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RECENT DEVELOPMENTS*

ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS: EVERYBODY WINS

THOMAS P. SULLIVAN**

According to Alan Harris, a veteran prosecutor in Minnesota, it was "the best thing we've ever had rammed down our throats."[1] He was referring to a practice that the Minnesota Supreme Court imposed on the state's police officers more than a decade ago—the electronic recording of custodial interrogations in felony investigations from the time that the *Miranda* warnings are given until the end of the interviews.[2]

Harris is hardly alone in his opinion. In the past few years, the many benefits of complete audio or video recording of custodial interviews have become increasingly apparent to all parties. For suspects, recordings expose abusive tactics and falsehoods about confessions. For law enforcement officials, recordings spare them from defending unfair charges

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[1] Telephone Interview with Alan K. Harris, Deputy Prosecutor, Hennepin County, Minn. (Feb. 8, 2005).

[2] State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994).

of using heavy-handed methods or misstating what occurred. Furthermore, prosecutors and defense lawyers no longer engage in courtroom disputes as to what took place: the interviews may contain exculpatory statements favorable to the defense, or admissions which strengthen the prosecution's case, but in either event, the record is clear and conclusive. Trial judges and reviewing courts no longer have to evaluate conflicting versions of what happened. Unlike the customary interview during which the police make handwritten notes and later prepare a typewritten report, electronic recordings contain a permanent record of the event, leaving no room for dispute as to what officers and suspects said and did.

Historically, the absence of audio or video recordings has led to widespread problems arising from disputes over what was said and done during custodial interrogations. I began focusing on this matter when, as Co-Chair of Illinois Governor George H. Ryan's Commission on Capital Punishment, I led a subcommittee charged with making recommendations to the Commission about police investigatory practices. The subcommittee and Commission ultimately recommended that all questioning of homicide suspects in custody in police facilities be recorded electronically.[3] The General Assembly acted on the proposal, making Illinois the first state to require complete custodial recordings by statute.[4]

During the course of the subcommittee's investigation, I discovered that a number of police agencies were already recording custodial interrogations. After the Commission concluded its work in 2002, my associates and I set out to locate these departments and learn about their experiences. We now know of more than 300 police and sheriff's departments in forty-three states—plus all departments in Alaska and Minnesota—that record full custodial interviews in various kinds of felony investigations, all of whom enthusiastically support this practice.[5]

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[3] FORMER GOVERNOR RYAN'S COMMISSION ON CAPITAL PUNISHMENT, FINAL REPORT, Recommendation 4 (2002). The Commission's recommendation and this article do not deal with recordings of pre-custodial interviews, or of interviews which occur outside a place of detention.

[4] 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2004); 705 ILL. COMP. STAT. ANN. 405/5-401.5 (West 2004).

[5] We telephoned departments that we believed recorded custodial interviews and asked them to name others that record. Two firms that specialize in training police, John E. Reid and Associates, Inc. and Wicklander Zulawski & Associates, Inc., asked departments they had trained to complete our questionnaire. *See* THOMAS P. SULLIVAN, CENTER ON WRONGFUL CONVICTIONS SPECIAL REPORT: POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS 10-13 (2004), *available at* http://www.jenner.com/policestudy; Thomas P. Sullivan, *Police Experience with Recording Custodial Interrogations*, JUDICATURE, Nov.-Dec. 2004, at 132; Thomas P. Sullivan, *The Police Experience: Recording Custodial Interrogations*, CHAMPION, Dec. 2004, at 24; Thomas P. Sullivan,

This article will summarize what our inquiries have revealed and explain why I conclude that recording custodial interrogations is of great importance, and is best instituted through legislation.

I. OUR FINDINGS: POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS

We located departments in the largest and smallest cities in the United States that routinely record full custodial interviews. The following points outline what we were repeatedly told by police officers, sheriff deputies and their supervisors, and veteran prosecutors:

- Recording custodial interviews is a tremendous benefit to the criminal justice system. A permanent record is created of what was said and done, how suspects acted, and how officers treated suspects. Officers are no longer subjected to unwarranted allegations about abusive conduct; those who may be inclined to use improper tactics cannot do so because their actions and words are being recorded.
- Voluntary admissions and confessions are indisputable. Defense motions to suppress based on alleged coercion and abuse drop off dramatically, and the few that are filed are easily resolved by the recording.
- Without the need to make detailed notes, officers are better able to concentrate on suspects' demeanors and statements. They no longer have to attempt to recall details about the interviews days and weeks later when recollections have faded.
- In most instances, the ability to obtain confessions and admissions is not affected by recording. Most states permit police to record covertly. But if a suspect realizes a recording is to be made and refuses to cooperate if recorded, the officers simply make a record of the suspect's refusal, and proceed in the "old-fashioned" manner with handwritten notes.
- Later review of recordings affords officers the ability to retrieve leads and inconsistent statements overlooked during the interviews.

Recording Custodial Interrogations: The Police Experience, FED. LAW., Jan. 2005, at 20; Thomas P. Sullivan, *Recording Custodial Interrogations*, L. & ORD., Mar. 2005, at 46.

- Recordings are valuable for training new officers in proper interrogation techniques and for experienced officers to self-evaluate and improve their methods.
- Public confidence in police practices increases, because recordings demonstrate that officers conducting closed custodial interviews have nothing to hide from public review.

With respect to the drawbacks of recording, very few officers mentioned cost as a concern. They said that front-end expenses (e.g., equipment, set up, training) were more than offset by saving officers' time in court, reducing motions to suppress, increasing the incidence of guilty pleas, saving defense costs in civil suits based on police coercion and perjury, and avoiding civil judgments based on wrongful convictions traced to false or coerced confessions.

Trial and reviewing courts often comment on the benefits of an objective record of what occurred at the station. Many courts, while declining to hold that police must record custodial questioning, urge that the practice be adopted. For example, an Indiana reviewing court commented:

> [W]e discern few instances in which law enforcement officers would be justified in failing to record custodial interrogations in places of detention. Disputes regarding the circumstances of an interrogation would be minimized, in that a tape recording preserves undisturbed that which the mind may forget. In turn, the judiciary would be relieved of much of the burden of resolving disputes involving differing recollections of events which occurred. Moreover, the recordings would serve to protect police officers against false allegations that a confession was not obtained voluntarily. Therefore, in light of the slight inconvenience and expense associated with the recordings of custodial interrogations in their entirety, it is strongly recommended, as a matter of sound policy, that law enforcement officers adopt this procedure.[6]

An exasperated state trial judge recently told a police 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.[7]

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[6] Stoker v. State, 692 N.E.2d 1386, 1390 (Ind. Ct. App. 1998) (citations omitted); *see e.g.*, People v. Raibon, 843 P.2d 46, 49 (Colo. Ct. App. 1993); State v. James, 678 A.2d 1338, 1360 (Conn. 1996); Smith v. State, 548 So.2d 673, 673-74 (Fla. Dist. Ct. App. 1989); State v. Kekona, 886 P.2d 740, 745-46 (Haw. 1994); State v. Buzzell, 617 A.2d 1016, 1018 (Me. 1992); State v. Godsey, 60 S.W.3d 759, 772 (Tenn. 2001); State v. James, 858 P.2d 1012, 1018 (Utah Ct. App. 1993); State v. Kilmer, 439 S.E.2d 881, 893 (W. Va. 1993).

[7] Transcript of Motion to Suppress Hearing at 72, United States v. Bland, No. 1:02-CR-93 (N.D. Ind. Dec. 13, 2002). A Michigan state court judge recently urged his state legislature to enact a recording law. Mark Randon & Tim Gardner Jr., *A Point Well Made: Taped Interrogations Would Benefit All Parties*, DET. FREE PRESS, Mar. 6, 2005, *available at* http://www.freep.com/voices/letters/epoint6e_20050306.htm.

II. THE PREFERRED SOLUTION: LEGISLATION

There are three ways in which recording of custodial interrogations may be implemented: by legislation, by action of the jurisdiction's highest court, or by adoption of recording policies by individual law enforcement departments. I believe legislation is the best method because it is inherently more comprehensive. Statutes are more likely to spell out in detail when and where recordings shall be required, the exceptions to the requirement, the consequences of failing to record, how the equipment will be funded and where it will be stored, how officers will be trained, and, where necessary, when recordings may be exempt from applicable eavesdrop/wiretap laws.[8] In contrast, when custodial interrogations are implemented by an action of the court, they have been framed in general mandatory terms, and have not taken into account funding or other practical problems that police may encounter during the recording process. With regard to the adoption of recording policies by individual law enforcement departments, it would take decades to persuade all departments in the United States to adopt voluntary recording policies, and those that did would have widely varying procedures, with no official sanction for non-compliance.

Thus far, Illinois, Maine, New Mexico, and the District of Columbia, have enacted recording legislation. The Illinois statute, which makes the practice mandatory by July 2005, serves as a model for other legislatures to follow.[9] It provides that any statement made by the accused during a custodial interrogation is presumed inadmissible in a homicide trial, unless the entire interrogation is electronically recorded and accurately preserved.[10] A number of exceptions are included[11]; the prosecution has the burden of proving the occurrence of an exception by a preponderance of the evidence. The Illinois Eavesdropping Act was amended to permit the recordings to be made covertly.[12]

The Maine statute, enacted in 2004, compels the Board of Trustees of the Maine Criminal Justice Academy to establish minimum standards for a law enforcement policy of "digital, electronic, audio, video or other

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[8] A model electronic recording statute is appended to this article.

[9] 725 ILL. COMP. STAT. ANN. 5/103-2.1. Because the statute was instigated by a recommendation of the Illinois Governor's Commission on Capital Punishment, it is limited to homicide investigations.

[10] *Id.*

[11] *See infra* Part V, app. § 4.

[12] 720 ILL. COMP. STAT. ANN. 5/14-3(k) (West 2004).

recording of law enforcement interviews of suspects in serious crimes and the preservation of investigative notes and records in such cases."[13] The Academy Board and the Board of Directors of the Maine Chiefs of Police Association have adopted a model policy that requires police to conduct recordings of custodial interrogations in serious felony investigations in police facilities.[14] By June 1, 2005, the chief administrative officers of all Maine law enforcement agencies must certify to the Academy Board that they have adopted policies consistent with the minimum standards, and by January 1, 2006, they must certify that they have provided orientation and training on their policies.

The New Mexico statute, which takes effect on January 1, 2006, provides that state and local law enforcement officers conducting custodial interviews of persons suspected of having committed a felony must electronically record the interview in its entirety when they are reasonably able to do so. The statutory command applies both inside and outside police facilities.

In 2004, the District of Columbia's City Council enacted the Electronic Recording Procedures Act of 2004, which requires all custodial interrogations of persons accused of crimes of violence to be recorded when the questioning takes place in the Metropolitan Police Department interview rooms equipped with electronic recording equipment. It further provides that an unrecorded custodial statement is presumed to be involuntary unless clear and convincing rebuttal evidence shows that the statement was given voluntarily. The Mayor vetoed the legislation, but the Council overrode the veto, and the Act has become law.[15]

Legislation similar to these statutes has been or will soon be introduced in a number of states.[16] Eavesdrop/wiretap laws must be checked carefully, and amendments should be proposed (as was done in

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[13] ME. REV. STAT. ANN. tit. 25 § 2803-B(1)(K) (West 2004).

[14] MAINE CHIEFS OF POLICE ASSOCIATION, RECORDING OF SUSPECTS IN SERIOUS CRIMES & THE PRESERVATION OF NOTES & RECORDS, GENERAL ORDER 2-23A (Draft February 11, 2005) [hereinafter MAINE REPORT]. The Office of the Maine Attorney General assisted in the development of the model policy.

[15] D.C. CODE §§ 5-116.01, 5-116.03 (2005).

[16] The Texas Code of Criminal Procedure provides that a defendant's oral statement is inadmissible unless recorded, but does not require that questioning preceding the final statement be recorded. Tex. Crim. Proc. Code Ann. art. 38.22 (2004); *see also* 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); George E. Dix, *Texas Confession Law and Oral Self-Incriminating Statements,* 41 BAYLOR L. REV. 1, 4-5 (1989); David A. Slansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure,* 88 VA. L. REV. 1229, 1263 n.108 (2002).

Illinois) where necessary to permit covert recordings without the suspect's knowledge or consent.

III. THE FALLBACK SOLUTION: COURT ORDERED RECORDING

Where legislatures fail to act, state supreme courts should take action, as did Alaska and Minnesota years ago, and, more recently, as did New Jersey, Massachusetts, and New Hampshire. In 1985, the Supreme Court of Alaska ruled that the state constitution's due process clause requires law enforcement officers to record custodial interrogations that occur at a place of detention if recording is feasible.[17] The court's rationale was that "recording . . . is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self incrimination and, ultimately, his right to a fair trial."[18] The court observed that "a recording also protects the public's interest in honest and effective law enforcement, and the individual interests of those police officers wrongfully accused of improper tactics."[19] For the past twenty years the local police have complied with the court's ruling, and they report their experiences with recording have been positive.[20]

The Minnesota Supreme Court took a different route,[21] exercising its "supervisory power to insure the fair administration of justice," and requiring that, where feasible, all custodial interviews shall be electronically recorded, and "must be recorded where questioning occurs at a place of detention," beginning with the *Miranda* warnings.[22] The court said that this practice "will reduce the number of disputes over the validity of *Miranda* warnings and the voluntariness of purported waivers. In addition, an accurate record makes it possible for a defendant to challenge misleading or

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[17] Stephan v. State, 711 P.2d 1156, 1162 (Alaska 1985).

[18] *Id.* at 1159-60.

[19] *Id.* at 1161.

[20] INSERT SOURCE OF THIS INFORMATION.

[21] State v. Scales, 518 N.W.2d 587, 591 (Minn. 1994).

[22] *Id.* at 592. Several commentators have urged other state supreme courts to adopt the Alaska court's rationale under state due process clauses. *See, e.g.*, Daniel Donovan & John Rhodes, *Comes a Time: The Case for Recording Interrogations*, 61 MONT. L. REV. 223, 245-46 (2000); Gail Johnson, *False Confessions and Fundamental Fairness: The Need For Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 735-41 (1997); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 153-55 (1997). But no other court has adopted the standard. See cases cited in *State v. Cook*, 847 A.2d 530, 542-43 (N.J. 2004). Several courts have recommended that the proper method is through state legislation. *See, e.g.*, People v. Everette, 543 N.E.2d 1040, 1047 (Ill. App. Ct. 1989); State v. Gorton, 548 A.2d 419, 422 (Vt. 1988).

false testimony and . . . protects the state against meritless claims."[23] Here too, the experience has been positive and the practice has been praised by Minnesota police and prosecutors.[24]

In August 2004, the Supreme Judicial Court of Massachusetts refused to impose a constitutional rule requiring police to record custodial interrogations, but held that when unrecorded statements are offered into evidence, the jury must be instructed that "the State's highest court has expressed a preference that [custodial] interrogations be recorded whenever practicable."[25] Also, if the defendant claims the statement was made involuntarily, the jury may (but need not) conclude from the police's failure to record the interrogation that the state has not met its burden of proof that the statement was made voluntarily.[26] To avoid these unfavorable jury instructions, many police departments throughout Massachusetts are working collaboratively with the Attorney General and District Attorneys to formulate a protocol on recording custodial interviews.

In June 2004, the Supreme Court of New Jersey declined to rule that the state's constitution mandated recording, but instead appointed a special committee "to study and make recommendations on the use of electronic recordation of custodial interrogations," in order for the court "to evaluate fully the protections that electronic recordation affords to both the state and to criminal defendants. [The committee's] inquiry should include whether to encourage electronic recordation through the use of a presumption against admissibility of a non-recorded statement, or other means."[27] On May 4, 2005, the New Jersey Supreme Court released the committee's report, which contains a summary of legislation and court rulings about recording as well as its pros and cons.[28] The committee recommended that the New Jersey Supreme Court exercise its supervisory authority over the administration of criminal justice by court rule and model jury charges. The rule would provide that custodial interrogation of suspects in most major felony investigations that occur in places of detention must be electronically recorded, from the time of the *Miranda* warnings to the end,

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[23] *Scales*, 518 N.W.2d at 591.

[24] *See, e.g.*, Amy Klobuchar, *Eye on Interrogations: How Videotaping Serves the Cause of Justice*, WASH. POST, June 10, 2002, at A21 ("Police and prosecutors have little to fear from a requirement to videotape all interrogations. Recording not only protects the innocent, it helps convict the guilty and sustain the public's faith in our criminal justice system.") (Klobuchar is Prosecutor of Hennepin County, Minn.).

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

[26] *Id.*

[27] *Cook*, 847 A.2d at 546-47.

[28] *Report of the Supreme Court Special Committee on Recordation of Custodial Interrogations*, Apr. 15, 2005, *available at* http://www.judiciary.state.nj.us/notices/reports/cookreport.pdf.

subject to exceptions similar to those contained in the Illinois statute.[29] If an unrecorded statement is offered into evidence, the trial judge must hold a hearing to determine whether the prosecution has established by a preponderance of the evidence that an exception is applicable. If no exception is proven, the judge may consider the lack of a recording in ruling on the admissibility of the statement.[30] If the judge admits the statement, the jury should be given instructions similar to those specified in the *DiGiambattista* case, with the following addition:

> Where there is a failure to electronically record an interrogation, you have not been provided with a complete picture of all of the facts surrounding the defendant's alleged statement and the precise details of that statement. By way of example, you cannot hear the tone or inflection of the defendant's or interrogator's voices, or hear first hand the interrogation, both questions and responses, in its entirety. Instead you have been presented with a summary based upon the recollections of law enforcement personnel. Therefore, you should weigh the evidence of the defendant's alleged statement with great caution and care as you determine whether or not the statement was in fact made and if so, whether what was said was accurately reported by State's witnesses, and what weight, if any, it should be given in your deliberations. The absence of an electronic recording permits but does not compel you to conclude that the State has failed to prove that a statement was in fact given and if so, accurately reported by State's witnesses.[31]

If the statement is oral, the jury should also be cautioned about

> the generally recognized risk of misunderstanding by the hearer, or the ability of the hearer to recall accurately the words used by the defendant. The specific words used and the ability to remember them are important to the correct understanding of any oral communication because the presence, or absence, or change of a single word may substantially change the true meaning of even the shortest sentence.[32]

The Supreme Court of New Hampshire has held that, if a recorded final statement is offered into evidence, the recording is admissible only if the entire post-*Miranda* interrogation session was recorded.[33] As a result of this ruling, a growing number of police departments in New Hampshire have begun to record all custodial interviews from the outset to the end.

These decisions illustrate the diverse ways in which the highest state courts may directly or indirectly implement custodial recordings.

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[29] *Id.* at 36-41.
[30] *Id.* at 41-44.
[31] *Id.* at 48.
[32] *Id.*
[33] State v. Barnett, 789 A.2d 629, 632-633 (N.H. 2002).

IV. THE INTERIM SOLUTION: INDIVIDUAL DEPARTMENT POLICIES

As we have seen, many police and sheriff departments have voluntarily adopted the practice of recording custodial questioning sessions. However, they represent only a small percent of all law enforcement agencies in this country.[34]

Experienced detectives from these agencies have repeatedly expressed to us their enthusiasm for recordings. Those comments are summarized above and are recounted in detail elsewhere.[35] We were often told that when detectives become accustomed to the practice, they embrace recordings and would not choose to return to unrecorded interviews. Accordingly, even if custodial recordings are not mandated by legislation or by supreme court orders, more and more individual departments undoubtedly will record voluntarily, simply because it is in their interest to do so.

V. SANCTIONS FOR FAILURE TO RECORD, AND EXCEPTIONS TO THE NEED FOR A RECORDING

When recordings are mandated by legislation, court orders, or police regulations, the drafters should include sanctions for failing to record as well as reasonable exceptions for mechanical failures, inadvertent errors, exigent circumstances, and other unforeseen problems. For example, the Illinois statute contains a rebuttable presumption against the admissibility of an unrecorded statement, but permits an unrecorded statement to be admitted into evidence if the prosecution establishes by a preponderance of evidence that a statutory exception is applicable or that the statement was voluntary and is reliable.[36] The New Mexico Statute and the Maine draft model also contain a number of exemptions from the recording requirement similar to those found in the Illinois statute.[37] The Supreme Court of

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[34] Most do not record every case, but rely on the discretion of the officer in charge. Most do not have written guidelines.

[35] *See* sources cited *supra* note 5.

[36] 725 ILL. COMP. STAT. ANN. 5/103-2.1(e)-(f) (West 2004). The exceptions are: an electronic recording was not feasible; a spontaneous statement was made not in response to a question; a non-recorded statement was made by a suspect who agreed to respond only if an electronic recording was not made, provided that the suspect's conditional refusal was electronically recorded; a statement was given at a time when the investigators were unaware that a death has occurred; statements were made outside Illinois; "a voluntary statement . . . that has a bearing on the credibility of the accused as a witness;" a statement was "used only for impeachment;" and "any other statement that may be admissible under law." *Id.* § 5/103-2.1(e).

[37] *See* MAINE REPORT, *supra* note 14, at § IV.G.

Alaska in *Stephan* acknowledged that there would be reasonable exceptions to the rule of exclusion.

The experiences in Alaska and Minnesota illustrate why legislation is preferable to court-ordered recordings. Their initial supreme court rulings mandated custodial recordings, but made no detailed provisions for unforeseen circumstances and inevitable glitches, which required reviewing courts in subsequent cases to carve out exceptions one by one.[38] Massachusetts law enforcement officials now face similar ambiguity: the Supreme Judicial Court's opinion in the DiGiambattista case merely states, "it is permissible for the prosecution to address any reasons or justifications that would explain why no recording was made, leaving it to the jury to assess what weight they should give to the lack of a recording."[39]

Examples of circumstances that should excuse recording are listed in Section 4 of the model statute attached as an appendix to this article. Provisions such as these ensure that excusable failures to record do not result in the loss of otherwise admissible evidence.[40]

VI. FEDERAL AGENCIES SHOULD "GET ON BOARD"

Federal investigative agencies do not routinely record custodial interviews. Rather, agents still make handwritten notes and later prepare typewritten summaries.[41] This practice is sorely out of date. Federal agents

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[38] For example, unrecorded statements are admissible when no operative recording device was available but *Miranda* warnings were given, and the statement was shown to be voluntary. State v. Schroeder, 560 N.W.2d 739, 740-41 (Minn. Ct. App. 1997); *see also* State v. Miller, 573 N.W.2d 661, 668, 674-75 (Minn. 1998) (interrogating officer not aware that when the first cassette tape ran out the second tape would not begin automatically, but had to be restarted manually); Bodnar v. Anchorage, No. A-7763, 2001 WL 1477922, at *1-2 (Alaska Ct. App. Nov. 21, 2001) (unpublished opinion); George v. State, 836 P.2d 960, 962 (Alaska Ct. App. 1992) (recording equipment was activated but failed to operate properly).

[39] Commonwealth v. DiGiambattista, 813 N.E.2d 516, 534 (Mass. 2004).

[40] The recent veto by the District of Columbia Mayor, mentioned above, illustrates what may happen if legislation mandates recording but omits reasonable exceptions. The veto message states in part: "While I share the Council's view that electronic recording of interrogations is desirable, the sanction to exclude an unrecorded statement, no matter what the circumstances of the non-recording may be, goes too far and provides an unacceptable vehicle for violent and dangerous offenders to escape criminal prosecution. . . . To impose the rule of exclusion when an officer inadvertently fails to record a statement punishes the victim and the public far more than the police." Letter from the Hon. Anthony A. Williams, Mayor of Washington, D.C., to the Hon. Linda W. Cropp, Chairman of the Council of D.C. 1-2 (Jan. 21, 2005) (on file with author).

[41] The applicable FBI regulation, adopted in 1987, affirmatively prohibits the use of recording equipment without the express approval of the Special Agent in Charge of the

are familiar with using modern electronic equipment; wiretap devices and hidden microphones are routinely employed when agents are working undercover or with confidential informants. Federal law enforcement's ongoing resistance to recording custodial interrogations is baffling, particularly given that their failure to record interviews has begun to result in serious consequences at trial.

For instance, in February 2005, DEA agents testified in a Michigan federal court that *Miranda* warnings were given before the defendants confessed orally, while the defendants testified that the warnings were not given.[42] The prosecutor advised the court that DEA policy permits agents to record custodial statements if the agents so request and the defendant consents. In granting the defense motion to suppress, the judge stated:

> Affording the Court the benefit of watching or listening to a videotaped or audiotaped 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. . . .'
>
> [T]he interviews were not memorialized by video or audio recording, notwithstanding that equipment to do so was available, and notwithstanding the fact that one of the officers had previously been involved in an interview situation where the failure to record was criticized.[43]

The judge cited an earlier case in which another Michigan federal judge, having suppressed the defendant's unrecorded oral statement, made the following observations:

> It certainly harms the prosecution in a close case when the court cannot evaluate the actual confession. The Court recommends that the DEA electronically record future interrogations and confessions so a reviewing court can fully evaluate whether a confession violates Fifth or Fourteenth Amendment.[44]

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local FBI office. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, LEGAL HANDBOOK FOR SPECIAL AGENTS § 7-14 (1987).

[42] United States v. Lewis, 355 F. Supp. 2d 870, 871, 873 (E.D. Mich. 2005).

[43] *Id.* at 873 (internal citations omitted).

[44] United States v. Thornton, 177 F. Supp. 2d 625, 628 (E.D. Mich. 2001). The same judge stated in a later case:

> Rather than relying on two divergent memories of events, an electronic record would have greatly aided this Court and other courts faced with these disputes. . . . It harms the prosecution in a close case when the court cannot evaluate an electronic record, especially where the interrogation took place at the FBI's own facilities. The Court strongly recommends that the FBI electronically record future interrogations and confessions so a reviewing court can fully evaluate whether the government has satisfied its burden to demonstrate waiver.

In another example from several years ago, a federal district court judge in South Dakota, frustrated by FBI agents' repeated failure to record custodial interviews, entered an order that said in part:

> This is another all too familiar case in which the F.B.I. agent testifies to one version of what was said and when it was said and the defendant testifies to an opposite version or versions. Despite numerous polite suggestions to the F.B.I., they continue to refuse to tape record or video tape interviews. This results, as it has in this case, in the use, or more correctly, the abuse of judicial time . . . . There is no good reason why F.B.I. agents should not follow the same careful practices [of recording interviews] unless the interview is being conducted under circumstances where it is impossible to tape or record the interview.[45]

The judge ruled that in future cases when defendants' unrecorded statements are offered into evidence, and they

> are not tape or video recorded and there is no good reason why the taping or recording was not done and there is disagreement over what was said, this Court intends to advise juries of exactly what is set forth in this Order and explain to the jury that F.B.I. agents continue to refuse to follow the suggestions of [the district court judges] and why, in the option [sic] of the court, they refuse to follow such suggestions."[46]

A federal District Court judge from Oklahoma recently wrote,

> 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 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.[47]

It is no longer wise or appropriate for federal agents to continue using their outdated, sometimes inaccurate and incomplete, "scribble-then-type" method of memorializing custodial interviews. With better, more accurate methods now so easily available, the time has come for Congress to enact legislation requiring electronically produced verbatim records in place of agents' summaries.

United States v. Bowlson, 240 F. Supp. 2d 678, 681 n.2 (E.D. Mich. 2003).

[45] United States v. Azure, No. CR 99-30077, 1999 WL 33218402, at *1 (D.S.D. Oct. 19, 1999).

[46] *Id.* at *2. A jury in a Philadelphia federal court recently acquitted a defendant whose non-custodial statements during a lengthy interview with F.B.I. agents were allegedly inconsistent with what he said during a secretly wiretapped telephone conversation. After the verdict, a juror said, "My advice to the FBI would be to tape their interviews." D. B. Caruso, *FBI's Reluctance to Tape Self Costs It*, SEATTLE POST-INTELLIGENCER, Feb. 3, 2005, *available at* http://www.wtop.com/index.php?sid=409418&nid=104.

[47] Letter to Thomas P. Sullivan (Dec. 30, 2004) (on file with author).

VII. CONCLUSION

It is ironic and regrettable that the chief opposition to recording comes from those who will benefit most when the practice is adopted—our law enforcement personnel. Their initial negative attitudes are understandable. Experienced detectives are skeptical about proposals coming from law professors and defense lawyers, who so often oppose, criticize and belittle them. Nor do they appreciate outsiders, who have never conducted a custodial interview in a criminal investigation, telling them how to conduct their specialized, hard-learned professional business.

To respond to these objections, I have amassed an impressive array of endorsements of electronic recording by detectives from small, medium and large communities all over the country. Their voices cannot be brushed aside; they speak from the same depth of experience as their fellow officers, who so adamantly oppose adopting a method they have never attempted. They speak about a better way to do their jobs, making their investigative techniques more professional, accurate and complete.

I admire, support and defend law enforcement personnel. It is therefore with the greatest respect that I suggest, request, and urge that they consider the poet's admonition:

> "Be not the first by whom the new are tried,
> Nor yet the last to lay the old aside."[48]

[48] ALEXANDER POPE, ESSAY ON CRITICISM 15, Part II, Line 133 (1711).

APPENDIX

MODEL BILL FOR ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS

Be it enacted by [insert name of state legislature]:

Section 1: Definitions.

(a) "Custodial Interrogation" means an interview which occurs while a person is in custody in a Place of Detention, involving a law enforcement officer's questioning that is reasonably likely to elicit incriminating responses.

(b) "Place of Detention" means a jail, police or sheriff's station, holding cell, correctional or detention facility, or other place where persons are held in connection with juvenile or criminal charges.[49]

(c) "Electronic Recording" or "Electronically Recorded" means an audio, video or digital recording that is an authentic, accurate, unaltered record of a Custodial Interrogation, beginning with a law enforcement officer's advice of the person's constitutional rights and ending when the interview has completely finished.

(d) "Statement" means an oral, written, sign language or nonverbal communication.

[49] In the event legislators wish to expand the reach of this bill to include custodial interrogations of persons who are in custody outside a "Place of Detention," they should delete Section 1(b), and delete the words "in a Place of Detention" from Section 1(a). Consideration should be given to the addition of an exception for excited utterances.

Section 2. Recordings Required. All Statements made by a person during a Custodial Interrogation relating to a crime described in the following sections of the [insert jurisdiction] Criminal and Juvenile Codes shall be Electronically Recorded: [insert section numbers].

Section 3. Presumption of Inadmissibility. Except as provided in Sections 4 and 5, all Statements made by a person during a Custodial Interrogation that is not Electronically Recorded, and all Statements made thereafter by the person during Custodial Interrogations, including but not limited to Statements that are Electronically Recorded, shall be presumed inadmissible as evidence against the person in any juvenile or criminal proceeding brought against the person.

Section 4. Overcoming the Presumption of Inadmissibility. The presumption of inadmissibility of Statements provided in Section 3 may be overcome, and Statements that were not Electronically Recorded may be admitted into evidence in a juvenile or criminal proceeding brought against the person, if the court finds:

> (a) That the Statements are admissible under applicable rules of evidence; and
>
> (b) That the Statements are proven [insert applicable burden of proof] to have been made voluntarily, and are reliable; and
>
> (c) That, if feasible to do so, law enforcement personnel made a contemporaneous record of the reason for not making an Electronic Recording of the Statements; and
>
> (d) That it is proven [insert applicable burden of proof] that one or more of the following circumstances existed at the time of the Custodial Interrogation:
>
> > (i) The questions put by law enforcement personnel, and the person's responsive Statements, were a part of the routine processing or "booking" of the person; or
> >
> > (ii) Before or during a Custodial Interrogation, the person agreed to respond to the officer's questions only if his or her Statements were not Electronically Recorded; or

(iii) The law enforcement officers in good faith failed to make an Electronic Recording of the Custodial Interrogation because the officers inadvertently failed to operate the recording equipment properly, or without the officers' knowledge the recording equipment malfunctioned or stopped operating; or

(iv) The Custodial Interrogation took place in another jurisdiction and was conducted by officials of that jurisdiction in compliance with the law of that jurisdiction; or

(v) The law enforcement officers conducting or contemporaneously observing the Custodial Interrogation reasonably believed that the making of an Electronic Recording would jeopardize the safety of the person, a law enforcement officer, another person, or the identity of a confidential informant; or

(vi) The law enforcement officers conducting or contemporaneously observing the Custodial Interrogation reasonably believed that the crime for which the person was taken into custody, or was being investigated or questioned, was not among those listed in Section 2; or

(vii) Exigent circumstances existed which prevented the making of, or rendered it not feasible to make, an Electronic Recording of the Custodial Interrogation.

Section 5. Exceptions. Statements, whether or not Electronically Recorded, which are admissible under applicable rules of evidence, and are proven [insert applicable burden of proof] to have been made by the person voluntarily, and are reliable, may be admitted into evidence in a juvenile or criminal proceeding brought against the person if the court finds:

(a) The Statements are offered as evidence solely to impeach or rebut the person's testimony, and not as substantive evidence; or

(b) The Custodial Interrogation occurred before a grand jury or court; or

(c) The person agreed to participate in a Custodial Interrogation after having consulted with his or her lawyer.

Section 6. Handling and Preservation of Electronic Recordings.

(a) Every Electronic Recording of a Custodial Interrogation shall be clearly identified and catalogued by law enforcement personnel.

(b) If a juvenile or criminal proceeding is brought against a person who was the subject of an Electronically Recorded Custodial Interrogation, the Electronic Recording shall be preserved by law enforcement personnel until all appeals, post-conviction and habeas corpus proceedings are final and concluded, or the time within which they must be brought has expired.

(c) If no juvenile or criminal proceeding is brought against a person who has been the subject of an Electronically Recorded Custodial Interrogation, the related Electronic Recording shall be preserved by law enforcement personnel until all applicable state and federal statutes of limitations bar prosecution of the person.

Section 7. Effective Date: This Act shall take effect on [insert date].