conviction.

[1] "Appellate courts possess an inherent supervisory authority over the administration of justice. . . . The standards that [are] set under this supervisory authority are not satisfied by observance of those minimal historic safeguards for securing trial by reason which are summarized as due process of law . . . . Rather, the standards are flexible and are to be determined in the interests of justice. . . . [O]ur supervisory authority [however] is not a form of free-floating justice, untethered to legal principle. . . . [T]he integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of our supervisory powers. . . . [O]ur supervisory powers are invoked only in the rare circumstance where [the] traditional protections are inadequate to ensure the fair and just administration of the courts . . . ." (Internal quotation marks omitted.) *State* v. *Connor*, 292 Conn. 483, 518–19 n.23, 973 A.2d 627 (2009). Thus, "[s]upervisory powers are exercised to direct trial courts to adopt judicial procedures that will address matters that are of [the] utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Internal quotation marks omitted.) *State* v. *Ouellette*, 271 Conn. 740, 762 n.28, 859 A.2d 907 (2004).

[2] The statement that the defendant, Julian J. Lockhart, gave to the police in the present case occurred at a police station following the defendant's arrest, and the defendant claims only that custodial interrogations conducted at a police station must be recorded. I see no reason, however, why such a rule should not be extended to include all interrogations of suspects that the police conduct at a police station or some other similar location. In addition, when I refer to electronic recordings, I am referring to recordings that contain both audio and video components.

[3] As I explain more fully hereinafter, "there can be little doubt that recording confessions would dramatically reduce, if not eliminate, any possible likelihood of an erroneous conviction predicated on an involuntary [or false] confession. Indeed, videotaping confessions would greatly aid both the trial court and the jury in evaluating the voluntariness and, ultimately, the reliability of those confessions.

"Moreover . . . it is apparent that the risk of a false confession is appreciably greater in cases of juveniles and persons with mental disabilities. Because children and mentally disabled persons are especially vulnerable to police overreaching—and because it appears that they also are more likely than others to confess falsely even in the absence of improper government coercion—videotaping confessions by such persons would serve an especially salutary purpose." *State* v. *Lawrence*, 282 Conn. 141, 185, 920 A.2d 236 (2007) (*Palmer*, *J.*, concurring).

[4] In this state, the police record interrogations only when they choose to do so in the exercise of their discretion. Although some confessions are recorded, it appears that the vast majority are not.

[5] As the majority has explained, this court never has considered whether to adopt a recording requirement for police interrogations under our supervisory authority. Although the claim was raised by the defendant in *State* v. *James*, 237 Conn. 390, 678 A.2d 1338 (1996), we concluded that the claim had not been adequately briefed and, therefore, declined to address it. Id., 434–35 n.36.

[6] I agree with all aspects of the majority opinion other than the majority's treatment of the defendant's supervisory authority claim.

[7] I use the term "confession" for ease of reference only. Police interroga-

tion of suspects sometimes results in a confession, sometimes in an incriminating statement short of a full confession, and sometimes in an exculpatory statement. For purposes of this opinion, the recording requirement applies to all such statements obtained from a suspect by the police at the police station.

[8] I note that the majority takes me to task for relying on certain sources of information containing material that it characterizes as inadmissible hearsay. See footnote 13 of the majority opinion. This criticism is unfounded because this court routinely relies on such sources when the information is helpful to the court in ascertaining the content of law and policy. See, e.g., *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 201–202, 957 A.2d 407 (2008); see also *Moore* v. *Moore*, 173 Conn. 120, 122, 376 A.2d 1085 (1977) (legislative facts, that is, facts that "help determine the content of law and policy," can be "judicially noticed without affording the parties an opportunity to be heard"). Moreover, the majority does not point to any particular facts or information in this opinion with which it takes issue; indeed, the majority acknowledges that a recording requirement would be a "welcome" development. Footnote 13 of the majority opinion.

[9] Indeed, just a few months ago, the Chicago Tribune chronicled the story of two men who, according to recently obtained DNA evidence, falsely confessed to the murder of their children. "After [fourteen] hours of interrogation in a small, windowless room, Kevin Fox simply gave up. He knew he hadn't sexually assaulted or murdered his [three]-year-old daughter, but police had rejected his requests for a lawyer and told him they would arrange for inmates to rape him in jail, according to court records.

"The distraught father later testified that detectives also screamed at him, showed him a picture of his daughter, bound and gagged with duct tape, and told him that his wife was planning to divorce him, the records show.

"Fox finally agreed to a detective's hypothetical account of how his daughter, Riley, died in an accident, thinking investigators would realize that the phony details didn't match up with the evidence, his lawyer said. Instead, he remained in Will County jail for [eight] months, released only after DNA evidence excluded him as a suspect. In May, another man was charged with the crime.

"What could be a similar story is now unfolding in Lake County, where Jerry Hobbs III . . . is accused of murdering his [eight]-year-old daughter and her [nine]-year-old friend. Hobbs, who had a criminal record, has been in jail five years, in large part because of a confession that emerged after hours of high-pressure interrogation. Prosecutors planned to seek the death penalty in his . . . trial, even though his DNA did not match semen found on his daughter's body.

"Authorities recently matched the DNA with another man accused of rape and robbery in Arlington, [Virginia], offering Hobbs a chance at exoneration and once again raising the possibility that police coerced a suspect to falsely confess.

"Both cases raise a question: Why would [any person] confess to such horrific crimes—especially involving [his] own child or loved one—if [he] didn't commit them? Seemingly unfathomable, it happens far more often than most people believe, experts say." L. Black & S. Mills, "Why Do People Falsely Confess?," Chicago Trib., July 11, 2010, § 1, pp. 1, 12.

The experts that the authors interviewed for this article offer various explanations for false confessions. " 'We know that for certain kinds of people, particularly those with mental illness and mental deficiencies, but other people as well, the psychological intensity of an interrogation can prove absolutely as torturous as physical pain,' said Lawrence Marshall, a Stanford University law professor who co-founded Northwestern University's Center on Wrongful Convictions." Id., p. 12. "Dr. Robert Galatzer-Levy, a psychiatrist on the faculty of the University of Chicago and the Chicago Institute for Psychoanalysis, said interrogations are designed 'not simply to get information,' as the police often portray them. Instead, he said, interrogations are 'well-thought-through psychological manipulations to get a confession.'

"Police do that by first developing a rapport with suspects. They then give them their *Miranda* rights, though in such a way that suspects feel they are being uncooperative if they invoke them. Finally, he said, police confront a suspect, saying they know he committed the crime but offering a way out that acknowledges guilt but to something less heinous.

* * *

"'People all say, "I'd never confess. Not in a million years,"' said Galatzer-Levy. 'But it turns out that people who are vigorously interrogated will

confess—even if they're innocent. The terrified but rational person might give police a story just to end the interrogation, or because they think it might improve their situation.' " Id.

[10] See footnote 1 of this opinion.

[11] This apparently is no less true in Connecticut. As amicus curiae, the Connecticut Criminal Defense Lawyers Association, notes, since this court's decision in *State* v. *James*, 237 Conn. 390, 428–29, 678 A.2d 1338 (1996), in which we rejected the claim that, under the due process clause of the Connecticut constitution, confessions obtained through police interrogation are inadmissible unless they are recorded, courts regularly, if not invariably, have credited the testimony of the police over that of the defendant in evaluating the voluntariness of a confession. See, e.g., *State* v. *Lapointe*, 237 Conn. 694, 731–33, 678 A.2d 942, cert. denied, 519 U.S. 994, 117 S. Ct. 484, 136 L. Ed. 2d 378 (1996); *State* v. *McColl*, 74 Conn. App. 545, 565–66, 813 A.2d 107, cert. denied, 262 Conn. 953, 818 A.2d 782 (2003); *State* v. *Stevenson*, 70 Conn. App. 29, 53, 797 A.2d 1 (2002), rev'd on other grounds, 269 Conn. 563, 849 A.2d 626 (2004); *State* v. *Spyke*, 68 Conn. App. 97, 102–103, 792 A.2d 93, cert. denied, 261 Conn. 909, 804 A.2d 214 (2002); *State* v. *Banks*, 58 Conn. App. 603, 614, 755 A.2d 279, cert. denied, 254 Conn. 923, 761 A.2d 755 (2000); *State* v. *Rodriguez*, 56 Conn. App. 117, 119–22, 741 A.2d 326 (1999), cert. denied, 252 Conn. 926, 746 A.2d 791 (2000); *State* v. *Fernandez*, 52 Conn. App. 599, 611–14, 728 A.2d 1, cert. denied, 249 Conn. 913, 733 A.2d 229, cert. denied, 528 U.S. 939, 120 S. Ct. 348, 145 L. Ed. 2d 272 (1999); *State* v. *Rivera*, 52 Conn. App. 503, 509–10, 728 A.2d 518, cert. denied, 249 Conn. 906, 733 A.2d 226 (1999); *State* v. *DaEria*, 51 Conn. App. 149, 167, 721 A.2d 539 (1998). In citing the foregoing cases, I do not suggest that the trial court in each such case did not make the correct decision concerning the admissibility of the confession. Rather, I refer to them simply to underscore the fact that, without a recording requirement, it is exceedingly unlikely that a defendant will be able to establish that his or her confession is unreliable.

[12] See, e.g., *State* v. *Ouellette*, 295 Conn. 173, 191–92, 989 A.2d 1048 (2010) (when state attests to witness' cooperation at witness' sentencing hearing, sentencing court must "inquire into the nature of any plea agreement between the state and the witness, and any representations concerning that agreement made during the trials at which the witness testified"); *State* v. *Connor*, 292 Conn. 483, 518–19, 973 A.2d 627 (2009) (upon finding that mentally ill or incapacitated defendant in criminal case is competent to stand trial and to waive right to counsel at that trial, court must make additional determination that defendant is competent to conduct trial proceedings without counsel); *State* v. *Gore*, 288 Conn. 770, 778, 955 A.2d 1 (2008) (when criminal defendant seeks to waive right to trial by jury without written waiver, court must canvass defendant to ensure that waiver is knowing, intelligent and voluntary); *State* v. *Camacho*, 282 Conn. 328, 385 n.38, 924 A.2d 99 (new trial may be ordered due to deliberate prosecutorial impropriety when such impropriety, although not sufficiently serious to constitute due process violation, is so offensive to sound administration of justice that only new trial can effectively deter such misconduct in future), cert. denied, 552 U.S. 956, 128 S. Ct. 388, 169 L. Ed. 2d 273 (2007); *State* v. *Ledbetter*, supra, 275 Conn. 578–79 (requiring jury instruction concerning certain risks inherent in eyewitness identification procedures); *State* v. *Padua*, 273 Conn. 138, 178–79, 869 A.2d 192 (2005) (reviewing court first must address defendant's insufficiency of evidence claim, if claim is properly briefed and sufficient record exists, even if another meritorious claim would result in new trial, because, if former claim is successful, new trial would be unnecessary); *Duperry* v. *Solnit*, 261 Conn. 309, 329, 803 A.2d 287 (2002) (when criminal defendant pleads not guilty by reason of mental disease or defect and state substantially agrees with defendant's plea, court must canvass defendant to ensure that plea is voluntary and made with full awareness of consequences); *State* v. *O'Neil*, 261 Conn. 49, 74–75, 801 A.2d 730 (2002) (directing specific version of "Chip Smith" charge); *State* v. *Aponte*, 259 Conn. 512, 522, 790 A.2d 457 (2002) (prohibiting jury instruction that "one who uses a dangerous weapon on the vital part of another 'will be deemed to have intended' the probable result of that act and that from such a circumstance the intent to kill properly may be inferred"); *Roth* v. *Weston*, 259 Conn. 202, 232, 789 A.2d 431 (2002) (establishing burden of proof in nonparent visitation cases); *State* v. *Griffin*, 253 Conn. 195, 209–10, 749 A.2d 1192 (2000) (prohibiting use of " 'two-inference' " jury instruction); *State* v. *Delvalle*, 250 Conn. 466, 475–76, 736 A.2d 125 (1999) (prohibiting use of jury instruction that reasonable doubt is not doubt suggested by " 'ingenuity of counsel' "); *State* v. *Schiappa*, 248 Conn. 132, 168, 175, 728

A.2d 466 (prohibiting use of jury instruction that requirement of proof beyond reasonable doubt is rule designed to " 'protect the innocent and not the guilty' "), cert. denied, 528 U.S. 862, 120 S. Ct. 152, 145 L. Ed. 2d 129 (1999); *Ireland* v. *Ireland*, 246 Conn. 413, 431–33, 717 A.2d 676 (1998) (adopting factors to be considered in determining best interests of child in cases involving parental relocation); *State* v. *Santiago*, 245 Conn. 301, 340, 715 A.2d 1 (1998) (expanding scope of inquiry required for general allegations of juror misconduct when alleged misconduct results from racial bias of juror or jurors); *State* v. *Coleman*, 242 Conn. 523, 542, 700 A.2d 14 (1997) (upon defendant's request, sentencing court must articulate its reasons for imposing greater sentence after trial than that previously imposed under terms of withdrawn plea agreement); *State* v. *Gould*, 241 Conn. 1, 15, 695 A.2d 1022 (1997) (video-recorded deposition testimony must be played in open court, under supervision of trial judge, and in presence of parties and counsel, rather than in jury room); *State* v. *Brown*, 235 Conn. 502, 528, 668 A.2d 1288 (1995) (when trial judge is presented with allegations of juror misconduct, he or she must conduct preliminary inquiry into such allegations); *State* v. *Breton*, 235 Conn. 206, 250, 663 A.2d 1026 (1995) (special verdict form submitted to jury in capital sentencing case must include brief statement of jury's responsibility for determining whether defendant is sentenced to death); *State* v. *Jones*, 234 Conn. 324, 346–47, 662 A.2d 1199 (1995) (bifurcation of jury proceedings in certain death penalty cases); *Bennett* v. *Automobile Ins. Co. of Hartford*, 230 Conn. 795, 806, 646 A.2d 806 (1994) (in cases involving insurance disputes, insurer must raise certain issues of policy limitation by way of special defense); *State* v. *Patterson*, 230 Conn. 385, 400, 645 A.2d 535 (1994) (trial judge must be present in court to oversee voir dire in criminal trial); *State* v. *Holloway*, 209 Conn. 636, 645–46, 553 A.2d 166 (establishing procedure to be followed during jury selection when defendant claims that state has peremptorily excluded juror on basis of race), cert. denied, 490 U.S. 1071, 109 S. Ct. 2078, 104 L. Ed. 2d 643 (1989).

[13] "Proponents of recording correctly point out that other critical evidence is ordinarily preserved with far greater care—e.g., crime scenes are photographed or even . . . videotaped, not just described from the witness stand by the responding officers." *Commonwealth* v. *DiGiambattista*, supra, 442 Mass. 446 n.22.

[14] The Minnesota Supreme Court took judicial notice of the fact that, since its adoption of a recording rule in 1994 pursuant to its "supervisory authority to [en]sure the fair administration of justice"; *State* v. *Scales*, supra, 518 N.W.2d 592; "fewer cases [had] come before [it] in which a key issue [was] whether a suspect [had] waived his or her constitutional rights during interrogation. The apparent reduction in appellate cases challenging *Miranda* warnings and waivers suggest[ed] that *Scales* ha[d] succeeded in providing an objective record to answer the contentious disputes around those issues." *State* v. *Conger*, 652 N.W.2d 704, 707 (Minn. 2002).

[15] According to one study, slightly more than 82 percent of Americans owned cell phones in 2007; see T. Stevens, "82% of Americans Own Cell Phones" (November 14, 2007), available at http://www.switched.com/2007/11/14/82-of-americans-own-cell-phones/ (last visited September 27, 2010); many of which came equipped with some type of camera or video capability. "This is impressive growth from a merely [twenty]-something-year-old industry. Back in 1987, a little over [one] million Americans had cell phones. In 1997, the figure was 55 million. [In 2007, it was] 250 million and climbing. Also climbing is data use on cell phones—in 2006, 22 [million] people subscribed to some sort of high-speed mobile data plan—the kind that lets you use your [cell phone] to surf the [Internet], download music and videos, and send pictures. This is an increase of 600 [percent] over the previous year alone." Id. "Personal computers [similarly] have grown increasingly ubiquitous. Where[as] fewer than 20 [percent] of homes had them in 1992, nearly 60 [percent] did in 2002 . . . ." Christian Science Monitor, "Poverty Now Comes With a Color TV," available at http://articles.moneycentral.msn.com/Investing/Extra/PovertyNowComesWithAColorTV.aspx (last visited September 27, 2010). By 2008, approximately 80 percent of homes in the United States had a desktop or portable computer. S. Ingram, "About 80% of United States Homes Have a Computer" (January 15, 2009), available at http://www.gadgetell.com/tech/comment/about-80-of-united-states-homes-has-a-computer/ (last visited September 27, 2010). A 2004 survey conducted on behalf of SBC Communications, Inc., found that 40 percent of American families owned a digital video camera in 2004. AT&T, "National Survey Finds the Internet, Web-Enabled Devices Too Important To Leave at Home During Summer Vacation" (June 8, 2004), available at http://www.att.com/gen/press-

room?pid=4800&cdvn=news&newsarticleid=21193 (last visited September 27, 2010). In light of these recent trends in technology, that number no doubt has increased exponentially.

[16] As Cornelia Grumman aptly explained in her 2002 editorial for the Chicago Tribune, "[v]ideo cameras cost a few hundred bucks. Sony sells digital video cameras starting at $500 retail. The entire setup, including cassettes, could reach [$1000]. That's cheaper than the alternative financial burden, shelling out millions in civil liabilities for false confessions. DuPage County paid $3.5 million to exonerated [d]eath [r]ow inmates Rolando Cruz and Alejandro Hernandez; Cook County paid $38.5 million to the four released [d]eath [r]ow inmates known as the Ford Heights Four. Cook [County] taxpayers are destined to shell out millions more in legal fees and settlements for mishandling interrogations and confessions of four men wrongfully convicted of murdering medical student Lori Roscetti. Then there are the two young boys initially charged in the Ryan Harris case after their questionable confessions." C. Grumman, Editorial, "No More Excuses. Go to the Tape," Chicago Trib., April 21, 2002, § 2, p. 6; see also id. (debunking the "[d]ozens of excuses, from the picayune to the far-fetched, [that] have been thrown out by police departments terrified by the idea of pulling back the curtain to the interrogation room").

[17] Courts invariably have concluded that interrogation methods involving trickery and deception are permissible unless the technique is so extreme or inappropriate as to render the confession involuntary. See, e.g., *State* v. *Lapointe*, 237 Conn. 694, 731–33, 678 A.2d 942 (rejecting defendant's claim that confession should be suppressed because police falsely told him that his fingerprints had been found on handle of knife used to stab victim, and setting forth cases in which use by police of similarly deceptive tactics was held not to support finding that confession was involuntary), cert. denied, 519 U.S. 994, 117 S. Ct. 484, 136 L. Ed. 2d 378 (1996).

[18] At oral argument, the state remarked that judges and juries might look "askance" at certain lawful police interrogation techniques, and, consequently, the police might be reluctant to employ those techniques with the knowledge that they were being recorded. The state explained: "We want our law enforcement officers to ferret out crime, consistent with due process, to do things we might not do as lawyers and judges. . . . They might have to do things that we might look askance at in hindsight."

[19] In *Miranda* v. *Arizona*, supra, 384 U.S. 436, the United States Supreme Court explained what occurs when the police question a suspect in custody. The court first observed that determining what takes place during such questioning is not always easy, noting that "[t]he difficulty in depicting what transpires at such interrogations," which, as the court noted, frequently take place in a "police-dominated" setting, "stems from the fact that in this country they have largely taken place incommunicado." Id., 445. After noting that police use of "physical brutality" to obtain confessions, although the exception, had not been eliminated completely; id., 446–47; the court further explained "that the modern practice of in-custody interrogation is psychologically rather than physically oriented. . . . [C]oercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. . . . 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." (Citations omitted; internal quotation marks omitted.) Id., 448. Relying on "various police manuals and texts [that] document procedures employed with success in the past . . . and [that] recommend various other effective tactics"; id.; the court described the various psychological ploys that the police use to extract a confession, including, among other things, isolating the suspect in unfamiliar surroundings; id., 449–50; maintaining an "air of confidence in the suspect's guilt"; id., 450; "minimiz[ing] the moral seriousness of the offense"; id.; and questioning the suspect about the reasons why he committed the crime rather than asking him whether he did it. Id. "[P]atience and perseverance" are described as "the major qualities an interrogator should possess . . . ." Id.

The court quoted one authority as advising that, when the suspect is resistant to cooperating, the questioner "must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated." (Internal quotation marks omitted.) Id.,

451. The court also observed that trickery and outright deception are tools available to the interrogator when more traditional tactics prove to be unsuccessful in inducing a confession. See id., 453–54.

The court then summarized what it had discerned about the way interrogations are conducted: "From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must patiently maneuver himself or his quarry into a position from which the desired objective may be attained. When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.

"Even without employing brutality, the third degree or the specific stratagems described [previously], the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." (Internal quotation marks omitted.) Id., 455. "It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our [n]ation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from [a] defendant can truly be the product of his free choice." Id., 457–58.

[20] Another reason sometimes "advanced by police for their frequent failure to electronically record an entire interrogation is their claim that recordings tend to have a 'chilling effect' on a suspect's willingness to talk." *Stephan* v. *State*, supra, 711 P.2d 1162. This concern is unfounded. In every jurisdiction that has implemented a recording requirement, a suspect's refusal to talk while being recorded constitutes an exception to the requirement such that, in the event that a suspect is unwilling to speak to the police if his or her statements are recorded, the requirement does not apply.

[21] I note that, at the time *Miranda* was decided, critics of the court's holding expressed the concern that advising suspects of their rights, including the right to remain silent, prior to custodial interrogation would severely impede police investigations. See, e.g., M. Cloud et al., "Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects," 69 U. Chi. L. Rev. 495, 496 and n.5 (2002). That concern has proven to be unfounded. "Statistical analyses conducted by *Miranda*'s critics and supporters indicate that waivers are secured in an overwhelming majority of custodial interrogations . . . ." Id., 497; see also S. Chanenson, "Get the Facts, Jack! Empirical Research and the Changing Constitutional Landscape of Consent Searches," 71 Tenn. L. Rev. 399, 442 (2004) (noting that approximately 84 percent of suspects who have been advised of their rights in accordance with *Miranda* nevertheless waive their right to remain silent and comply with request for statement). Similarly, in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 229–32, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), the United States Supreme Court declined to adopt a rule requiring that suspects be informed of their right to withhold consent to an officer's request to conduct a warrantless consent search because, among other reasons, the court was concerned that requiring such a warning could jeopardize the continued viability of consent searches. These concerns also appear to have been misplaced, however, because empirical studies indicate that individuals give consent at roughly the same rate regardless of whether they are informed of their right to refuse consent. See, e.g., I. Lichtenberg, "*Miranda* in Ohio: The Effects of *Robinette* on the 'Voluntary' Waiver of Fourth Amendment Rights," 44 How. L.J. 349, 370, 373 (2001) (study demonstrated that between approximately 75 and 95 percent of motorists agree to police search of vehicle and that rates were very similar regardless of whether motorists were apprised of their right to refuse such consent, and, consequently, assertion of court in *Schneckloth* that such advisement would jeopardize continued viability of consent searches was "[c]learly . . . unfounded"); M. Phillips, note, "Effective Warnings Before Consent Searches: Practical, Necessary, and Desirable,"

45 Am. Crim. L. Rev. 1185, 1201 (2008) (citing study demonstrating that approximately 88 percent of motorists agree to consent search after being advised verbally and in writing of right to refuse consent).

[22] In 2008, the legislature enacted Public Acts 2008, No. 08-143, § 2 (P.A. 08-143), which, among other things, directed the advisory commission on wrongful convictions (advisory commission) "[to] monitor and evaluate the implementation of . . . [a] pilot program to electronically record the interrogations of arrested persons . . . ." Pursuant to P.A. 08-143, § 2, the advisory commission was "[to] report its findings and recommendations to the [judiciary] committee of the General Assembly" no later than January 7, 2009. In February, 2009, the advisory commission issued its report, finding that, as of January 29, 2009, ninety-nine custodial interrogations had been conducted in four pilot program cities or towns (Bridgeport, Meriden, Southington and Waterford) and that the vast majority of law enforcement personnel involved in the program reported a positive experience, although a small number were neutral on the program. See Advisory Commission on Wrongful Convictions, State of Connecticut, Report Pursuant to Public Act 08-143 (February, 2009) appendix B, available at http://www.jud.ct.gov/committees/wrongfulconviction/wrongfulconvictioncomm report.pdf (last visited September 27, 2010). Further, each and every one of the participating detectives or officers reported that the use of recording equipment did not interfere in any way with their questioning of suspects or the outcome of the interrogations. Id. These findings mirror the overwhelmingly favorable experiences of the law enforcement agencies around the country that previously have implemented—either voluntarily or pursuant to legislative or judicial mandate—a recording requirement.

[23] Despite the success of the pilot program, the state division of criminal justice opposes legislation mandating a recording requirement. In its view, each police department should be permitted to consider the results of the pilot program and to decide for itself whether to adopt a policy of recording interrogations. See, e.g., Testimony in Opposition of Senate Bill No. 230 (March 10, 2010), available at http://www.ct.gov/csao/cwp/view.asp?A=1802&Q=456774 (last visited September 27, 2010). Kevin Kane, the chief state's attorney, testifying on behalf of the state division of criminal justice, stated that, although "the recording of interrogations might be a desirable investigative practice that is to be encouraged, such recording is not a requirement under the constitutional guarantee of due process" and suggested, therefore, that such a practice should not be mandatory.

[24] "For example, Minnesota requires that all custodial interrogations, including any information about rights, waiver of those rights, and all questioning, be recorded electronically when feasible and whenever questioning occurs at a place of detention. *State* v. *Scales*, supra, [518 N.W.2d 592]. In contrast, New Hampshire does not require a recording of the administration of a defendant's *Miranda* rights or the defendant's subsequent waiver of those rights, but it does require a complete recording following the waiver of a defendant's *Miranda* rights. *State* v. *Barnett*, [147 N.H. 334, 338, 789 A.2d 629 (2001)]." *Clark* v. *State*, 374 Ark. 292, 304, 287 S.W.3d 567 (2008).

[25] In many jurisdictions, the failure to record a confession as required results either in the exclusion of the confession; see, e.g., Texas Code Crim. Proc. Ann. art. 38.22, § 3 (a) (Vernon 2005); *Stephan* v. *State*, supra, 711 P.2d 1163–64; *State* v. *Scales*, supra, 518 N.W.2d 592; or a rebuttable presumption of involuntariness, which the state can overcome by establishing, under the totality of the circumstances, that the confession or statements were voluntary and are reliable. See, e.g., D.C. Code Ann. § 5-116.03 (LexisNexis 2009); 725 Ill. Comp. Stat. Ann. § 5/103-2.1 (b) (1) (West 2006).

[26] Since 1996, the judiciary committee has considered a number of bills that would have required electronic recording of custodial interrogations; see, e.g., Senate Bill No. 230 (2010); Senate Bill No. 608 (2008); House Bill No. 1281 (2005); House Bill No. 6631 (1999); House Bill No. 5490 (1996); only one of which made it out of committee. The bill that made it out of committee, namely, House Bill No. 6631, was not acted on by the full legislature. Because these proposed bills never were considered by the full legislature, no inference can be drawn that the bills were rejected on their merits. See, e.g., *State* v. *Salamon*, 287 Conn. 509, 526 n.14, 949 A.2d 1092 (2008) (court ordinarily draws no inference that legislature perceived bill as lacking in merit when bill never was reported out of committee).

[27] Of course, as this court has recognized, "the rules of evidence . . . have never in this state been regarded as exclusively within the judicial domain. Over a period of many years, the legislature has enacted various statutes modifying the rules of evidence prevailing at common law . . . .

These changes have been accepted by our courts and have never been challenged as violating the principle of separation of powers." (Emphasis added.) *State* v. *James*, 211 Conn. 555, 560, 560 A.2d 426 (1989); accord *State* v. *DeJesus*, supra, 288 Conn. 462 n.31. Because the issue of whether to impose a recording requirement involves an important issue of public policy, and not merely an issue pertaining to the orderly dispatch of judicial business in our courts, there is no reason why the legislature would not be free to alter or even to abolish any such requirement that this court might adopt. See *State* v. *James*, supra, 560; see also *McDougall* v. *Schanz*, 461 Mich. 15, 30–31, 597 N.W.2d 148 (1999) (statutory rule of evidence violates state constitutional separation of powers principles only when "no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified," and, therefore, "[i]f a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration . . . the [court] rule should yield" [internal quotation marks omitted]). Consequently, there is no reason why this court should decline to consider the issue merely because the legislature also has an interest in it.

The majority nevertheless asserts that, because the legislature has not taken any action in response to the report recounting the success of the pilot program for the recording of interrogations; see footnote 22 of this opinion; it would constitute "a potential usurpation" of the legislature's prerogative in this area for this court to adopt a recording requirement. Footnote 13 of the majority opinion. On the contrary, this court and the legislature share authority in such matters, and there simply is no reason for this court to decline to exercise its reasoned judgment on the issue because, as I have explained, if the legislature ultimately were to conclude that a recording requirement is not warranted, it would be free to abolish any such requirement that this court has imposed.

[28] I note that an increasing number of courts have been persuaded to adopt a recording requirement. For example, in September, 2009, the Indiana Supreme Court expressly found that "the interests of justice and sound judicial administration will be served by the adoption of a new [r]ule of [e]vidence to require electronic audio-video recordings of customary custodial interrogation of suspects in felony cases as a prerequisite for the admission of evidence of any statements made during such interrogation." Indiana Supreme Court, Order No. 94S00-0909-MS-4 (September 15, 2009) (adopting rule 617 of the Indiana Rules of Evidence, which precludes admissibility of unrecorded confessions with certain exceptions), available at http://indianalawblog.com/documents/Evidence%20Rule%20617s.pdf (last visited September 27, 2010); see also, e.g., *Clark* v. *State*, 374 Ark. 292, 302, 304, 287 S.W.3d 567 (2008) (rejecting defendant's claim that recording of custodial interrogation was constitutionally mandated but concluding that "criminal-justice system will be better served if [the court's] supervisory authority is brought to bear on this issue"); *In re Jerrell C.J.*, supra, 283 Wis. 2d 173 (exercising supervisory authority to adopt rule requiring recording of custodial interrogation of juvenile suspects).

[29] The majority characterizes this concurrence as an "impassioned plea for the point that no one in the majority disagrees with, namely, that the recording of confessions is desirable as an aid in evaluating the reliability and trustworthiness of confessions [and would] increase the accuracy and efficiency of judicial proceedings . . . ." Footnote 13 of the majority opinion. The majority's expression of support for a recording requirement is difficult to square with the myriad of reasons it offers for rejecting such a requirement. Moreover, the majority misapprehends the purpose of this opinion in asserting that the point of it is to demonstrate the desirability of a recording requirement. My point, rather, is to demonstrate *why this court should adopt such a requirement*, a position with which the majority fundamentally disagrees.