

# The Case for Recording Police Interrogations

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The power of a defendant's confession of guilt is obvious. The Supreme Court long ago recognized that a confession, "if freely and voluntarily made, is evidence of the most satisfactory character." *Hopt v. Utah*, 110 U.S. 574, 584 (1884). A confession deserves "the highest credit, because it is presumed to flow from the strongest sense of guilt. . . ." *Id.*, quoting *King v. Warickshall*, 1 Leach 263.

But in recent years, we have seen a growing number of DNA exonerations involving defendants who falsely confessed guilt while they were being interrogated. Now we are confronted with the uncomfortable reality that many of these out-of-court confessions did not receive adequate judicial scrutiny. Why? Because the judges and juries did not know exactly what the defendants said, and who did what, leading up to those confessions.

Although our criminal justice system never will be infallible, we are obliged to embrace reforms that help bring the true perpetrators to justice and prevent the innocent from being convicted. This obligation is all the more pressing when a simple, proven reform is available. One reform that will prevent convictions based on false confessions is the electronic recording of stationhouse interrogations of felony suspects.

Recording interrogations at the stationhouse, beginning with the *Miranda* warning, is a commonsense, easy way to identify false confessions. A recorded interrogation provides other benefits as well, as hundreds of police and sheriff's departments across the country will attest. Given the growing recognition of those benefits, we predict that one day soon all law enforcement departments in the United States will record their custodial interrogations electronically. The last holdouts may be those who ought to be in the forefront: agencies of the

federal government. Sad to say, the Department of Justice recently failed to authorize a proposed one-year statewide pilot program in Arizona to test the effectiveness of electronic recordings of custodial interrogations.

Most custodial interviews are conducted by law enforcement personnel using lawful techniques, and most suspects who confess to crimes do so voluntarily, truthfully acknowledging their guilt. But the growing number of convicted defendants exonerated by DNA evidence, along with recent social science research, forces us to conclude that a significant minority of suspects falsely confessed to crimes they did not commit, despite the panoply of procedural protections that our criminal justice system provides—including the right to remain silent, the right to retained or appointed counsel, the right to confront witnesses, the presumption of innocence, and the requirement of proof beyond a reasonable doubt. Their convictions usually appear solid because they are based on the perceived strength and credibility of confession evidence.

While it may be hard to believe that an innocent person would confess to a crime that he did not commit, the statistics of proven false confessions should give us all pause:

- The Innocence Project, which looked at 130 post-conviction exonerations of people whose DNA conclusively proved them innocent, reports that 35 of those cases (27 percent), involved false confessions. Innocence Project, "Causes and Remedies of Wrongful Convictions," [www.innocenceproject.org/causes](http://www.innocenceproject.org/causes).
- Professors Steven Drizin and Richard Leo conducted a study of 125 confessions in felony investigations that were proven false because the real perpetrator was subsequently apprehended and convicted. Forty-one suspects (35 percent) confessed to and were convicted of crimes they did not commit. See Steven A. Drizin & Richard Leo, "The Problem of False Confessions in a Post-DNA World," 2004 N.C. L. Rev. 892, 951 (2004).

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A well-known example of multiple false confessions in the same case arose out of a police investigation following the discovery of a young female jogger who had been raped and left for dead in New York City's Central Park in 1989. The police quickly turned their suspicion on five teenagers who already were in custody in connection with other assaults in Central Park that same night. After being subjected to extensive unrecorded questioning sessions, and after being kept awake for up to two days, all five suspects gave statements to the police, all but one on videotape and all but one with an adult present. The confessions were full of inconsistencies as to the specifics of the crime. For example, they did not agree on who instigated the attack, who caused the most injuries, who had intercourse with the victim, and what weapons were used. At trial, the defendants unsuccessfully claimed that their statements were coerced during the pre-recorded portion of their interrogation, and they denied making several inflammatory off-camera statements attributed to them by the police. The jury was not swayed, and the young men were convicted, notwithstanding the lack of physical evidence or an eyewitness identification. *See* Susan Saulny, "Why Confess to What You Didn't Do?," *N.Y. Times*, Sec. 4, at 5 (Dec. 8, 2002).

Years later, in 2002, after new evidence was uncovered, the Manhattan district attorney recommended that the convictions be vacated. DNA testing implicated a man who had used the same modus operandi to rape another woman in Central Park a few days earlier in 1989. He subsequently confessed to the crime. The five young men were released from custody after serving years in jail.

Psychologists who study cases like this have found that several different reasons lead innocent people to confess to crimes they did not commit. One useful and often-cited scientific study authored by Saul M. Kassin and Gisli H. Gudjonsson, "The Psychology of Confessions: A Review of the Literature & Issues," 5 *Psych. Science in the Pub. Interest* 33, 49-50 (Nov. 2004), offers the following classification of false confessions:

**Compliant false confessions.** People will confess to a crime that they did not commit because they believe that the short-term gains of a confession will outweigh the long-term costs. In the Central Park jogger case, for example, the five youths said they confessed because each believed he could go home afterward. When denials of guilt did not stop the interrogation, they instead offered admissions of guilt. Other suspects may confess because they are hungry and want to eat or are frightened and want to speak with their families. Still others may confess out of an expectation of leniency that will accompany a confession. Those who most typically fall into this category—the young, the socially dependent, the mentally handicapped, and the desperate—often have a desire to please authority figures like police officers and prosecutors.

**Voluntary false confessions.** Some people will confess to a crime they did not commit with very little police prompting. They may be unable to distinguish fantasy from fact. In some instances, they may desire to protect the real criminal. Others may have an irrational desire for publicity. For example, more than 200 people came forward to confess to having kidnapped Charles Lindbergh's baby in 1932. In 2006, John Mark Karr confessed to being involved in the rape and murder of JonBenet Ramsey, a young girl whose unsolved 1996

murder has been widely publicized. After he was arrested overseas and brought back to the United States, local prosecutors asked the court to drop the arrest warrant against him despite his "own repeated admissions" because DNA tests failed to link him to the crime. *See* Julie Bosman, "Reflection and Red Faces after the Ramsey Storm," *N.Y. Times*, Sec. E, at 2 (Aug. 30, 2006).

**Internalized false confessions.** Other people may, in the course of an interrogation, come to believe that they did what the police claim they did. In the interrogation room, isolated from external reality cues and under enormous stress, exhausted and disoriented suspects are especially vulnerable when the police—as they are allowed to do in most jurisdictions—confront them with false evidence, which may include statements like: "We found your DNA under the victim's fingernails," "a witness places you at the scene," "your friend in the next room says you were the shooter," "your fingerprints are on the gun," or "you failed the lie detector test."

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## False confessions typically result from a combination of subtle factors.

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The suspect begins with denials ("I didn't do it"), then engages in self-doubt ("I don't think I did it"), then converts ("I must have done it"), and eventually completely internalizes the claim ("I did it").

A classic example of the internalized false confession comes from Escondido, California, where the police told a 14-year-old boy named Michael Crowe that his hair was found in his murdered sister Stephanie's hands, that he had failed a lie detector test, that the house where the murder occurred had been locked at the time (thus excluding an intruder), and that Stephanie's blood was found in his bedroom. None of these statements was true. The police convinced Michael that he had a split personality: while "good Michael" could not remember the crime, "bad Michael" had killed his sister. Eventually, he confessed: "I'm not sure how I did it. All I know is I did it." Despite his confession, the charges were dropped. *See, e.g.,* Sharon Begley, "Criminal Injustice," *Wall Street Journal* (Oct. 2005), at [http://wsjclassroom.com/archive/05oct/poli\\_confession.htm](http://wsjclassroom.com/archive/05oct/poli_confession.htm). The police later located a mentally ill transient in the area named Richard Tuite, who had Stephanie's blood on his clothing. Eventually, he was convicted of the crime. *See* Greg Moran, "Tuite Enters Guilty Plea on Escape Charge," *San Diego Union-Tribune*, Sec. B, at 1 (Sept. 9, 2004).

Recording custodial interviews, from start to finish, will not guarantee that innocent suspects who make false confessions will not be prosecuted or convicted. These confessions typically result from a combination of many subtle factors. But a complete electronic record of interrogations, along with the help of psychologists and psychiatrists, will make it easier for investigators and prosecutors to determine which confessions are truthful and which are not.

In *Miranda v. Arizona*, the Supreme Court held that the government may not use any statements made during a "cus-

custodial interrogation” against a felony suspect without proof that the police told the suspect about certain constitutional rights: that the suspect has the right to remain silent, that any statements made may be used against him, that he has the right to a lawyer during any part of the interrogation, and that a lawyer will be appointed for him if he cannot afford to hire one. 384 U.S. 436, 444 (1966). The requirement for the *Miranda* warnings is triggered when a suspect is subjected to “questioning initiated by law enforcement officers after . . . [having] been taken into custody or otherwise deprived of his freedom of action in any significant way.” A formal arrest is not required. Determining whether a suspect was in custody at the time that he was questioned requires an examination of all attendant circumstances, including consideration of “how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action.” *Stansbury v. California*, 511 U.S. 318, 325 (1994). A waiver of the right against self-incrimination is valid only if it was “the product of a free and deliberate choice rather than intimidation, coercion, or deception.” *Moran v. Burbine*, 475 U.S. 412, 421 (1986). For example, the police may not falsely tell the suspect that his lawyer does not want to see him. *Escobedo v. Illinois*, 378 U.S. 478, 491 (1964).

Arrested suspects, especially indigents, waive their *Miranda* rights with great frequency and agree to answer custodial questions without a lawyer. According to one study, more than 83 percent of observed suspects agreed to be questioned by police without a lawyer. Paul G. Cassell & Bret S. Hayman, “Police Interrogation in the 1990s: An Empirical Study of the Effects of *Miranda*,” 43 *UCLA L. Rev.* 839, 860 (1996).

After the police obtain a valid waiver of *Miranda* rights, any statements made by the suspect as the result of the interrogation may be used against him in a criminal prosecution. This is true unless and until the suspect invokes his right to remain silent or requests a lawyer, and so long as the police do not use unlawful tactics during the interview. Statements have been rendered involuntary by proof of actual or threatened violence, or by deprivation of food, water, or sleep for extended periods of time. Psychological coercion, which implicates factors like the length of the interrogation and the age, intelligence, and psychological makeup of the suspect, can render a statement involuntary, as can promises of leniency, warnings of especially harsh legal treatment, and threats to tell the prosecutor that the suspect refused to cooperate.

While physical and psychological coercion are not permitted in the interrogation room, federal law and the law in most states permit the police to use certain “sophisticated” interrogation techniques to obtain confessions. Chief among these, as noted above, is deception or trickery, often in the form of lies about evidence indicating the suspects’ guilt. For example, courts have generally refused to suppress confessions obtained after the police falsely stated that the suspects’ fingerprints were found at the scene, or that witnesses had identified the suspect. *Lucero v. Kerby*, 133 F.3d 1299, 1311 (10th Cir. 1998). Courts also have permitted the police to display false sympathy for the suspect and to minimize the moral significance of the crime. *United States v. Montanez*, 186 F. Supp. 2d 971, 979 (E.D. Wis. 2002). But deception, when taken to the extreme, may render a statement involuntary. In *Leyra v. Denno*, 347 U.S. 556, 559-61 (1954), for example, an undercover police psychiatrist treating the suspect’s painful

sinus infection while questioning him about the crime rendered the statement involuntary. In *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963), false statements to a mother that her ability to retain custody of her children and her state financial aid depended on her cooperation with the police made her confession involuntary.

Because so much of the law governing the admissibility of a suspect’s statement at trial depends on the detailed facts and circumstances under which the statement was made, it is imperative that both trial and reviewing courts be able to reconstruct accurately what occurred behind the closed doors of the interrogation room. In almost every instance of custodial questioning, law enforcement officers can accurately record what was said and what happened with electronic audio or video equipment that preserves everything from the *Miranda* warnings to the conclusion of the interviews. Electronic recordings significantly increase the chance of discovering false confessions before innocent persons are charged, tried, and perhaps convicted. They can also prove the opposite—that the required warnings were given to the suspects, who then confessed voluntarily, openly, and apparently truthfully.

Without complete electronically recorded interrogations, expensive and time-consuming disputes often arise over what occurred in police interrogation rooms. In the face of their incriminating statements, defendants frequently contend that detectives failed to give them the required *Miranda* warnings; that the police continued questioning them after they invoked the right to counsel; that officers used improper physical or psychological tactics to elicit incriminating statements; that the officers made impermissible threats or promises; and that they misstated or exaggerated what was said or done.

When a motion to suppress the defendant’s statement is made, a pretrial hearing typically is held in which participants give testimonial versions of what occurred. If after hearing conflicting testimony, the trial judge rules that an unrecorded statement is admissible, the defendant is permitted to present the same issue to the jury at trial—so the same ground is plowed again. If a guilty verdict is returned, the issue often becomes a basis for appeal, and the reviewing court is confronted with transcripts containing opposing versions of the closed-door interrogation session. If the trial or appellate court credits the defense version, a suit for civil damages may result, in which case the contradictory evidence as to what occurred during the custodial interrogation will be heard once more.

A high-profile case in Chicago, in which four young black men were wrongfully convicted, illustrates the waste of resources that failing to record interrogations can cause. A young medical student, Lori Roscetti, was found murdered on railroad tracks on Chicago’s South Side in 1986. The “Roscetti Four” were arrested. Two of them made confessions that implicated all four. They claimed in pretrial motions to suppress that Chicago police detectives physically abused them during their interrogations. After a hearing, the motions were denied. They presented their torture claims—the same ones that the judge had considered—to the criminal trial jury, but they were convicted based largely on the confessions. They brought several post-conviction challenges to their convictions, including attacks on the confessions; all were denied. The four convicted defendants spent nearly 15 years in jail, until DNA exonerated them in 2001. The Illinois

governor pardoned them in 2002. The actual perpetrators were located, arrested, convicted, and sent to prison, where they should have been from the outset. The Roscetti Four filed civil suits against the detectives, the prosecutors, and the city. After extensive factual and expert discovery, primarily focused on what occurred during the unrecorded interviews, the city settled the claims for over \$10 million.

Several years ago, we became interested in ways to reduce the incidence of false confessions that lead to wrongful convictions and continued freedom for the perpetrators. In reviewing articles recommending that custodial interviews of felony suspects be electronically recorded, we noted that virtually all the authors argued that recordings were necessary in order to prevent police from abusing prisoners or falsely reporting and testifying about what suspects said. These assertions were contrary to our views; we believed (and still believe) that the vast majority of law enforcement officers conduct themselves in accordance with the law, report accurately, and testify truthfully about what they recall. We decided to speak directly with officers who electronically record complete custodial interrogations, usually detectives, and learn what they had to say.

We started our investigation knowing that some years back the Supreme Courts of Alaska and Minnesota had mandated statewide electronic recordings, from *Miranda* warnings to the end of the interviews. We also telephoned ten departments in other states that recorded complete interviews. We did not conduct a survey; rather, as we made our phone calls to these police and sheriff departments, we asked for leads to other departments that recorded complete custodial interviews.

Our calls over the past five years to hundreds of state and local law enforcement agencies, in every state, have yielded impressive results. We have spoken to officers from more than 600 police and sheriff departments that electronically record—by audio, video, or both—the entirety of most of their stationhouse interviews in serious felony investigations, starting with the *Miranda* warnings. The means of recording vary from inexpensive tape recorders to sophisticated computer systems that allow for video access and digital storage. We also spoke to departments that do not record. From the hundreds that do record—many for over a decade—we heard with amazing consistency about the multiple benefits these recordings provide to law enforcement officers, prosecutors, courts, and in many instances to the suspects. What we heard rebuts the hypothetical objections raised by non-recording departments. None of the officers who had experience with electronic recordings would voluntarily return to reliance on handwritten notes (often inaccurate and incomplete), and efforts at reconstructing through later testimony what occurred during the interviews. Many expressed surprise that there are departments not making use of modern recording technology.

Here is a summary of the benefits provided by recording complete custodial interviews:

- Recordings protect against baseless charges of improper police conduct. Complete electronic recordings of everything that transpired in the interrogation room, from the initial *Miranda* warnings to the end, preclude unfounded claims that the officers failed to give the warnings, refused requests for lawyers, engaged in physical or psychological abuse, or used other unlawful tactics to extract a confession. As an officer from the El Dorado, California, county

sheriff's office said, "A motion to suppress is a swearing match between the suspect's word and the officer's word. Now we play the tape and the judge says, 'It's right there! Motion denied.'" Another officer, from the Collier County, Florida, sheriff's office, reported that with the help of a videotape of an interrogation he was able to refute allegations that he used a rubber hose on the defendant—allegations that, if a judge had believed them, would have resulted in the suppression of the confession and subjected the officer and his employer to civil liability and subjected the officer to removal from the force. It is not surprising that municipal risk pools have begun to endorse police recordings as an effective way to reduce civil damage claims and awards. See Gene King, "Why Michigan Police Agencies Should Embrace a Policy to Record Certain Custodial Interrogations," *Law Enforcement Action Forum News*, Vol. 13, Issue 3, at 4 (Oct. 2006).

- Recordings capture reactions and nuances that later testimony cannot possibly reproduce, such as suspects' facial expressions, indicia of evasion or remorse, or direct, honest responsiveness. A detective from the Nashville, Tennessee, metropolitan police department said that defense claims that stress or pressure caused the defendant to falsely confess evaporated when a videotape showed a calm and collected suspect throughout the questioning.
- Recordings allow officers to focus on the suspect's answers to questions rather than on notetaking. Many lawyers have learned through taking depositions in civil cases that if they try to write everything the deponent says, they are impaired in effectively processing the testimony and observing the witness's demeanor. This in turn affects the thrust, pace, force, and quality of questioning. Experienced lawyers, knowing that the testimony is being recorded by a court reporter or recording device, focus on listening and observing the witness, perhaps making a few

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notes for follow-up questions. Experienced detectives who electronically record their interviews take the same approach: they concentrate on the suspects' demeanor and responses, looking for indicia of truthfulness or evasiveness. They are better able to develop rapport with suspects by maintaining eye contact, making it more likely that they will receive responsive information. Indeed, we have been told that suspects often become nervous when detectives scribble numerous notes, which is unnecessary when a recording device is used.

- Recordings make it easier for some suspects to confess, because many of them find it easier to admit verbally to committing a crime, rather than writing out or signing a written confession.
- Recordings deter improper police conduct during custodial interviews. A detective from the Kentwood, Michigan, police department said, "I think as the investigator, it

keeps you in check knowing the video may be seen by a judge or jury.”

- Many departments have recording equipment that permits officers outside the interrogation room to observe interviews in “real time” by remote video hookup, and to relay helpful suggestions to the questioners. One sheriff’s deputy in Randall County, Texas, reported, “I often ask another officer to watch the interview to see what I am missing.”
- The number of motions to suppress custodial statements has been dramatically reduced, and eliminated completely in some jurisdictions. When interviews have been recorded, defense attorneys seldom file motions to suppress statements on voluntariness or *Miranda* violation grounds—the statements and conduct of both detectives and suspects are incontestable. This relieves detectives from having to engage in courtroom swearing matches. An officer from Elizabethtown, Kentucky, observed that recordings put an end to hostile defense cross-examinations designed to disparage the officer’s memory of what was said and done during custodial interviews, and precluded questions about the officer’s conduct during the interrogations. In the words of another officer from the Houston, Texas, police department, officers cannot be accused of “changing what the suspect said.” The resulting benefits allow police personnel to devote themselves to other cases, and save substantial amounts of prosecutorial and judicial time.
- Prosecutors and police across the country confirm a direct relationship between the recorded stationhouse interviews that contain confessions or damaging admissions and the increased numbers of guilty pleas. Here again, the expenditure of time of all concerned in contested trials is avoided.
- Another result is an increased incidence of guilty verdicts for those cases that go to trial, because the recordings eliminate entire lines of defense and afford judges and juries an opportunity to observe defendants before they have been prepared for trial. When a composed suspect is seen or heard voluntarily admitting guilt, the verdict is usually a foregone conclusion.
- On the other hand, if detectives have conducted themselves in a manner that goes outside the law, and impinge on the rights or overcome the willpower of suspects, the judge and jury will have a first-hand look, and the advantage shifts to the defense.
- Detectives with whom we have spoken often review recordings of their interrogations to look for clues they did not observe during the session, as well as for self-evaluation and training. An officer in Oak Grove, Louisiana, told us that young officers like to review tapes of more experienced officers as a way to improve their own techniques. According to a detective from Coeur d’Alene, Idaho, experienced detectives benefit from reviewing tapes of others in order to learn “new angles, themes, and techniques” for use in interrogations. Supervising officers in the Elkhart, Indiana, police department use recordings when evaluating detectives’ job performances.
- Recordings improve the public perception of the police. The news media, television, and Hollywood routinely depict law enforcement officers acting outside the bounds of the law when interviewing arrested suspects. Record-

ings counter this misinformation. Many detectives who we have interviewed, particularly those in large metropolitan areas, say recordings increase public trust in police conduct because they show that the police have nothing to hide.

- The practice of recording interrogations also permits psychologists and psychiatrists, for both the prosecution and the defense, to look for indicators of truthful or false confessions. They show whether the police provided the suspect with details of the crime that only the perpetrator could know, in order to make the ultimate “confession” appear credible on its face, or conversely, whether the suspect volunteered incriminating factual details previously unknown to the police.

In sum, recording interrogations electronically is—to quote a sergeant from the Hutto, Texas, police department—“fantastic . . . law enforcement’s best friend.” A Santa Clara, California, assistant district attorney concluded, “This reform benefits the accused to be sure, and its benefits to law enforcement and the people cannot be overstated.”

Here is an underlying irony: despite the many benefits that electronic recordings provide to law enforcement and the criminal justice system, the major opponents of requiring custodial recordings are those who would benefit most from the practice—law enforcement officers and prosecutors who have not tried recording. Although they have no experience with this superior method of capturing what occurred during custodial interviews, many expound dire predictions of serious negative consequences that they believe will inevitably result if they are required to record. We have found that the speculations of law enforcement personnel who have not given recordings a try to be as repetitious as the glowing descriptions of the benefits of recordings received from those who record on a regular basis.

To their credit, some detectives and their supervisors, who once gave affidavits and testimony in opposition to recordings because of anticipated problems, later acknowledged openly that they changed their opinions after they began recording, and confirmed the wisdom of the practice.

Strangely, federal investigative agents are among the most prolific at spinning hypothetical theories as to why recording custodial interviews will seriously undermine their efforts to enforce the law. This is difficult to understand because federal agents routinely use sophisticated recording equipment in their investigations and at trials. Judges and juries have come to expect government agents to record suspect interviews in the controlled environment of custodial facilities. As a result, as we have explained elsewhere, federal agencies are beginning to experience backlash from their stubborn adherence to the old ways. “Federal Law Enforcement Should Record Interrogations,” 53 *The Federal Lawyer* 44 (2006).

As the benefits of electronically recording custodial interrogations become better known, the landscape is beginning to change; support is increasing, and opposition is decreasing. Courts and legislators are beginning to understand that they should support electronic recordings rather than stay neutral to them. As a result, more police and sheriff departments are voluntarily adopting the practice, more courts are endorsing it, and more state legislatures are enacting legislation mandating custodial recordings. We believe we are not engaging in undue optimism when we predict that the intelligent, forward-thinking heads of federal agencies will put an end to institu-

tional, stubborn adherence to past practices and begin electronically recording felony suspects in custodial settings, as droves of their state and local counterparts are doing.

The routine criticisms made by non-recorders, including many of the federal agencies, are not shared by officers who actually record. One expressed concern is that recording will affect suspects' conduct by making them "clam up," refuse to cooperate, or on the flip side, "play to the camera." A related concern is that recordings will interfere with detectives' efforts to "build rapport" with suspects. These concerns have proved to be unfounded. Federal agents and most state officers may record custodial interviews without the knowledge of the suspects, as permitted by law, although some departments advise suspects that the interviews are being recorded, and even place recording equipment in plain sight. We have repeatedly been told by experienced officers—both those who advise suspects of the recordings and those who do not—that in the vast majority of cases the suspect's knowledge or suspicion of a recording makes absolutely no difference to the suspect's cooperation. They remind us that, in our electronic age, most suspects expect to be recorded, and after a few minutes the suspects pay no attention even to exposed equipment. As to suspects' outright refusals to speak if recorded, the statutes and court rulings do not require that statements be recorded if suspects refuse; rather, when suspects decline to cooperate if recorded, a record is made of their refusal, and the officers proceed with handwritten notes.

We have learned from many experienced detectives that they are able to achieve a cooperative atmosphere whether or not the suspect knows of the recording, and that a need to build rapport without recording is without substance. To the contrary, we have often been told that offering suspects the opportunity to have the interview recorded usually results in cooperation because it demonstrates that the officers want an accurate and complete record of the suspects' stories in their own words.

It is becoming increasingly dangerous to record less than the complete custodial interviews because officers are exposed to cross-examination about why, with equipment readily at hand, they did not press the button and record the entire session. If the officers had nothing to hide, why was the beginning of the session excluded from the recording, which would provide indisputable proof as to what occurred?

Another concern sometimes expressed by opponents of recording is that judges and juries may disapprove of the tactics used. This is an inappropriate objection, because its underlying but unspoken premise is that the testifying officer should be able to avoid revealing what occurred during the custodial interview, despite the obligation to report the session fully and objectively, and to testify to the whole truth. It is an embarrassment that several federal agencies recently raised this objection to recording complete custodial interviews. Putting aside the serious ethical issues, we have not heard concerns on this subject from any of the more than 600 departments that record or the many prosecutors with whom we have spoken. Trial judges can prevent inappropriate reactions by juries by instructing the jury as to the interrogation tactics that are legal and those that are not. If jurors and judges are convinced of a suspect's guilt, they do not acquit because the officers engaged in permissible techniques. On the other hand, law enforcement officers should abide by the law, and unlawful tactics ought to be exposed, along with

those who engage in them. Many departments, before undertaking recording as a policy, retain specialized trainers to explain methods officers may lawfully use, and those they may not, during recorded interviews. If recording prevents unlawful conduct, this can only benefit the system of justice.

Some opponents of recording argue that confessions may be lost if there are inadvertent problems that result in failures to record. This is another hypothetical objection, which has not been a problem for departments that have been recording for years. The statutes and decisions that require recording, as well as many departments' regulations, include provisions excusing recordings if there are inadvertent equipment failures, or if the officer mistakenly forgets to activate the equipment, or fails to operate the equipment properly.

Concerns about the cost of recording are also unfounded. Many small departments use inexpensive audio recording equipment. Many larger departments use video cameras, often concealed. Some have spent substantial sums for purchase, installation, and training. None has said the expense was unjustified or excessive. They realize there are larger savings in officers' time in preparing written reports, preparing to testify, and testifying about what happened during unrecorded interviews, as well as saving the time of prosecutors and judges. Recordings usually eliminate time-consuming motions to suppress or disputes at trial about whether *Miranda* warnings were given, improper tactics were used, or

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## Recordings increase public trust in police conduct because they show that the police have nothing to hide.

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what was said by suspects. Guilty pleas rather than costly trials often result from recorded confessions and admissions, which preclude appeals and post-conviction litigation, resulting in savings in both state and federal trial and appellate courts. Gone also is the threat of civil litigation and judgments based on allegations of coercive tactics, failure to give warnings, and false testimony as to what occurred, as well as wrongful convictions of innocent defendants.

We have heard a concern about the costs of transcripts and storage (although new technology has substantially reduced storage costs), and who should bear these costs—the police or the prosecutors? But these costs are not deemed to be a reason to stop recording because of the far greater savings that result to the public treasury, and the increased efficiency and accuracy in law enforcement.

Although some have argued that requiring officers to record is an unwarranted slap at their integrity, not a single officer in a department that records has expressed such a complaint to us. To the contrary, we have repeatedly heard the opposite: Recordings help build public confidence in law enforcement agencies by eliminating unrecorded, closed-door stationhouse interrogations and placing all interrogations on the record, literally.

The judicial and legislative branches of several states now require recording of custodial interrogations in serious felony

investigations, and there is an ever-increasing number of departments that have voluntarily begun to record custodial stationhouse interviews from *Miranda* to the end. Alaska became the first in 1985, when its supreme court decided that the state constitution's due process clause required the police to record suspect interviews in felony investigations conducted in police stations. *Stephan v. State*, 711 P.2d 1156, 1162 (Ala. 1985). Nine years later, in 1994, the Minnesota Supreme Court exercised its supervisory powers over the administration of criminal justice by ordering the police to record all stationhouse questioning of felony suspects. *State v. Scales*, 518 N.W.2d 587, 591 (Minn. 1994). In 2004, Illinois became the first state to pass legislation on this subject, making unrecorded stationhouse interrogations presumptively inadmissible in homicide prosecutions, unless a statutory exception applies. 705 Ill. Comp. Stat. Ann. § 405/5-401.5 (West 2006); 725 Ill. Comp. Stat. Ann. § 5/103-2.1 (West 2006); 720 Ill. Comp. Stat. Ann. § 5/14-3(k) (West 2006). That same year, the Maine legislature directed police chiefs throughout the state to implement regulations for officers to record police station interviews of felony suspects. Me. Rev. Stat. Ann. tit. 25 § 2803-B(1)(K) (West 2006). In 2004, the Supreme Judicial Court of Massachusetts held that, if a criminal defendant's non-recorded statements are placed into evidence, the jury must be instructed that "the State's highest court has expressed a preference that . . . interrogations be recorded whenever practicable," and that if the defendant claims the statement was made involuntarily, the jury must also be instructed that it may (but need not) conclude from the police's failure to record the interrogation that the prosecution has not met its burden of proof that the statement was made voluntarily. *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533-34 (Mass. 2004). This holding has resulted in most departments in Massachusetts now recording custodial interviews.

Year by year, the trend continues to grow: The District of Columbia, New Mexico, and (in response to a state supreme

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## The FBI has retained an antiquated policy that expressly prohibits agents recording without advance supervisory approval.

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court decision) Wisconsin have passed legislation requiring that recordings be made of stationhouse interviews in a wide range of felony investigations. D.C. Code §§ 5-116.01-03 (2005); N.M. Stat. Ann. § 29-1-16 (West 2006); Wis. Stat. Ann. §§ 968.073, 972.115 (2005). The New Jersey Supreme Court exercised its supervisory rulemaking power to require the police to begin recording custodial felony interrogations, with strong cautionary jury instructions about unrecorded statements. N.J. Sup. Ct. R. 3:17 (2005). In *State v. Hajtic*, 724 N.W. 449 (Iowa 2006), the Supreme Court of Iowa made a strong statement in support of recording full custodial inter-

views. The state attorney general's office interpreted this decision to require recording, and the Iowa State Department of Public Safety has implemented a guideline requiring recording of interrogations conducted in detention facilities. And in August 2007, North Carolina became the most recent statewide convert, by enacting legislation requiring electronic recording of custodial interviews in homicide investigations. N. C. Gen. Stat. §15A-211 (2007), effective March 1, 2008.

Federal law enforcement agencies, however, continue to resist this trend. Despite their reputations as leaders in incorporating modern technology into criminal investigations, federal investigation agencies do not routinely record custodial interrogations. Indeed, the FBI has retained an antiquated policy that expressly prohibits agents recording without advance supervisory approval.

Federal judges, understandably impatient at having to spend precious time trying to reconstruct what happened during custodial interrogations, and facing skepticism from jurors about unrecorded statements, have been vocal in their criticism of these policies. A few years ago, district court judge Charles B. Kornmann in South Dakota lamented the "abuse of judicial time" when he was forced to hear "another all too familiar case in which the FBI agent testifies to one version of what was said and when it was said[,] and the defendant testifies to an opposite version or versions," noting that "Despite numerous polite suggestions to the FBI, they continue to refuse to tape record or video tape interviews." *United States v. Azure*, No. CR 99-30077, 1999 WL 33218402, at \*1 (D.S.D. Oct. 19, 1999). The judge announced that to remedy this situation in future cases in which the agent had no good excuse for not recording, he would "explain to the jury that FBI agents continue to refuse to follow the suggestions of [the district court judges] and why, in the [opinion] of the court, they refuse to follow such suggestions." *Id.* at \*2. Chief Judge Mark W. Bennett of the Northern District of Iowa threatened to begin issuing similar admonitions to the jury because the failure to record interrogations results in a "proliferation" of motions to suppress that would be "unnecessary if the [D.E.A.] officers had videotaped or otherwise recorded their interaction with the defendant." *United States v. Plummer*, 118 F. Supp. 2d 945, 947 (N.D. Iowa 2000).

District Court Judge William C. Lee in the Northern District of Indiana told a local police officer-witness, "If you've got audio and videotape there, I think you ought to use it. I don't know why I have to sit here and sort through the credibility of what was said in these interviews when there's a perfect device available to resolve that and eliminate any discussion about it. . . . We shouldn't be taking up the federal court's time of an hour and a half this morning and a couple of hours in the other case trying to figure out who said what to whom when in these interviews because there's no videotape of them." *United States v. Bland*, No. 1:02-CR-93 (N.D. Ind. Dec. 13, 2002).

District Court Judge Stephen P. Friot from the Western District of Oklahoma wrote us: "I find it ironic that if the cost of repairing a car is at stake in a civil case, the defendant's account of the 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 are at stake."

While the courts of several states have played an integral

role in causing police agencies to begin recording, and many agencies have voluntarily adopted the practice, it is our opinion that state legislatures should take the lead in mandating recording. One obvious advantage is the legislatures' ability to provide funds for equipment and training, just as the Illinois legislature did. *See* 20 Ill. Comp. Stat. Ann. § 3930/7.5 (grants for equipment); 50 Ill. Comp. Stat. Ann. § 705/10.3 (funds for training). While the equipment can be as simple and inexpensive as a portable tape recorder, legislatures may decide that law enforcement will reap the maximum benefits through more sophisticated recording technology: for example, soundproof interrogation rooms equipped with hidden digital video cameras connected to a central command center, especially in large urban centers and high crime areas. Other expenses are involved, such as training officers how to conduct recorded interrogations and transcribing the recorded statements.

A powerful advantage of legislative action is the development of a statewide uniform, comprehensive set of rules and exceptions for the guidance of law enforcement. For example, the Alaska and Minnesota Supreme Courts ruled that interrogations must be recorded, but did not deal in detail with situations involving equipment failure, officers forgetting to begin the recorder, suspects who refuse to cooperate while being recorded, or interviews of suspects at the crime scene or in police cars. After such a ruling, the judiciary explores its contours over time through a series of cases with varying fact patterns. In contrast, the legislature is able to consider and make rules in advance for these and other instances, with input from both police and defense, including adapting existing eavesdropping laws, as Illinois did. If law enforcement officers know exactly what the rules are, they are better able to avoid the risk of having valid confessions suppressed as evidence. Statewide legislation will prevent police practices from being different from one county to the next, and will assist in assuring admissible evidence that is obtained through cooperation among law enforcement agencies.

The National Conference of Commissioners on Uniform State Laws has recently approved formation of a drafting committee on electronic recording of custodial interrogations. This may well lead to a national effort to achieve uni-

form statutes requiring recording, which will benefit all participants in the criminal justice system who are devoted to equitable enforcement of the laws, to convicting the guilty, and to avoiding the risk of prosecuting the innocent.

We know that innocent people sometimes confess to crimes that they did not commit. We know, too, that guilty persons often falsely accuse police of using improper tactics, or of misstating what occurred. Without a complete record of the interrogation, we are not always able to detect the truth, creating the risk that guilty persons are acquitted, and innocent persons convicted. The time-consuming fact-sensitive inquiries required to determine precisely what statements

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## **The practice of recording interviews will avoid the waste of resources caused by a lack of a verbatim record.**

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were made, and whether they were voluntary, become unnecessary with a complete electronic record. The simple and commonsense practice of recording custodial interviews at police facilities will avoid the waste of resources caused by a lack of a verbatim record.

A deputy chief district attorney in Tarrant County, Texas, correctly said that electronic recordings are the "wave of the future." Indeed, they are the wave of the present. All members of the criminal justice system—judges, defense attorneys, prosecutors, and police officers—are beginning to realize the enormous benefits that they receive from recording station-house interrogations. There is a growing trend among state legislatures and courts to require electronic recording of custodial interrogations in police facilities, and among law enforcement agencies to do so voluntarily even though it is not required. We all should encourage this trend. □