THE JOURNAL OF Psychiatry & Law

The evolution of law enforcement attitudes to recording custodial interviews

BY THOMAS P. SULLIVAN, J.D.

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Year in and year out, in criminal trials throughout the country, trial court judges and juries listen to police and defendants testify to conflicting versions of what occurred when the defendants—then suspects—were brought to the stationhouse and questioned about their alleged participation in crimes.

Detectives conduct stationhouse interviews of persons arrested on suspicion of committing crimes in rooms set aside for that purpose. Most suspects are without funds to retain lawyers, and agree to proceed without legal representation. Later, after the suspects are indicted and have lawyers appointed, questions are presented about what occurred: Were the required Miranda warnings given at the outset? Were the suspects' requests for lawyers ignored? Were coercive tactics used? What was actually said and done behind those closed doors?

A movement is underway throughout the country to adopt a readily available and inexpensive method of putting an end to these disputes: making electronic recordings of the events that occur during the interrogations. Law enforcement agencies throughout the country have begun to install electronic equipment, audio, video or both, to produce recordings of the entire sessions.

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Recordings of custodial interrogations almost always yield an incontestable record of what was said and done. They are therefore becoming recognized as a major improvement, which leads to more accurate and just results, and cost savings to all concerned. As a result, an increasing number of state legislatures have been enacting laws, and state supreme courts have begun issuing rulings which either require or strongly urge that electronic recordings be made of custodial interviews in major felony investigations.

KEY WORDS: *Law enforcement, recording custodial interviews, interrogation.*

> "Life is not what one lived, but what one remembers and how one remembers it in order to recount it."
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> —GABRIEL GARCIA MARQUEZ, *Living to Tell the Tale*

> "The first notion to get rid of is that memory is primarily or literally reduplicative, or reproductive . . . remembering appears to be far more decisively an affair of construction rather than one of mere reproduction . . . condensation, elaboration and invention are common features of ordinary remembering . . . Remembering...is an imaginative reconstruction, or construction, built out of the relation of our attitude towards a whole active mass of organized past reactions or experiences. . . ."
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> —FREDERIC C. BARTLETT, *Remembering: A Study in Experimental and Social Psychology*

My interest in this subject was initially piqued by the strong opposition of the Illinois police, sheriff and state's attorney associations to proposed legislation requiring recordings to be made of custodial questioning of suspects in capital-eligible homicide cases. This proposal was made to the Illinois General Assembly in 2002, based on a recommendation of the Illinois Governor's Commission on Capital Punishment (I served as co-chair), formed by gubernatorial Executive Order, after the 13th defendant on Illinois' death row was released, including several cases in which the defendant had "confessed" during police questioning.

After strenuous negotiations during the 2003 session of the Illinois General Assembly, the Illinois mandatory electronic recording statute was passed and approved by the governor.[1] This was the first time that recording of custodial interviews was required by a state statute.[2]

Observing this contretemps, I became perplexed as to why the Illinois law enforcement community was so vigorously opposed to a reform that the Commission members thought was designed chiefly to benefit law enforcement? Why would police, sheriffs and prosecutors resist installation of recording facilities in stationhouse rooms, and thus diminish unwarranted claims that *Miranda* warnings were not given, that confessions had been obtained through unlawful tactics, or that the investigators were testifying falsely as to what took place? Why would prosecutors oppose obtaining exact evidence of what was said and done?

In 2003, my associates and I set out to learn the answers to these questions. We acted on our own, without outside funding (or interference).[3] Because there are thousands police and sheriff departments in the United States, we did not attempt to conduct a nationwide survey. Instead, we began with a list of ten departments we were told recorded custodial interviews, contacted them, asked whether they recorded custodial questioning of suspects, and if so, what their experiences had been. If they did not record, we asked their

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[1] 705 ILL. COMP. STAT. ANN. 405/5-401.5 and 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2009), effective July 2005. These statutes are limited to custodial interviews of homicide suspects. Then Illinois Senator Barack Obama was chief sponsor and a leader of the negotiations.

[2] The supreme courts of Alaska and Minnesota had earlier ruled that custodial interviews must be recorded under the laws of those states. *See* Stephan v. State, 711 P.2d 1156, 1162 (Alaska 1985); State v. Scales, 518 N.W.2d 587, 591 (Minn. 1994).

[3] The firm of Wicklander-Zulawski & Associates of Downers Grove, Illinois, which trains law enforcement officers, assisted us by asking their trainees to complete a survey form as to their recording practices.

reasons. We asked them all to identify other departments that recorded.

During the past years, we have spoken with over 800 officers employed in police and sheriff departments in every state that make it a regular practice to record custodial interviews of felony suspects. We have also talked to about 200 that do not customarily record custodial interrogations. Our interviews have yielded amazingly consistent responses:

- Those that make recordings a regular practice describe their experiences in glowing terms. For a variety of reasons, they enthusiastically support the practice.
- Those that do not record express fears of negative consequences arising from a litany of anticipated problems. The departments that have given recording a fair try have not experienced these problems, and do not consider them to be valid reasons for not recording.

Growing acceptance of electronic recordings

My colleagues and I have published the results of our inquiries in a number of law enforcement and legal journals. (A list of published material is available from the author.) Based on the first hand testimony of experienced detectives and their supervisors, we have recounted how and why electronic recordings, especially videotape, have proven a great boon to law enforcement and the defense of innocent suspects. We have also made personal appearances to explain our findings to police, prosecutors, defense lawyers and judges, and legislative bodies and conferences.

Slowly but inexorably, word has spread in the law enforcement community and among members of state legislatures about the positive results obtained from electronic recordings of custodial interrogations. The evolution of changed attitudes among law enforcement personnel, legislators and courts have been interesting to observe, and impressive. At this writing:

- Recording statutes have been enacted in 9 states[4] and the District of Columbia.
- Recent rulings of 3 state supreme courts[5] have resulted in statewide recordings.
- Thus, 14 states now require that electronic recordings be made of custodial interviews of felony suspects in various categories of felony investigations.
- In addition we have identified over 580 police and sheriff departments in the other 36 states that have voluntarily adopted the practice of using electronic devices to record custodial interrogations.
- A committee of the National Conference of Commissioners on Uniform State Laws (ULC) has drafted a model state statute on electronic recording of custodial interviews. If approved by the Conference, the statute will be presented to all state legislatures with recommendations for enactment.

The Appendix contains a list of the statutes, court rulings and the departments that voluntarily record all or a majority of their custodial interviews.

Evolution of law enforcement attitudes

As discussed above, when we first ventured into this area, a majority of police and prosecutors opposed the requirement that complete custodial interviews must be electronically recorded. The reasons varied; most were grounded upon fears that having a recording activated at the outset would impair the ability of detectives to establish "rapport" with suspects before they began pointed questioning about the crimes; that

[4] Illinois, Maine, Maryland, Montana, New Mexico, Nebraska, North Carolina, Oregon, Wisconsin.

[5] Iowa, Massachusetts and New Jersey. *See* State v. Hajtic, 724 N.W.2d 449 (Iowa 2006); Commonwealth v. DiGiambattista, 813 N.E.2d 516, 533-34 (Mass. 2004); N.J. Ct. R. 3.17 (2005) (West 2009). As noted, the supreme courts of Alaska and Minnesota ordered statewide custodial recordings years before enactment of the Illinois statute. *See supra* text and cases cited accompanying note 2.

suspects would refuse to speak if recorded; that various kinds of equipment malfunctions might occur during questioning; and cost. In short, mandatory recordings would require large expenditures and somehow create risks that guilty criminals would go free.[6]

Since we began our efforts in 2003, we have observed a dramatic evolution of attitudes among police, sheriffs and prosecutors. From initial resistance to the notion of recording complete custodial interviews of criminal suspects, there is now a widespread acknowledgement by law enforcement personnel that electronic recordings, *Miranda* to the end, is a wise practice, although—as discussed below—in some quarters opposition persists to legislation that provides sanctions for unexcused failures to record.

An apt example is contained in the affidavits filed by experienced Massachusetts detectives when the Supreme Judicial Court of Massachusetts was asked to adopt a statewide rule requiring recording. The affidavits contained dire predictions of restraints that would be put on detectives, and resulting doom for law enforcement, if beginning-to-end custodial recordings were mandated. The need for initial "rapport building" sessions was described as crucial to obtaining cooperation from guilty suspects. Mechanical problems and unacceptably high costs were predicted, as well as lost opportunities to question suspects who declined to speak if recorded. In its ruling, the Court declined to require recordings, but jury instructions (described below) were mandated when officers testified to unrecorded interviews.[7]

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[6] Similar doom and gloom predictions were voiced by law enforcement when the United States Supreme Court ruled in the *Miranda* case that arrested suspects could not be questioned about crimes until after they were told of their rights to remain silent and to legal representation. As it has turned out, most "street crimes" suspects are indigent, and voluntarily waive these rights.

[7] Commonwealth v. DiGiambattista, 813 N.E.2d 516, 533-34 (Mass. 2004).

This led state law enforcement organizations to direct statewide recordings of "all custodial interrogations of suspects and interrogations of suspects conducted in places of detention."[8] To their credit, several District Attorneys and the General Counsel for the Massachusetts Chiefs of Police Association conceded that their fears were unjustified, and that recordings have worked to the benefit of police and prosecutors.[9]

We all tend to resent suggestions for change, especially when presented by those who are outsiders. A pattern often emerges when new ideas of how to do business are presented to those who have been become accustomed to their own tried and true methods: vigorous opposition gives way to cautious consideration, followed by grudging agreement to give it a try, and, if warranted by experience, by eventual acceptance and endorsement. It reflects credit on the many law enforcement officers and prosecutors throughout the country who, following initial opposition, now acknowledge the benefits of custodial recordings.

Experiences of those involved

Detectives

For purposes of the following discussion, the term "law enforcement personnel" includes state and local police, sheriffs and prosecutors.

Officers who conduct custodial interviews of arrested suspects in stationhouse facilities must begin with the *Miranda* warnings—that the suspect has the right to remain silent, that what is said may be used against him/her, that

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[8] Mass. Dist. Att'ys Ass'n, Report of the Justice Initiative 14 (Sept. 2006).

[9] *See* Noah Schaffer, *Tale of the Tape: Recorded Interrogations Level the Playing Field, Despite Initial Fears*, MASS. LAW. WKLY., Apr. 2, 2007, *available at* http://www.nacdl.org/sl_docs.nsf/freeform/Mandatory:028?OpenDocument.

he/she has a right to a lawyer, and if he/she cannot afford to pay a lawyer, one will be appointed.[10] If these rights are waived by the suspects, as usually occurs when the suspects are indigent (as most are), the interview proceeds, with one or two detectives present with the suspect, in a room that contains a table, chairs, sometimes with an audio recording machine on the table, and nothing else.

Detectives' conduct toward suspects

As noted, almost all interviews of felony suspects that occur in police and sheriff stations are conducted by detectives, who often receive special training in methods of conducting interrogations so as to elicit admissions or confessions from suspects. They are taught that the primary purpose of custodial interviews is to obtain confessions or damaging admissions from guilty parties, or verify that the suspects were not involved in the crimes.

In our many telephonic interviews with detectives, and in the forms they have completed in response to our survey document, it is common to learn that, when a department first adopts the practice of recording custodial interviews, detectives are given special training as to how to conduct themselves. They report that, knowing interviews are being recorded, they alter their conduct, making adjustments to the language, physical movements and methods they previously used. With or without training, we typically hear from detectives that they become "more professional" in the way they conduct themselves. They avoid threatening gestures, "getting in the faces" of suspects, "street talk," profanity and shouting. When appropriate, they keep distances from suspects, and adopt congenial attitudes and conversational tones of voice.

Do these restraints make a difference? We have often been told that the use of toned down approaches and respectful attitudes produce reductions in negative, resistant reactions,

[10] *See* Miranda v. Arizona, 384 U.S. 436 (1966).

and greater cooperation. Use of professional conduct results in less confrontational, more productive, interviews.

Detectives' abilities to concentrate during interviews

When recordings are made, detectives are relieved from either having to take detailed notes of what they and the suspects say and do, or trying to memorize the encounters and conversations. They avoid the distractions to both themselves and the suspects when they take notes—a normal consequence of unrecorded interviews, many of which last for several hours or more. This affords detectives enhanced abilities to concentrate on suspects and what they are saying, sustain eye contact, observe body language, and evaluate the logic and credibility of responses. With enhanced opportunities to observe suspects and their behavior, detectives are better able to evaluate and judge deception and candor.

Observations of suspects when they are alone

We have learned of instances when, during breaks taken during interviews, suspects were alone in the room but were unaware that recording devices were operating and inadvertently provided incriminating evidence. For example, in one case the suspect took a concealed cell phone from his pocket, placed a call to a friend and explained how he was deliberately falsifying his responses. Another suspect tried to wipe away blood from his shoe, which was found to have come from the victim.

Detectives' later observations and self-evaluation

When reviewing past recordings (especially videos), detectives have been able to observe clues in suspects' statements or behavior which were overlooked. Detectives also watch their past interviews, either alone or with their peers, in order to evaluate their tactics, and learn how to improve their interviewing techniques and skills.

State eavesdropping statutes

A word of caution: the so-called eavesdropping statutes of each state must be consulted to determine whether recordings may be made without notifying suspects. In most states, officers are not required to tell suspects that recordings are being made. Many detectives nevertheless inform suspects, or

place the equipment in the suspects' view. We have been repeatedly told that in most instances suspects do not object to being recorded. When objections are lodged, detectives turn off the recording devices and proceed with the interviews, usually making handwritten notes.

Detectives' supervisors

There are several ways in which supervisors make use of recordings. Supervisors often watch videotaped interviews in real time from nearby locations, especially in high crime areas having multiple custodial interrogations involving serious crimes, giving them the ability to make suggestions to the interviewing detectives during breaks. They later review recordings to look for clues and areas of potential inquiry overlooked by detectives during the interviews. They are able to assess the methods used by the detectives, their skills and need for training or correction, as well as bases for awards and promotions.

Training of detective recruits

Recordings of past interviews are used for training of officers who have applied for promotion to detective. Recordings illustrate excellent techniques and successful interrogations, and also illustrate how not to conduct interviews.

Suspects

The laws of 38 of the 50 states do not require detectives to inform suspects that the interviews will be recorded, or obtain their consent to recording. However, some suspects, especially those who are repeat offenders, realize that recordings will be made unless they object. And many detectives tell suspects that recordings will be made although they are not required by state law to do so.

The statutes and court cases that require custodial recordings provide that when suspects object to having interviews recorded, detectives should proceed without recording. However, when suspects resist, detectives may try to persuade suspects that recordings will work to their benefit by providing an incontestable record of what is said and done during the interviews.

Most detectives tell us that few suspects object to having their interviews recorded, that suspects often assume their interviews will be recorded, and express a preference to be recorded in order to protect against detectives distorting or misstating what was said and done, or omitting exculpatory information.

It has been repeatedly reported to us that, once questioning begins, suspects pay no attention to the recording devices, and fix their concentration solely on their responses to the detectives.

Prosecutors

Although most of our conversations have been with detectives, we have also spoken about recordings with prosecutors from throughout the country. As with police and sheriff officers, prosecutors often have initial negative reactions, but when exposed to the results they have become strong advocates of custodial recordings. For example, here is what the State's Attorney of a fairly high crime county in Illinois said when speaking at a public hearing conducted by a committee established by the state General Assembly,[11] concerning the Illinois mandatory recording statute (limited to custodial homicide investigations):

> I thought that [videotaping of suspects in homicide cases] would result in, and it has resulted in hours and hours of videotape. But I think the courts have done a good job in redacting it and paring it down. [It has] been a healthy addition I think . . . you know the old saying, a picture says a thousand words . . . a video is a thousand words. . . . I probably am even more agreeable to the expansion of it in other cases [beyond homicides] . . . last year I had a case where it was a fervent denial, why do you people have me here . . . why do you keep doing this? And then right before your eyes, I did it. It's a case study in psyche. I was believing that lie right up until that moment.[12]

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[11] Capital Punishment Reform Study Comm., 20 ILL. COMP. STAT. ANN. 3929/2 (West 2003). I serve as chair of this committee.

[12] State's Att'y of Peoria County, IL, transcript of public hearing at 67, Capital Punishment Reform Study Comm., Springfield, IL (Mar. 2, 2009).

Another Illinois prosecutor from a high crime county told the committee:

> [Recording] has been so overwhelmingly successful that most of the police departments in my jurisdiction now videotape in almost every felony investigation. The police, law enforcement realize that it's better for them. It protects them from false accusations of physical or mental coercion. It's a better end product . . . many issues I think were the foundation for some of the exoneration cases are now gone . . .

An experienced prosecutor from San Diego, California described the value of recordings by using a theatrical analogy:

> Consider . . . the immeasurable value of giving the eventual jury the opportunity to hear, if not see, the defendant before he has thought to temper his attitude, clean up his language . . . and otherwise soften his commonly offensive physical appearance, and you begin to appreciate the tremendous value of a taped interview. . . . Not even Richard Gere [as the defense lawyer in the motion picture Chicago] will be able to tap dance his way around the truth that an audio or videotape recording so obviously displays.[14]

NDAA position paper

The National District Attorney's Association (NDAA) recently adopted a position paper on recording, which begins with a summary of the benefits from the standpoint of law enforcement:

> The benefits of electronic recording of statements obtained by law enforcement officers through custodial interviews have been widely recognized by various commentators and courts. Electronic recording provides an objective record of what happened during the interview. By preserving the actual words as they were spoken during police/suspect encounters, electronic recording can reveal the content and context of the statements, demonstrate police compliance with Miranda, assist courts in determining the voluntariness of a

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[13] State's Att'y of St. Clair County, IL, transcript of public hearing at 76, Capital Punishment Reform Study Comm., Springfield, IL (Nov. 13, 2006).

[14] *See* Thomas P. Sullivan, *available at Police Experiences* (2004), http://www.jenner.com/policestudy, at 12-13.

statement, and disproving unfounded defense claims that coercion, duress, entrapment or other types of misconduct occurred.[15]

However, despite acknowledging the multiple benefits of recorded interviews, the NDAA asserts that it will "vigorously oppose in any forum or before any legislature the expansion of the exclusionary rule or other sanctions to punish victims and the public when the police do not record a statement the state can prove to a judge and jury is voluntary." Particular concern is expressed about "some sort of 'exclusionary rule' that would bar prosecutors from presenting reliable but unrecorded statements from defendants." The NDAA asserts, "Rather than pursuing this 'stick' approach to encouraging electronic record, a far better idea would be to use a 'carrot' or incentive." The NDAA "would encourage recording by the 'carrot' of giving a presumption of admissibility to any recorded custodial interview in a pre-trial or post-trial proceeding." With the certification of authenticity, which presumably could be in writing, the recording would be admissible at pre-trial and

15 Memorandum of the Nat'l Dist. Attorney's Ass'n (NDAA), *Expanding Electronic Recording of Statements by Law Enforcement: An Incentive-Based Approach*, Executive Summary, i (undated). The memorandum goes on to summarize in detail what we have been saying for the past several years about how recordings work to the advantage of law enforcement: "eliminating 'swearing contests' about who said what to whom"; "permits the interrogating officer to focus on questioning the suspect rather than writing notes"; "also eliminates the need for a detailed report from officer about precisely what was said during the interview. The officer is also free to go back to review the recording to see whether any details about the investigation might have been overlooked. Later hearings about the interrogation are also simplified, as the recording usually eliminates debate about what happened during the recorded interview." Defendants and the courts also benefit from recorded statements. "Because the officer is aware that an objective record is being made of the interview, there is a clear disincentive for the officer to use improper questioning techniques. Also, in highly unusual cases where a mentally disabled suspect has "confessed" to a crime that he did not commit, the recording will provide an opportunity for a reviewing court to identify the problem. More generally, "recorded statements provide clear evidence to judges and juries of what was said during an interview—including the demeanor and physical appearance of those involved."

post-trial hearings without the need for "foundation" testimony by an officer who was present when the recording was made,[16] "unless the defendant can make a substantial preliminary showing that there is some reason to disbelieve the officer."[17]

For those not familiar with the procedures used in most state court criminal proceedings, a brief explanation is in order. When state prosecutors intend to offer evidence at trial about what a defendant said or did when questioned at the stationhouse about his/her involvement in a crime, the defendant may move to suppress (prohibit) use of that evidence at the trial. If the motion sets forth facts indicating that the officers violated the defendant's fundamental rights during the interrogation (for example, failed to give the *Miranda* warnings; ignored the defendant's request for a lawyer; used improper or coercive tactics to elicit the defendant's statements), the trial judge is required to hold a pretrial hearing—called a suppression hearing—to determine whether the interrogation was conducted properly, or whether the evidence was elicited in violation of the defendants' rights. If the trial judge determines that the interrogation was held in violation of defendant's fundamental rights, he is to enter an order prohibiting use of the defendant's statements at the trial.

The unspoken net result of the NDAA proposal is that recordings of custodial interviews are permitted but not required. The NDAA model statute contains no sanctions for failure to record custodial interviews.

There are multiple serious flaws in the NDAA's proposal:

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[16] Foundation: the proponent of recordings is required to introduce evidence, before recordings are heard or seen by the court and/or jury, demonstrating how the recordings were made, and that they are accurate and complete.

[17] *See* NDAA Memorandum, *supra* note 15, at i.

First, we no longer endorse the sanction most feared by the NDAA. We have withdrawn our prior proposal that the unexcused failure to record should result in a rebuttable presumption that the testimony is inadmissible.[18] Instead, our suggestion for legislation is that when the prosecution offers officers' testimony (whether in pre- or post-trial hearings, or at trial) about custodial interviews that should have been but were not recorded, the trial judge must give an instruction to the jury explaining: (1) that the law required the interviews to be recorded, (2) the officers failed to comply with the requirement, and (3) why electronic recordings are more reliable than testimony as to what occurred.[19]

Second, as the NDAA acknowledges, one of the most significant results of recordings is that they are, in virtually every instance, an incontestable record of what occurred. As a result, pre-trial motions to suppress recorded statements are reduced to near zero, and the incidence of pleas of guilty soars, which eliminates the risk of post-trial hearings. Thus, the proposed "carrot" of saving police time in coming to court pre- and post-trial to provide foundation testimony for recordings is virtually meaningless, because in most cases there will be no hearings, therefore police testimony will not be required.

The NDAA does not allude to the fact that the real saving of detectives' time results from their *not having to testify at all,* either at pre-and post-trial hearings, and trials, as to what occurred during fully recorded interviews.[20] On the other hand,

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[18] *See* the model statute published in Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins,* 95 J. CRIM. L. & CRIMINOLOGY 1127 (2005) at 1136.

[19] *See* Thomas P. Sullivan, & Andrew D. Vail, *The Consequences of Law Enforcement Officials' Failure to Record*, 99 J. CRIM. L. & CRIMINOLOGY, app. A at 225-26.

[20] The NDAA recognizes that "recording of interviews of a suspect provides an objective record of what has happened during police interrogations, eliminating 'swearing contests' about who said what to whom." *See* NDAA Memorandum, *supra* note 15, at 1.

when disputes arise as to what occurred during closed-door interviews that were not recorded, at least one of the detectives present must testify at trial.[21] Because more than one detective is often present during the custodial questionings, several detectives are often called to testify about what took place behind the interview room doors. It is not uncommon to have this testimony consume many hours or even days.

Third, compared to this potential expenditure of courtroom time at trials, the inducement of saving time to provide foundational testimony at pre- and post-trial hearings is insignificant. If it is necessary to play recordings in pre- or post-trial hearings, the prosecution and defense normally stipulate to the admission of the recordings into evidence, as parties routinely do with depositions in civil cases. Second, if a stipulation is not reached, it usually takes but a brief time to lay the necessary foundation.

Fourth, the NDAA proposal is not a practical way to induce compliance with custodial recording by the numerous police and sheriff departments in the states that currently do not record their custodial interviews. If the inducement to record is the almost totally valueless carrot suggested by the NDAA, it is likely that a voluntary, department-by-department solution will not achieve nationwide compliance within the foreseeable future. Statutory requirements on custodial recordings should contain sanctions adequate to motivate compliance. The NDAA proposal is merely a statement of desire, lacking any consequences in the event of noncompliance. This provides no inducements to recalcitrant law enforcement officers to change the way they have historically conducted custodial interrogations.

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[21] The NDAA proposal does not apply the "carrot" at *trial*, because under Confrontation Clauses of the 6th and 14th Amendments one of the officers who made the recordings must personally appear in court at trial and lay the necessary evidentiary foundation for admission of the recordings into evidence. *See* Barber v. Page, 390 U.S. 719, 721 (1968); Crawford v. Washington, 541 U.S. 36, 42 (2004).

Fifth, the NDAA's fears about sanctions for unexcused failures to record are unfounded. The statutes and court rulings contain exceptions to the recording requirements contained in the state statutes, and our model code, as well as broad savings clauses designed to prevent exclusion from evidence of verifiably true confessions and admissions. For example, the Illinois statute contains many exceptions which excuse recording, and a saving provision that allows the trial judge to admit the detectives' testimony if "electronic recording was not feasible," or the prosecution establishes "by a preponderance of the evidence that the statement was voluntarily given and is reliable based on the totality of the circumstances."[22]

Sixth, as noted, the NDAA's model statute provides that at pretrial suppression hearings, the foundation for electronic recordings of custodial interrogations may be supplied by an officer's sworn affidavit, instead of the personal testimony of the officer. This proposal raises serious questions in state court pretrial suppression hearings, regarding defendants' rights under state and federal constitutional "confrontation clauses" and "due process clauses": must one of the officers who was present when the interviews were conducted appear personally in court to lay the foundation for admission of the recording into evidence. This procedure would assure that the defendants' lawyers would have an opportunity to confront and cross examine the officers; affidavits and certificates of authenticity cannot be cross examined.

Analysis of this question requires consideration of the United States Constitution's Confrontation Clause and Due Process Clause, as well as the confrontation and due process clauses contained in state constitutions.

The Confrontation Clause

The Sixth Amendment to the Federal Constitution provides, "In all criminal prosecutions, the accused shall enjoy the

[22] 720 ILL. COMP. STAT. ANN. 5/103-2.1(e)-(f) (West 2003). For the exceptions contained in various statutes and court rulings, see Thomas P. Sullivan *Recording Federal Custodial Interviews*, 45 AM. CRIM. L. REV. 1297 (2008), at 1327-28 n.116.

right . . . to be confronted with the witnesses against him." It has long been settled that this right is applicable, through the 14th Amendment Due Process Clause, in state court criminal trials.[23] While the United States Supreme Court has ruled in a number of cases cited by the NDAA that the Federal Confrontation Clause does not apply in state court criminal cases during certain kinds of pretrial hearings (for example, probable cause hearings; witness competency hearings),[24] the Court has not yet ruled on whether or not the Clause applies in sate court suppression hearings.[25] When that question is presented, the Supreme Court may well rule that, under the Federal Confrontation Clause, the foundation for custodial recordings may not be supplied by affidavits, and that the officers who made the recordings are required to appear in court and testify under oath that the recordings are genuine, complete and unaltered.

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[23] Pointer v. Texas, 380 U.S. 400, 403, 406 (1965).

[24] Gerstein v. Pugh, 420 U.S. 103, 120-22 (1975) (holding that the right to cross examine witnesses is not required at a probable cause hearing); Kentucky v. Stincer, 482 U.S. 730, 744-45 (1987) (holding that the exclusion of the defendant from a witness competency hearing did not violate the defendant's rights under the confrontation clause of the sixth amendment nor the due process clause of the fourteenth amendment).

[25] Dicta in several Supreme Court cases, some cited in the NDAA Memorandum, may be read to suggest that the Federal Confrontation Clause is inapplicable in state court suppression hearings (*see,* for example, Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004); United States v. Raddatz, 447 U.S. 667, 679 (1980); Gerstein v. Pugh, 420 U.S. 103, 120-23 (1975); United States v. Matlock, 415 U.S. 163, 174-77 (1974)), but there is no holding to that effect. To the contrary, see United States v. Green, 670 F.2d 1148, 1154 (D.C. Cir. 1981) ("It is clear that a defendant has some right to cross-examine Government witnesses at a suppression hearing. . . . The adversary procedure of suppression hearings is well established in the federal courts.... Indeed, the suppression hearing is a critical stage of the prosecution which affects substantial rights of an accused person; the outcome of the hearing—the suppression *vel non* of evidence—may often determine the eventual outcome of conviction or acquittal."); United States v. Garcia, No. 07-2173, 2009 WL 868019, at *3 (10th Cir. Apr. 2, 2009) ("There is no binding precedent from the Supreme Court or this court concerning whether [Crawford v. Washington, 541 U.S. 36 (2004)] applies to pretrial suppression hearings.").

The Due Process Clause

A similar but distinct issue is presented, also not yet ruled upon by the Supreme Court, as to the applicability in state court pretrial suppression hearings of the Fourteenth Amendment Due Process Clause: "nor shall any State deprive any person of life, liberty, or property, without due process of law." Referring to the rights of state court criminal defendants guaranteed by that provision, the Supreme Court stated many years ago, "a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure."[26]

Under the NDAA's proposal, a recording of the defendant's custodial interrogation is admissible at a suppression hearing without testimony of the recording officers. Experience has taught that cross examination by defense counsel of the officers who conducted the custodial interrogations and made the recordings is usually the single most important part of pretrial motions to suppress. Without cross examination of the recording officers, the contents of the recordings are far less likely to be suppressed as evidence at trial, with the result that trial jurors will hear and/or see the recordings. Hence, there are sound reasons to anticipate that, when the issue is presented, the Supreme Court will hold that use of affidavits or certificates in place of personal foundational testimony violates the Fourteenth Amendment Due Process Clause.

State constitutional confrontation and due process clauses

The constitutions of almost all fifty states contain provisions that track the language or effect of the Federal Confrontation Clause[27] and many also contain provisions tracking the Federal Due Process Clause.[28] The U.S. Supreme Court has held that the state courts are entitled to construe their own constitutional provisions in ways that are more restrictive

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[26] Kentucky v. Stincer, 482 U.S. 730 at 744-45 (1987).

[27] 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1397, at 155 n.1 (James H. Chadbourn ed., rev. ed. 1974).

[28] 16B Am. Jur. 2d *Constitutional Law* at § 899 (West 2009).

than the interpretations given by the Supreme Court to similar provisions of the Federal Constitution.[29] Accordingly, even if the U. S. Supreme Court were to hold that the Federal Confrontation and Due Process clauses are inapplicable in state court suppression hearings, each state supreme court may determine that the confrontation clause or due process clause of their state constitution requires officers' personal foundation testimony, and may not be supplanted by affidavits. The Supreme Court of New Mexico, for example, held that the state Constitution confrontation clause (Art. II, § 14) is applicable at pretrial suppression hearings.[30]

To summarize, the NDAA's proposal may be held to be an inadequate substitute in state court suppression hearings for the personal testimony of the officers who recorded the defendants' statements, either by the Supreme Court of the United States, and/or by state supreme courts. The carrot may well turn out to be inedible.

There remains the question of what sanction should be provided in the event recordings are not made as required, and there is no statutory exception that excuses the making of recordings, discussed below.

It is unfortunate that the officials of the NDAA are opposed to a mandatory recording requirement, even one that contains relatively straight forward, accurate jury instructions. Unless the NDAA endorses the movement toward mandatory

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[29] Pineyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980).

[30] Mascarenas v. State, 458 P.2d 789, 792 (N.M. 1969). Several other state supreme courts have ruled that the *Federal* Confrontation Clause does not apply during pretrial suppression hearings, but did not discuss whether the *state* constitutional provision was applicable. *See* State v. Woinarowicz, 720 N.W.2d 635, 641 (N.D. 2006); Fair v. State, 664 S.E.2d 227, 237 (Ga. 2008); State v. Rivera, 192 P.3d 1213, 1216 n.1, 1218 (N.M. 2008). The New Mexico Supreme Court did not address the state Confrontation Clause, or discuss its holding in the *Mascarenas* case, because defendant "did not preserve any separate argument under the New Mexico Constitution."

recording statutes, with sanctions for not following the statutory requirements, it is likely that events will pass them by.[31] The NDAA's best interests will be served by bringing to bear the considerable influence and experience of its members in a positive way, through the support of mandatory recording legislation which provides consequences for noncompliance that a majority of its members believe fair, reasonable, and workable, rather than proposing an unrealistic, precatory alternative.

Defense lawyers

There is an interesting phenomenon at play here. Until 2003, the only states that required recording of custodial interviews were Alaska and Minnesota, owing to the rulings of their Supreme Courts referred to above. Before the Illinois statute was enacted in 2003, the chief advocates of custodial recordings were members of the criminal defense bar; most members of the law enforcement community were opposed. In 2004 my first article was published, listing 238 police and sheriff departments that recorded voluntarily, in addition to those in Alaska and Minnesota.[32] The article contained explanations of the tremendous benefits of recorded confessions and admissions, as distinguished from testimony of police based on notes and typed reports, as well as supportive quotations from detectives throughout the country. The detectives and their supervisors explained that, when interviews containing voluntary confessions or damaging admissions were recorded from the *Miranda* warnings to the end, motions to suppress became a thing of the past: trials became an exercise in futility, and defendants usually pled guilty. Widespread publicity about false confessions cannot eclipse the fact that most confessions are given voluntarily, without coercion or trickery on the part of detectives.

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[31] The NDAA leadership is aware that the National Conference of Commissioners on Uniform State Laws (ULC) is now drafting a uniform state statute mandating the recording of custodial interviews.

[32] *See Police Experiences* http://www.jenner.com/policestudy, *supra* note 14, at 1.

As a result, the defense bar has been forced to come to grips with a reform they initially urged upon reluctant opponents, but that more often than not favors the prosecution. They quickly realized the simple truth—most custodial interviews that contain confessions or admissions lead to the convictions and incarcerations of their clients. The recordings foreclose the option of going to trial, or of contesting what was said and done in the interrogation room, and arguing to judges and juries that the proof is insufficient to prove guilt beyond reasonable doubt.

By and large, defense lawyers have come to accept these consequences of the reform they advocated. The benefits they sought are attained: Innocent suspects' conduct is recorded for all to hear and/or see. Errant detectives either change their ways, or are weeded out as their improper tactics are disclosed. There is no opportunity for detectives to falsely claim they gave the *Miranda* warnings in a timely fashion, or to embellish or misstate what suspects said or did.

The playing field is leveled. Suspects' are given fair treatment, and their rights are fully upheld. Those who oppose wrongful convictions may not consistently oppose rightful convictions.

Trial and reviewing court judges

It should come as no surprise that the trial judges we've contacted are enthusiastic supporters of recorded interrogations. They are saved immeasurable amounts of time at pretrial hearings and at trials, listening to contradictory testimony, often consuming several days, about what was said and done during unrecorded interviews, and evaluating the credibility of witnesses. As noted above, recordings drastically reduce the number of pretrial motions to suppress and trials, resulting in a great savings of court time.

When questions are presented to the judge as to whether the results of an audio or videotape are admissible, the tape is played, usually by stipulation and without objection.

Regarding the value of recording custodial interviews, a federal District Court Judge in Michigan said:

Affording the court the benefit of watching or listening to a videotaped or audio taped statement is invaluable; indeed a tape-recorded interrogation allows the Court to more accurately assess whether a statement was given knowingly, voluntarily, and intelligently. . . . One legal commentator has noted that "some of the most detailed assessments of voluntariness have come in cases of recorded interrogations, which permit judges to parse implicit promises and threats made to obtain an admission. . . . Taping is thus the only means of eliminating 'swearing contests' about what went on in the interrogation room.[33]

A letter I received a few years ago from an Oklahoma federal trial court judge points out the remarkable disparity between civil and criminal cases, when it comes to making an incontestable record of evidence:

I came to the bench three years ago after 29 years in civil practice. I find it ironic that if the cost of repairing a car is at stake in a civil case, the defendant's account of that matter (i. e., his deposition) is meticulously recorded, but agencies with ample opportunity and resources to do so fail to record statements where liberty or perhaps even life is at stake.[34]

Judges of reviewing courts concur. The Supreme Court of Massachusetts summarized the reasons:

As is all too often the case, the lack of any recording has resulted in the expenditure of significant judicial resources (by three courts), all in an attempt to reconstruct what transpired during several hours of interrogation conducted in 1998 and to perform an analysis of the constitutional ramifications of that incomplete reconstruction.[35]

The Supreme Court of Iowa recently said:

We are aided in our de novo review of this case by a complete videotape and audiotape of the *Miranda* proceedings and the inter-

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[33] United States v. Lewis, 355 F. Supp. 2d 870, 873 (citations omitted).

[34] Letter to the author (Dec. 30, 2004) (on file with author).

[35] *DiGiambattista*, 813 N.E. 2d at 529.

rogation that followed. . . . This case illustrates the value of electronic recording, particularly videotaping, of custodial interrogations.[36]

Jurors

Now that recording has become so commonplace in our daily lives, the lack of recordings of custodial interviews is beginning to have effects on jury verdicts. Several years ago, the federal prosecutor in Arizona lost several jury cases in which his cases were based in part on testimony of FBI agents about unrecorded interrogations with the defendants. After the verdicts were returned, the jurors made a point of commenting on the lack of recordings. As a result, the prosecutor requested permission from the Department of Justice (DOJ) to conduct a one year pilot program in Arizona, during which federal investigative agencies would be required to record questioning of suspects during investigations of major felonies. Before DOJ officials concluded their review of the proposal, the Arizona prosecutor was removed from office (together with a number of other United States Attorneys whose removals were questioned as being based on political considerations).[37]

Similar jurors' reactions have been reported by investigators and prosecutors. An article published in the FBI Law Enforcement Bulletin, co-authored by an FBI agent, discusses jurors' difficulty in believing that some kind of electronic recording was not available to the investigating officer.[38] In a

[36] State v. Hajtic, 724 N.W.2d 449, 454 (Iowa 2006). Following this ruling, the state Attorney General wrote, "Although the court stated that it is 'encouraging' the practice of electronic recording, the attorney general's office believes that the *Hajtic* decision should be interpreted as essentially requiring this practice." Tom Miller, *Cautions Regarding Custodial Issues*, *39*(1) IOWA POLICE J. 15.

[37] The circumstances of this intrepid prosecutor's futile efforts to obtain approval of the pilot program are recounted in Sullivan, *supra* note 22, at 1300-03.

[38] B. P. Boetig et al., *Revealing Incommunicado: Electronic Recording of Police Interrogations*, FBI LAW ENFORCEMENT BULLETIN, Dec. 2006, at 1-8: "Many law enforcement agencies and courts have recognized and accepted electronic recording as a just and viable manner to collect and preserve confession evidence, the single most valuable tool in securing a conviction in a criminal case."

case tried in the federal court in Philadelphia, a jury acquitted a defendant prosecuted for statements made during a lengthy interview with FBI agents. After the verdict, a juror said, "My advice to the FBI would be to tape their interviews."[39]

In this age of widespread use of electronic devices, these same sentiments will undoubtedly be a factor in future cases, when unrecorded statements taken in police facilities are the basic evidence in criminal cases. People selected as jurors know that recordings will capture precisely what was said and done, whereas testimony—even when aided by handwritten notes or typed reports—is incapable of replicating events with accuracy and completeness.

Public perception of law enforcement

There can be no doubt that making full recordings of what goes on behind the doors of stationhouse interview rooms is a boon to public perception of law enforcement. The degree of cynicism about law enforcement seems to be on the rise, which is in some sense ironic, because so often the cause is the misconduct of officers outside the stationhouse which happens to be captured on video or audio tape. But when detectives and prosecutors conduct themselves properly—which in my opinion is almost always the case—and recordings prove that they acted properly, there is a resulting increase in public confidence in our police and our system of criminal justice.

Sanctions for nonrecorded custodial interviews

As explained above, my views on this matter have evolved. My first model recording statute adopted the approach taken by the Illinois General Assembly, containing a rebuttable

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[39] Caruso, D. B. (2005, February 6). *FBI's policy against taping interviews. Pittsburgh Post-Gazette*, p. 1.

presumption that testimony about interviews that should have been recorded but were not, and none of the statutory exceptions applied, is presumed inadmissible, unless the judge deems the evidence reliable and otherwise admissible under the rules of evidence.[40] Since that model was originally published in 2005, we have obtained a greater understanding of the attraction that recordings have to law enforcement officers once they have adopted the practice. But we have also learned of problems potentially faced by detectives when conducting custodial interviews, and observed first hand the vigor of law enforcement resistance to a presumption of inadmissibility, with the threat of losing confessions and admissions of suspects they believe guilty.

In order to accommodate the legitimate concerns of law enforcement personnel, we have altered our position as to consequences of failures to record when required by statute or court decision. The revised model code, published in a recent edition of the *Journal of Criminal Law and Criminology*, provides that testimony about unrecorded sessions is admissible, but unexcused failures to record are dealt with through the following jury instructions:

> The law of this state required that the interview of the defendant by law enforcement officers which took place on [insert date] at [insert place] was to be electronically recorded, from beginning to end. The purpose of this requirement is to ensure that you jurors will have before you a complete, unaltered, and precise record of the circumstances under which the interview was conducted, and what was said and done by each of the persons present.
>
> In this case, the interviewing law enforcement agents failed to comply with that law. They did not make an electronic recording of the interview of the defendant. No justification for their failure to do so has been presented to the court. Instead of an electronic recording, you have been presented with testimony as to what took place, based upon the recollections of law enforcement personnel [and the defendant].
>
> Accordingly, I must give you the following special instructions about your consideration of the evidence concerning that interview.

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[40] *See* Sullivan, *supra* note 18, at 1142.

Because the interview was not electronically recorded as required by our law, you have not been provided the most reliable evidence as to what was said and done by the participants. You cannot hear the exact words used by the participants, or the tone or inflection of their voices.

Accordingly, as you go about determining what occurred during the interview, you should give special attention to whether you are satisfied that what was said and done has been accurately reported by the participants, including testimony as to statements attributed by law enforcement witnesses to the defendant.[41]

These instructions are similar to those required by the New Jersey Supreme Court.[42]

Unrecorded false confessions

Recent in-depth research into adjudicated cases has disclosed that many of the persons who have been exonerated through DNA have confessed, thus establishing without doubt that people occasionally confess to committing crimes they did not commit.[43] The authors of one of the studies have stated:

Without equivocation, our first and most essential recommendation is to lift the veil of secrecy from the interrogation process in favor of the principle of transparency. Specifically, all custodial interviews and interrogations of felony suspects should be videotaped in their entirety and with an equal focus on suspects and interrogator.[44]

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[41] *See* Sullivan, *supra* note 19, app. A at 226.

[42] N.J. CT. R. 3:17(d), (e) (West 2009). *See also* the statutes enacted in Nebraska, NEB. REV. STAT. § 29-4505 (West 2009); North Carolina, N.C. GEN. STAT. § 15A-211 (West 2009); Oregon, Act of Jan. 24, 2009, ch. 488, 2009 Or. Laws ch. 488 (West 2009); Wisconsin, WIS. STAT. ANN. § 972.115(d)(2) (West 2009).

[43] Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, Law & Hum. Behav. (forthcoming Jan. 2010); Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. (forthcoming 2009), *available at* http://bepress.com/uva/wps/uva_publiclaw/art136.

[44] *See* Kassin et al., *supra* note 43 (manuscript at 23, on file with author, *emphasis omitted).*

The author of another study had this to say:

> Absent a recording of the interrogation, courts were faced with a swearing contest between the defendant alleging coercion and law enforcement denying coercion. . . . A complete interrogation record enables meaningful reliability review and could help to prevent the problem of confession contamination through disclosure of key facts.[45]

An inevitable result of not recording custodial interviews is that detectives, unintentionally or deliberately, will fail to give an accurate, fair description of what occurred. There is also a risk that detectives may inadvertently induce confessions that are untrue. One veteran detective has candidly admitted that he obtained a confession from an innocent suspect, and explained how it occurred: After the suspect/confessor's innocence was proven by an ironclad alibi, the detective reviewed the videotape of the interrogation, and saw how he and his fellow detectives had "unintentionally fed [the suspect] details" of the crime that the suspect "was able to parrot back" to the detectives.[46]

Costs incurred and saved

There are costs incurred and costs saved when custodial interviews are recorded. Analysis shows that savings far outstrip the expenditures, although many of the savings result from money, time and effort not expended, which do not appear on the books.

Here are the major costs:

- Purchasing, installing and maintaining audio and/or video equipment.

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[45] *See* Garrett, *supra* note 43, at 53-54

[46] *See* Jim Trainum, *I Took A False Confession—So Don't Tell Me It Doesn't Happen!*, THE CALIFORNIA MAJORITY REPORT, Sept. 20, 2007, *availa ble at* http://www.camajorityreport.com/index.php?module=articles &func=display&aid=2306.

- Preparing/constructing interview rooms, perhaps with soundproof walls.
- Training officers in the use of equipment and techniques of conducting recorded interviews.
- Officers and prosecutors reading transcripts and/or viewing tape recordings.
- Preparing typewritten transcriptions of recordings.
- Preparing recordings for use/display in courtrooms.
- Storing cassettes, compact discs and related digital equipment.

Here are the major savings:

- Police preparing for, attending and testifying regarding unrecorded interviews at pretrial motions to suppress, trials, and post-conviction hearings.
- Prosecutors preparing police to testify regarding unrecorded interviews, and examining them at pretrial motions to suppress, trials and post-conviction hearings.
- Prosecutors preparing to cross examine, and cross examining, defense witnesses regarding unrecorded interviews.
- Avoiding the risk of judges and jurors accepting defense versions of what was said and/or done during unrecorded interviews, leading to suppression of unrecorded confessions and admissions, and/or acquittals.
- Avoiding state court appellate proceedings, and federal habeas corpus proceedings, related to the foregoing.
- Avoiding risk of civil suits for damages for alleged improper conduct of detectives during interviews, including cost of preparing a defense and trials, and risk of verdicts for money damages.
- Saving premiums for law enforcement liability insurance.

Federal investigative agencies, still in the stone age

It is sad but true that federal agencies resist using in their interviews of suspects the very same recording devices they employ on a daily basis for other investigative purposes.[47]

[47] For example, undercover agents and "cooperating individuals" routinely use recorded personal and telephone conversations and videotapes to depict suspects' conduct.

While agents from these fine organizations, both civil and criminal, routinely use the most modern electronic equipment in many aspects of their work they continue to use primitive methods of "recording" what was said and done during custodial interviews, clinging stubbornly to outmoded "scribble and type" practices.[48] Almost all federal agents, both civil and criminal investigative agents, make handwritten notes of their interviews, and later prepare typewritten summaries. These summaries are, of course, incapable of accurately and completely capturing precisely what was said and done during the interviews; they are a far cry from what would be shown by electronic recordings of the events they purport to portray.

Federal agencies' adherence to outdated methods of chronicling interviews is of particular significance because, under federal law, it is a crime to make a material misstatement of fact when being interviewed by a federal agent.[49] The context and accuracy of interviews with federal agents thus becomes of critical importance—precisely what was asked and answered? The only records usually made are the agents' typed reports. Persons interviewed are thus at a serious risk that the reports may inaccurately summarize what they were asked and answered, which is no small matter because of the deference often given to federal agents by courts and juries.

As observed above, now President Barack Obama, as a Senator in the Illinois General Assembly, was a leading proponent of the bill to require electronic recordings of custodial interviews of homicide suspects, and Illinois became the first state to enact a mandatory recording statute. As President, he has power by issuance of an Executive

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[48] The bases for their opposition, summarized by three Department of Justice investigatory agencies, have been found baseless by experienced detectives throughout the country. *See* Sullivan, *supra* note 22, at 1315-35.

[49] 18 U.S.C.A. § 1001(a)(2) (West 2009).

Order[50] to require federal investigative agencies to make electronic recordings of all custodial interviews.

When federal agencies come to adopt electronic recording—which they inevitably are destined to do—whether voluntarily, or as a result of a statutory mandate or Executive Order—it will be a major step forward for the accuracy and integrity of federal law enforcement.

Conclusion

Let us hope that this evolutionary process will continue, so that within a few years all police and sheriff departments in the United States, including federal investigative agencies, will routinely record their custodial interviews of arrested suspects.

[50] 10 U.S.C.A. § 836 (West 2009).

APPENDIX

Departments that currently record a majority of custodial innterrogations[1]

Alabama
Mobile CS
Mobile PD
Prichard PD
Alaska
All departments - SupremeCourt ruling[2]
Arizona
Casa Grande PD
Chandler PD
Coconino CS
El Mirage PD
Flagstaff PD
Gila CS
Gilbert PD
Glendale PD
Marana PD
Maricopa CS
Mesa PD
Oro Valley PD
Payson PD
Peoria PD
Phoenix PD
Pima CS
Pinal CS
Prescott PD
Scottsdale PD
Sierra Vista PD
Somerton PD
South Tucson PD
Surprise PD
Tempe PD
Tucson PD
Yavapai CS
Yuma CS
Yuma PD
Arkansas[3]
AR State PD
Eureka Springs PD
Fayetteville FD
Fayetteville PD
14th Judicial District Drug Task Force
Washington CS
Van Buren PD
California
Alameda CS
Arcadia PD
Auburn PD
Bishop PD
Butte CS
Carlsbad PD
Contra Costa CS
El Cajon PD
El Dorado CS
Escondido PD
Folsom PD
Grass Valley PD
Hayward PD
LaMesa PD
Livermore PD
Oceanside PD
Orange CO Fire Authority
Orange CS
Placer CS
Pleasanton PD
Rocklin PD
Roseville PD
Sacramento CS
Sacramento PD
San Bernardino CS
San Diego PD
San Francisco PD
San Joaquin CS
San Jose PD
San Leandro PD
San Luis PD
Santa Clara CS
Santa Clara PD
Santa Cruz PD
Stockton PD
Sunnyvale DPS
Union City PD
Vallejo PD
Ventura CS
West Sacramento PD
Woodland PD
Yolo CS
Colorado
Arvada PD
Aurora PD
Boulder PD
Brighton PD
Broomfield PD
Colorado Springs PD
Commerce City PD
Cortez PD
Denver PD
El Paso CS
Ft. Collins PD
Lakewood PD
Larimer CS
Logan CS
Loveland PD
Montezuma CS
Sterling PD
Thornton PD
Connecticut[4]
Bloomfield PD
Cheshire PD
CT State PD Internal Affairs Unit
Delaware
DE State PD
New Castle City PD
New Castle County PD
District of Columbia
All departments - statute[5]
Florida
Broward CS
Cape Coral PD
Collier CS
Coral Springs PD

KEY: *PD stands for Police Department, DPS for Department of Public Safety, and CS for County Sheriff.*

Daytona Beach PD
Ft. Lauderdale PD
Ft. Myers PD
Hallandale Beach PD
Hialeah PD
Hollywood PD
Key West PD
Kissimmee PD
Lee CS
Manatee CS
Margate PD
Miami PD
Monroe CS
Mount Dora PD
Orange CS
Osceola CS
Palatka PD
Pembroke Pines PD
Pinellas CS
Port Orange PD
Sanibel PD
St. Petersburg PD
Georgia
Atlanta PD
Centerville PD
Cobb County PD
DeKalb County PD
Fulton County PD
Gwinnett County PD
Houston CS
Macon PD
Perry PD
Savannah-Chatham PD
Warner Robins PD
Hawaii
Honolulu PD
Idaho
Ada CS
Blaine CS
Boise City PD
Boise CS
Bonneville CS
Caldwell PD
Canyon CS
Cassia CS
Coeur d' Alene PD
Garden City PD
Gooding CS
Gooding PD
Hailey PD
ID Dept Fish & Games
ID Falls PD
ID State PD
Jerome CS
Jerome PD
Ketchum PD
Lincoln CS
Meridian PD
Nampa PD
Pocatello PD
Post Falls PD
Twin Falls PD
Illinois
All departments -
homicides - statute[6]
Other felonies -
Bloomington PD
Cahokia PD
Carlinville PD
Caseyville PD
Dixon PD
DuPage CS
East St. Louis PD
Fairview Heights PD
Galena PD
IL Gaming Board
Kankakee CS
Kankakee PD
Lincoln PD
Macon CS
Naperville PD
O'Fallon PD
Rockton PD
Springfield PD
St. Clair CS
Swansea PD
Troy PD
Winnebago CS
Indiana[7]
Albion PD
Allen CS
Atlanta PD
Auburn PD
Carmel PD
Cicero PD
Clark CS
Clarksville PD
Columbia City PD
Dyer PD
Elkhart CS
Elkhart PD
Elwood PD
Fishers PD
Floyd CS
Fort Wayne PD
Greensburg PD
Hamilton CS
Hancock CS
Hartford PD
IN State PD
Jeffersonville PD
Johnson CS
Kendallville PD
LaGrange CS
Lowell PD
Montpelier PD
Nappanee PD
Noble CS
Noblesville PD
Pendleton PD
Schererville PD
Sheridan PD
Shipshewana PD
Steuben CS
Tipton PD
Wells CS
Westfield PD
Iowa[8]
Altoona PD
Ames PD
Ankeny PD
Arnolds Park PD
Benton CS
Bettendorf PD
Cedar Rapids PD
Clarion PD
Colfax PD
Council Bluffs PD
Davenport PD
Des Moines PD
Fayette CS
Fayette County PD
Iowa City PD
Iowa DPS
Johnson CS
Kossuth CS
Linn CS
Marion PD
Marshalltown PD
Mason City PD

Merrill PD
Muscatine PD
Nevada PD
Parkersburg PD
Polk CS
Pottawattamie CS
Sioux City PD
Storm Lake PD
Vinton PD
Washington CS
Waterloo PD
Waverly PD
West Burlington PD
Woodbury CS
Kansas
Kansas Univ. DPS
Liberal PD
Ottawa PD
Sedgwick CS
Sedgwick PD
Topeka PD
Wichita PD
Kentucky
Elizabethtown PD
Hardin CS
Jeffersontown PD
Louisville Metro PD
Louisville PD
Oldham CS
St. Matthews PD
Louisiana
Lafayette City PD
Lake Charles PD
Oak Grove PD
Plaquemines Parish CS
St. Tammany Parish CS
Maine
All departments - statute[9]
Maryland
All departments - statute[10]
Massachusetts[11]
Barnstable PD
Boston PD
Bourne PD
Brewster PD
Cambridge
Chatham PD
Dalton PD
Dennis PD
Easton PD
Edgartown PD
Fall River PD
MA State PD
North Central Correctional Inst.
Oak Bluffs PD
Orleans PD
Pittsfield PD
Revere Fire Dept.
Somerset PD
Tewksbury PD
Troro PD
West Tisbury PD
Yarmouth PD
Michigan
Auburn Hills PD
Benzie CS
Big Rapids DPS
Bloomfield Hills DPS
Cass County Drug Enforcement Team
Cass County CS
Charlevoix CS
Detroit PD (homicides)
Emmet CS
Farmington DPS
Gerrish Township PD
Gladwin PD
Huntington Woods DPS
Isabella CS
Kent CS
Kentwood PD
Lake CS
Ludington PD
Manistee CS
Mason CS
Mecosta CS
MI State PD
Milford PD
Mt. Pleasant PD
Niles City PD
Novi PD
Oak Park DPS
Onaway PD
Paw Paw PD
Redford Township PD
Scottville PD
Troy PD
Waterford PD
West Branch PD
Wyoming PD
Minnesota
All departments - Supreme Court ruling[12]
Mississippi
Biloxi PD
Cleveland PD
Gulfport PD
Harrison CS
Jackson CS
Missouri
Clay CS
Lake Area Narcotics Enforcement Group
Lincoln CS
Platte CS
St. Louis County Major Case Squad
St. Louis County PD
Montana
All departments - statute[xii]
Nebraska
All departments - statute[14]
Nevada
Boulder City PD
Carlin PD
Douglas CS
Elko CS
Elko PD
Henderson PD
Lander CS
Las Vegas Metro PD
Nevada DPS
North Las Vegas PD
Reno PD
Sparks PD
Washoe CS
Wells PD
Yerington PD
New Hampshire[15]
Carroll CS
Concord PD
Conway PD

Enfield PD
Keene PD
Laconia PD
Lebanon PD
Nashua PD
NH State PD
Plymouth PD
Portsmouth PD
Swanzey PD
New Jersey
All departments - Supreme Court Rule[16]
New Mexico
All departments - statute[17]
New York
Binghamton PD
Broome CS
Cayuga Heights PD
Delaware CS
Deposit PD
Dryden PD
Endicott PD
Greece PD
Glenville PD
Irondequoit PD
NY State PD - Ithaca
NY State PD - Oneonta
NY State PD - Sidney
Rotterdam PD
Schenectady PD
Tompkins CS
Vestal PD
North Carolina
All departments - homicides - statute[18]
Other felonies -
Burlington PD
Concord PD
Wilmington PD
North Dakota
Bismarck PD
Burleigh CS
Fargo PD
Grand Forks CS
Grand Forks PD
Valley City PD
Ohio
Akron PD
Brown CS
Cincinnati PD
Columbus PD
Dawson CS
Dublin PD
Franklin PD
Garfield Heights PD
Grandview Heights PD
Grove City PD
Hartford PD
Hudson PD
Millersburg PD
OH Board of Pharmacy
OH State Univ. PD
Ontario PD
Reynoldsburg PD
Springboro PD
Upper Arlington PD
Wapakoneta PD
Warren CS
Westerville PD
Westlake PD
Worthington PD
Oklahoma
Moore PD
Norman PD
Oklahoma CS
Tecumseh PD
Oregon
All departments - statute (effective Jan. 1, 2010)[19]
Bend PD
Clackamas CS
Coburg PD
Corvallis PD
Douglas CS
Eugene PD
Lincoln City PD
Medford PD
Ontario PD
OR State PD, Springfield
Portland PD
Roseburg PD
Salem PD
Toledo PD
Warrenton PD
Yamhill CS
Pennsylvania
Bethlehem PD
Tredyffrin Township PD
Whitehall PD
Rhode Island
RI Dept of Public Safety (capital offenses)
Woonsocket PD
South Carolina
Aiken CS
Aiken DPS
N. Augusta DPS
Savannah River Site Law Enf.
South Dakota
Aberdeen PD
Brookings PD
Brown CS
Clay CS
Lincoln CS
Minnehaha CS
Mitchell PD
Rapid City PD
Sioux Falls PD
SD State Div. of Criminal Investigations
SD State Univ. PD
Vermillion PD
Tennessee
Blount CS
Bradley CS
Brentwood PD
Chattanooga PD
Cleveland PD
Goodlettsville PD
Hamilton CS
Hendersonville PD
Loudon CS
Montgomery CS
Murfreesboro PD
Nashville PD
Texas[20]
Abilene PD
Andrews PD
Arlington PD
Austin PD
Burleson PD

Cedar Park PD
Cleburne PD
Collin CS
Corpus Christi PD
Dallas PD
Duncanville PD
Florence PD
Frisco PD
Georgetown PD
Granger PD
Harris CS
Houston PD
Hutto PD
Irving PD
Johnson CS
Kileen PD
Knox CSO
Leander PD
Midland PD
Parker CS
Plano PD
Randall CS
Richardson PD
Round Rock PD
San Antonio PD
San Jacinto CS
Southlake DPS
Sugar Land PD
Taylor PD
Travis CS
Webster PD
Williamson CS

Utah[21]
Layton PD
Salt Lake City PD
Salt Lake CS
Utah CS

Vermont
Burlington PD
Norwich PD
Rutland PD

Virginia
Alexandria PD
Chesterfield County PD
Clarke CS
Fairfax PD
Loudoun CS
Norfolk PD
Richmond PD
Stafford CS
Virginia Beach PD

Washington
Adams CS
Arlington PD
Bellevue PD
Bothell PD
Buckley PD
Columbia CS
Ellesburg PD
Federal Way PD
Kennewick PD
Kent City PD
King CS
Kirkland PD
Kittitas CS
Klickitat CS
Lewis CS
Marysville PD
Mercer Island PD
Mount Vernon PD
Pierce CS
Prosser PD
Snohomish CS
Thurston CS
Univ. WA PD
Walla Walla PD
WA State Patrol
Yakima CS

West Virginia
Charles Town PD
Morgantown CS
Morgantown PD
Wheeling PD

Wisconsin
All departments - statute[22]

Wyoming
Cheyenne PD
Cody PD
Gillette City PD
Laramie CS
Laramie PD
Lovell PD
Polk CS

Notes

1. In August 2007, the National Conference of Commissioners on Uniform State Laws approved formation of a drafting committee to formulate a uniform state statute on electronic recording of custodial interrogations.

2. *Stephan v. State*, 711 P.2d 1156, 1162 (Alaska 1985).

3. In *Clark v. State*, 374 Ark. 292, 302 (2008), the Arkansas Supreme Court rejected the defendant's argument that she had a constitutional right to have the police make a complete recording of her custodial interview. However, the Court stated, "we believe that the criminal justice system will be better served if our supervisory authority is brought to bear on this issue. We therefore refer the practicability of adopting such a rule to the Committee on Criminal Practice for study and consideration." *Clark*, 374 Ark. at 304.

4. In 2008, the Connecticut General Assembly instructed the Advisory Commission on Wrongful Convictions to implement a "pilot program to electronically record the interrogations of arrested persons" and report findings and recommendations by July 1, 2009. Act of June 5, 2008, Pub. Act No. 08-143, sec. 2-4, 2008 Conn. Legis. Serv. (West), effective June 5, 2008. The Commission reported that of the ninety-nine custodial interviews recorded under the pilot program, eighty-four interviews were covert, fifty-five resulted in confessions, and three resulted in statements of criminal involvement. Conn. Advisory Comm'n on Wrongful Convictions, Report, at 4 (Feb. 2009). A substantial majority of detectives reported positive opinions of the recording program, and a remainder expressed neutral opinions. Report at app. B. The detectives reported that the use of recording equipment did not interfere with questioning or outcomes. Report at app. B.

5. D.C. CODE §§ 5-116.01-03 (West 2009), effective Apr. 13, 2005.

6. 705 ILL. COMP. STAT. ANN. § 405/5-401.5 and 725 ILL. COMP. STAT. ANN. § 5/103-2.1 (West 2009), effective July 18, 2005.

7. In March 2009, the Indiana Supreme Court Committee on Rules of Practice and Procedure distributed an announcement which states: "The Indiana Supreme Court is interested in receiving comments from the bench, bar and public concerning (1) whether it should adopt a rule requiring that custodial interrogations in criminal investigations be electronically recorded in some circumstances, and (2) if so, the appropriate content of such a rule. To that end, the Court asked the Committee on Rules of Practice and Procedure to develop and publish such a rule."

8. Following the ruling of the Iowa Supreme Court in *State v. Hajtic*, 724 N.W.2d 449 (Iowa 2006), the Attorney General wrote in the State Police Association's publication: "Although the court stated that it is 'encouraging' the practice of electronic recording, the attorney general's office believes that the *Hajtic* decision should be interpreted as essentially requiring this practice." Tom Miller, *Cautions Regarding Custodial Issues*, IOWA POLICE J., vol. 39, no. 1, at 15 (2007).

9. ME REV. STAT. ANN. Title 25, § 2803-B(1)(K) (West 2009), effective Jan. 1, 2005.

10. The Maryland Code of Criminal Procedure requires that law enforcement units shall make "reasonable efforts" to create a recording of custodial interviews of suspects in connection with cases involving named felonies "whenever possible." MD. ANN. CODE, CRIM. PROC. § 2-402 (West 2009), effective Oct. 1, 2008.

11. *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533-34 (Mass. 2004). Following this ruling, the state Attorney General and District Attorneys Ass'n wrote in a Sept. 2006 Justice Initiative Report: "Law enforcement officers shall, whenever it is practical and with the suspect's knowledge, electronically record all custodial interrogations of suspects and interrogations of suspects conducted in places of detention." The Chiefs of Police Ass'n, District Attorneys Ass'n and State Police distributed a "Sample Policy and Procedure" (No. 2.17) to law enforcement agencies throughout the state, which states, "It is the policy of the department, whenever it is practical, to electronically record all custodial interrogations of suspects or interrogations of suspects in places of detention."

12. *State v. Scales*, 518 N.W.2d 587, 591 (Minn. 1994).

13. The Montana statute requires recording of custodial interviews of felony suspects. Act of Apr. 15, 2009, ch. 214, 2009 Mont. Laws (West), effective Oct. 1, 2009 (to be codified at MONT. CODE ANN. tit. 46, ch. 4).

14. NEB. REV. STAT. ANN. § 29-4501-4508 (West 2009), effective July 18, 2008.

15. In *State v. Barnett*, 789 A.2d 629, 632-33 (N.H. 2001), the New Hampshire Supreme Court held that if an electronically recorded statement is offered into evidence, the recording is admissible only if the entire post-*Miranda* interrogation interview was recorded. The ruling does not require that custodial interviews be recorded either in whole or in part. If a partially recorded statement is excluded from evidence because the entire interview was not recorded, testimonial evidence is nevertheless admissible as to what occurred before, during and after the custodial interview, including the portion that was recorded.

16. N.J. CT. R. 3.17 (2005).

17. N.M. STAT. ANN. § 29-1-16 (West 2009), effective Jan. 1, 2006.

18. N.C. GEN. STAT. Ann. § 15A-211 (West 2009), effective Mar. 1, 2008.

19. The Oregon statute requires recording of custodial interviews of suspects of aggravated homicides and crimes with mandatory minimum sentences. Act of Jan. 24, 2009, ch. 488, 2009 Or. Laws ch. 488 (West 2009), effective July 1, 2010 and July 1, 2011 (to be codified at OR. REV. STAT. § 165.540).

20. The Texas Code of Criminal Procedure provides that a defendant's unrecorded oral statement is inadmissible unless the statement "contains assertions of facts or circumstances that are found to be

true and which conduce to establish the guilt of the accused." TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 2009) (effective Sept. 1, 1989, amended 2001); *see Moore v. State*, 999 S.W.2d 385, 400 (Tex. App. 1999). The statute does not require recording of custodial interviews preceding recorded statements, nor exclusion of suspects' unrecorded written statements. *See Rae v. State*, No. 01-98-00283-CR, 2001 WL 125977, at 3 (Tex. App. 2001); *Franks v. State*, 712 S.W.2d 858, 860 (Tex. App. 1986).

21. The Utah Attorney General has adopted a Best Practices Statement, endorsed by all state law enforcement agencies, recommending that custodial interrogations in a fixed place of detention of persons suspected of committing a statutory violent felony, should be electronically recorded from the *Miranda* warnings to the end in their entirety. Various exceptions to the requirement are included. Office of the Utah Attorney General, *Best Practices Statement for Law Enforcement: Recommendations for Recording of Custodial Interviews* (Oct. 2008).

21. Wis. Stat. Ann. §§ 968.073, 972.115 (West 2009), effective Dec. 31, 2005.