



# *Revealing Incommunicado Electronic Recording of Police Interrogations*

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Many U.S. law enforcement agencies face the decision of whether or not to electronically record interrogations.<sup>1</sup> The underlying principle of recording interrogations is to accurately collect and preserve confession evidence in the most unbiased and efficient manner. Law enforcement officers and administrators should be aware of the judicial decisions and statutes in several states that require the recording of interrogations, the benefits of electronically recording, and obstacles to overcome when deciding to begin this technique.

In the landmark *Miranda v. Arizona* decision, the U.S. Supreme Court noted that the difficulty in depicting what transpires during interrogations is based on the fact that “they have largely taken place incommunicado.”<sup>2</sup> The privacy of the interrogation is not simply an inherent characteristic but a carefully calculated strategy aimed at creating an environment of isolation,<sup>3</sup> evident by the fact that most law enforcement officers do not conduct successful interrogations with a group of suspects at once or in public places. Similar to

nonsuspect interviews, interrogations generally are conducted in private locations that limit distractions and outside interferences. On the other hand, privacy limits the number of available witnesses to the two or three people present who can attest to the activities that occurred during the interrogation, and these participants generally have a vested interest in the outcome of the interrogation.

Testimony regarding what transpired inside the interrogation room can become tainted if only the participants witnessed what occurred. Conflicting

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statements by the police and defendant regarding the presentation and waiver of *Miranda* warnings, requests for an attorney, the use of coercive tactics, and the mere presence of a confession expose the spectrum of issues that can arise.<sup>4</sup>

Although dishonesty and other nefarious machinations can explain contradicting accounts of what occurred, other abstruse reasons may apply. First, problems associated with recollection can contribute to conflicting statements. Interrogations often last for hours and exact transcripts cannot precisely memorialize everything. Furthermore, a trial may not occur for years after the interrogation, reducing the ability to cognitively recall all of the specific details and circumstances not recorded in notes or reports.

Second, disparities in perceptions or preconceived biases by participants might facilitate certain, and possibly wrong, inferences. Perception is the mental process by which people gather, organize, interpret, and evaluate information; each participant could perceive the same incident or conversation differently. In the interrogation setting, this not only includes differences in perceptions between the investigator and the suspect but also between investigators.

Third, certain statements can have equivocal interpretations.<sup>5</sup> While officers, with a few exceptions, are not intentionally coercive or dishonest, they can view some statements differently. For example, an interrogator's references to counseling for the defendant

may imply an offer of leniency to the defendant, although that never was the intention.

Investigators assigned to conduct criminal investigations and custodial interrogations have the common goal of uncovering the truth. Often, interrogations result in admissions and confessions by suspects. Currently, many departments do not electronically record custodial interrogations despite the exceptional value and benefit to the criminal justice system, including the police, prosecutors, and courts, as well as defendants and the community. Two reasons exist for this failure to record. First, most states do not legally require it. But, electronic recording has proven a valuable tool in administering justice by accurately preserving confession evidence.<sup>6</sup> Despite



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its value, some law enforcement agencies often do not view electronic recording as a priority because many courts still accept confession evidence based solely on an investigator's oral testimony and written reports. If a state supreme court issues a ruling similar to those in states that do require the recording of custodial interrogations, the impact on law enforcement agencies could be disastrous. Unless the court makes special provisions, such a ruling could impact pending cases with confession evidence as extraordinarily as causing those confessions to be inadmissible or, at a minimum, harder to introduce as evidence. Additionally, procuring and installing equipment and training investigators on how to use it may prevent the timely and logical progression of active and new cases involving custodial interrogations.

The second impediment preventing law enforcement agencies from routinely electronically recording interrogations, and perhaps the most important, is that agencies do not possess the proper equipment to adequately perform the task. While agency support, community pressure, or a legal mandate might force recording to occur, acceptable electronic recording requires the use of appropriate equipment. Although just having a standard video camera may seem to suffice, audio and visual recordings

will suffer. For example, interrogations may run longer than a standard video camera's taping capacity; therefore, agencies must use a system that will not cause unrecorded breaks. Further, covert recording requires special equipment.

Law enforcement agencies should address the contemporary issue of electronic recording in a progressive manner. The commitment of departments to effectuate change in their investigative practices

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related to the electronic recording of custodial interrogations will allow them to reap the benefits of an established, effective, and reliable police practice while avoiding a potentially chaotic transition if mandated to do so in the future. Waiting until the law requires it, and without knowing when that time will occur, will prevent agencies from maximizing the many benefits electronic recording

can provide in the interim to the criminal justice system and the citizens of the community.<sup>7</sup>

## **EXAMINATION OF EFFECTIVENESS**

Many law enforcement agencies and courts have recognized and accepted electronic recording as a just and viable manner to collect and preserve confession evidence, the single most valuable tool in securing a conviction in a criminal case.<sup>8</sup> Departments routinely use electronic recording in other aspects of evidence collection and preservation, and it has proven an effective tool. For example, they regularly use video recording to document crime scenes, traffic stops, accidents, and undercover and surveillance operations, as well as to monitor prisoners.

In 1990, one-third of domestic law enforcement agencies video recorded at least some of their interrogations.<sup>9</sup> By 1993, it was anticipated that 60 percent of law enforcement agencies would electronically record confessions in at least some cases they investigated.<sup>10</sup> These estimates were based on some departments recording as a result of legal requirements and others doing so on a voluntary basis.

When deciding whether or not to electronically record, an agency must dispel a major myth associated with the

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practice: that recording will adversely affect the ability to obtain cooperation and confessions. First, most states permit covert recording. Therefore, agencies can install such systems to record without a suspect's knowledge, thus eliminating this myth. Second, departments that electronically record obtained more incriminating information when they recorded than when they did not. Finally, no conclusive evidence exists to support the belief that suspects' reluctance to cooperate and confess increases when they know that officers are recording them.<sup>11</sup> In the rare case that a suspect refuses to talk while recorded, the investigator simply can turn off the camera and obtain the evidence without a recording (or covertly record anyway). The court and statutory provisions in those states that mandate recording concluded that a suspect's refusal to be recorded constitutes a permissible exception to the mandatory recording requirement.

### STATUTORY PROVISIONS

Several states have passed legislation requiring law enforcement agencies to electronically record interrogations while Alaska and Minnesota have court-ordered requirements mandating that departments electronically record certain custodial interrogations.

Beginning in August 2005, Illinois law enforcement agencies were required, by legislative statute, to electronically record custodial interviews for certain criminal violations, most of which involve homicides.<sup>12</sup> The statute was specifically intended to protect agencies from claims of abuse and coercion while preserving the rights of the interviewee. Although only a few

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other state legislatures have adopted such measures, the courts in two other states have set precedent that clearly imposes a requirement on law enforcement to record interrogations when conducted in police or detention facilities.

### COURT PRECEDENT

In 1980, the Supreme Court of Alaska ruled that police must electronically record interrogations of suspects when feasible, especially when the interrogation occurs in a police facility.<sup>13</sup>

The court cited its reason as the assistance a recording would provide the court in determining the circumstances surrounding a defendant's confession and *Miranda* rights waiver. Without a recording, the court was charged with resolving contrary statements. In 1985, the court realized that ambiguity existed with its earlier decision. Therefore, it established that recording interrogations was a requirement of the state's due process as provided in the Alaska Constitution when an interrogation occurred in a law enforcement or detention facility and when feasible.<sup>14</sup>

In 1994, the Supreme Court of Minnesota followed the Alaskan court's decision and established precedent that required police to record interrogations when conducted in a place of detention and when feasible.<sup>15</sup> It concluded that recording was now a reasonable and necessary safeguard, essential to the adequate protection of the accused's rights to counsel, against self-incrimination, and, ultimately, to a fair trial.

In 2004, a Massachusetts court issued a ruling related to recording interrogations to better preserve details.<sup>16</sup> Although not cited as a violation of the state's constitutionally guaranteed due process, the lack of recording was considered a relevant factor in determining the voluntariness of a *Miranda*



rights waiver and confession. The court concluded that the failure to preserve evidence in a thorough and reliable form, cited as electronic recording, could comprise the basis for establishing that voluntariness and valid waiver of *Miranda* rights had not been proven beyond a reasonable doubt. Jurors now can receive special instructions to cast doubt on the reliability of the confession evidence because it was not recorded. Other trial and reviewing judges also have stopped short of mandating electronic recording but urge its use when feasible.<sup>17</sup>

## BENEFITS

### Courts

No court ruling or legislative action aims to make police work more difficult but, instead, to provide a mechanism of fundamental fairness in the overall pursuit of justice. An accurate depiction of the interrogation, rather than dishonesty and police misconduct, prompted the statutes and court decisions requiring electronic recording. People, including officers and suspects, forget facts or reconstruct and interpret them differently. Furthermore, given the fine line between proper and improper interrogative techniques, the ability to reproduce the exact statements made benefits everyone. The courts have cited several other advantages of

recording interrogations, including deterring police misconduct, reducing the number and length of motions to suppress confessions, providing accurate resolution of conflicting testimony by furnishing a complete version of what was said to the fact finders, and ensuring that the essence of the *Miranda* decision was not eschewed when presented to suspects.<sup>18</sup>



Many courts recognize the value of recording interrogations for use in resolving matters. Each U.S. law enforcement agency not already electronically recording interrogations is, quite possibly, only one judicial court decision away from the requirement, which could come in the next session or in 10 years. Even if courts do not make the practice mandatory, extensive lobbying occurs for statutory requirements similar to those recently passed in Illinois. Although the mandatory

electronic recording requirements are generally court or statute related, law enforcement agencies can benefit from this effective tool because the value of recording is even greater for them than for the courts.

### Law Enforcement Agencies

Law enforcement agencies concurrently reap all the benefits of electronically recording custodial interrogations as the courts have acknowledged. Departments that use electronic recording overwhelmingly report their experiences as positive.<sup>19</sup> The reduced time spent in pretrial motions to suppress directly impacts the ability of officers to commit their time to other valuable activities or lessens overtime costs associated with lengthy hearings. Decreasing claims of police misconduct in the interrogation room also translates to hours saved conducting lengthy investigations and litigation costs for frivolous lawsuits.<sup>20</sup>

A law enforcement officer's credibility is his most valuable asset when testifying in court.<sup>21</sup> Electronic recordings of suspect confessions help enhance an officer's credibility in several ways. First, it provides unequivocal, unbiased evidence that can support the officer's testimony. Second, it indicates that the officer used the most complete and accurate method available for collecting the confession

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evidence. Because video-recording technology is readily available in the United States, jurors have difficulty believing that some type of electronic recording equipment was not available to the investigating officer, the same assumption the courts made that led to the requirement in several states. By recording, the officer can demonstrate commitment to impartiality by collecting and preserving evidence in its most unbiased and unadulterated form.

As an operational benefit, electronic monitoring allows investigators to concentrate on the interrogation while it occurs without having to engage in distracting note-taking practices counterproductive to effective active listening. Therefore, investigators can focus on the verbal and nonverbal properties associated with the suspect that might reveal evasive answers, deceptive cues, or inconsistent responses. Investigators have cited not having to take copious notes during the interrogation as an important aspect because it also puts the suspect at ease by making the interrogation more of a natural conversation than a formal government inquiry.

Once the interrogation concludes, a review of the recorded interrogation proves valuable to investigators because it permits them to have an exact transcription of what was said during

the encounter. An examination of nonverbal mannerisms; linguistic properties, such as voice inflection and pitch; and the words chosen by the suspect may provide insight overlooked during the actual interrogation. Also, other investigators, nonlaw enforcement professionals, and those familiar with the suspect can assess both the credibility of the statement and the suspect's behavior and mannerisms.<sup>22</sup>

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Without an electronic recording, police reports only paraphrase and summarize the occurrences within the interrogation room. Information provided by the suspect but not captured in official notes may be lost forever. Details that may have appeared innocuous at the time of the interrogation may later become critical to the investigation or prosecution. Unless adequately recorded in the investigator's notes and

interview report, the information may not be easily admitted in court or even recalled by the investigator. Electronic recording provides a permanent and complete record of the entire interrogation.

In addition, electronically recording interrogations also permits supervisors to evaluate an investigator's performance. Because a key element of most successful interrogations is privacy, supervisors rarely get the opportunity to observe an investigator in action, inhibiting the ability of supervisory personnel to take corrective measures on ineffective or inappropriate techniques. Knowing that an interrogation is recorded often deters officers from lapsing into improper tactics or misinterpreting what someone said. Finally, agencies can use recordings in the training environment to enhance interview and interrogation skills.

### **Prosecutors**

Prosecutors in jurisdictions that routinely electronically record interrogations approve and encourage the technique because it helps reinforce cases. With a recording, prosecutors overwhelmingly believe that they can better assess a case and prepare for trial. They can use the recordings to evaluate a defendant's sophistication level, as well as to appraise how he answers questions, to assist in

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preparing a cross-examination approach. Electronic recordings capture details, such as demeanor, physical condition of the investigator and suspect, body language, and treatment, not easily memorialized in police reports. Even if videotapes do not provide favorable results for the prosecution, they can prove useful when preparing for a trial or plea bargain.<sup>23</sup>

### **Defense Counsels and Defendants**

Defense attorneys and their clients share the same value from electronic recording as prosecutors. If police conduct was too coercive or a statement was not voluntary, the recording provides an independent, disinterested witness on behalf of the suspect. The ability to use a recording to develop defenses or identify potential support for a false confession claim will improve with a recording to examine. Additionally, the tapes can be used for “client control,” cutting through inconsistencies told to the representing attorneys about what actually occurred during the encounter between the officer and the suspect.<sup>24</sup>

### **Citizens**

Public confidence in police practices increases with electronic recording. Many of the nefarious connotations associated with interrogations are media

generated and rarely occur in real life. The recording helps dispel these myths and beliefs. Furthermore, the cost savings identified by the courts as one advantage of electronic recording directly benefits the public. Ultimately, the electronic recording of interrogations does not unjustly affect any member of the criminal justice system or community.



Miscarriages of justice are a detriment to society. Wrongful convictions place innocent people in jail and permit the guilty parties to escape punishment. One of the greatest sources of wrongful convictions is an unreliable confession.<sup>25</sup> Factors that make confessions unreliable include violence or threats of it, the effects of custody on demeanor, psychological factors associated with the interrogation style, and unethical behavior by the police.<sup>26</sup> Recording custodial interrogations enables each

of these factors to be examined in its entirety, within context, to assess the credibility and veracity of confession evidence.

### **PROPER RECORDING**

Studies show that electronic recordings of police interrogations can have certain biases if not conducted properly. The point-of-view bias, the most prominent one, suggests that the positioning of the camera can adversely affect the objectivity of the interrogation and not provide the police and courts all of the protections discussed. For example, a video camera that records only the suspect would not preclude the defense from making a claim that officers outside the lens of the camera pointed weapons at him, thus coercing a statement. When the camera focuses solely on the suspect, the amount of pressure placed on him can be underestimated.<sup>27</sup>

Equipment failures can present a serious problem for law enforcement agencies involved in the electronic recording of interrogations. While the courts and statutory laws have realized that technical problems occasionally occur, the malfunction of equipment can be devastating. First, the failure to produce a recording when expected may cause concerns about improprieties during the interrogation, easily resulting in a police cover-up claim. Second,

all of the other benefits will be lost, including the potential for reducing lengthy court proceedings, saving overtime costs, preparing for trial, and increasing public confidence. Finally, if detectives planned to rely on the recording for a detailed account of the suspect's statements, rather than taking copious notes, the exact account of the interrogation may be lost forever. Having the proper equipment, including backup power supplies, multiple digital or analog recording devices, and several cameras with the capability to capture various angles, is critical.

## CONCLUSION

The electronic recording of custodial interrogations is a valuable law enforcement tool when executed properly. As the most accurate and efficient method of collecting and preserving confession evidence, the benefits of recording to the criminal justice system and community are unequivocal. Further, electronically recording during the interrogation process enables investigators to concentrate on a suspect's verbal and nonverbal components and can enhance an officer's credibility. The technique also offers supervisors an opportunity to evaluate the performance of investigators.

Law enforcement professionals should be cognizant of

the judicial decisions and statutes in several states that require the recording of interrogations, as well as problems they may face when deciding to implement this technique. Agencies not currently recording custodial interrogations may have legislation or court rulings force the issue upon them. However, departments do not have to wait for these potential mandates to occur to begin reaping the benefits of this valuable practice. ♦

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## Endnotes

<sup>1</sup> For the purposes of this article, electronic recording refers to contemporaneous audio and visual recordings, including analog or digital.

<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>3</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966), referring to Inbau and Reid, *Criminal Interrogation and Confessions* (1962).

<sup>4</sup> T.P. Sullivan, Northwestern School of Law, Center on Wrongful Convictions, *Police Experiences with Recording Custodial Interrogations*, no. 1 (Summer 2004), 1-28.

<sup>5</sup> For additional information, see Vincent A. Sandoval, “Strategies to Avoid

Interview Contamination,” *FBI Law Enforcement Bulletin*, October 2003, 1-12.

<sup>6</sup> Supra note 4; and W.A. Geller, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, *Videotaping Interrogations and Confessions* (Washington, DC, March 1993).

<sup>7</sup> An examination of existing literature, legal cases, and statutory laws related to electronic recording can realize and justify these benefits.

<sup>8</sup> S.M. Kassir, “The Psychology of Confession Evidence,” *American Psychologist* 52, no. 3 (1997): 221-223.

<sup>9</sup> Supra note 6 (Geller).

<sup>10</sup> Supra note 6 (Geller).

<sup>11</sup> Supra note 4.

<sup>12</sup> 20 ILCS 3930/7.2(d) (Illinois custodial monitoring law).

<sup>13</sup> *Mallott v. State*, 608 P.2d 737 (Alaska 1980); and *S.B. v. State*, 614 P.2d 786 (Alaska 1980).

<sup>14</sup> *Stephan v. State*, 711 P.2d 1156 (Alaska 1985).

<sup>15</sup> *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994).

<sup>16</sup> *Commonwealth v. DiGiambattista*, 442 Mass. 423 (2004).

<sup>17</sup> *United States v. Azure*, 1999 WL 33218402.

<sup>18</sup> *Ibid.*; and supra notes 12, 14, and 15.

<sup>19</sup> Supra note 4.

<sup>20</sup> Supra notes 4 and 6.

<sup>21</sup> For illustrative purposes, the authors employ masculine pronouns throughout the article.

<sup>22</sup> Supra note 6 (Geller).

<sup>23</sup> Supra note 6 (Geller).

<sup>24</sup> Supra note 6 (Geller).

<sup>25</sup> R.P. Conti, “The Psychology of False Confessions,” *The Journal of Credibility Assessment and Witness Psychology* 2, no. 1, (1999): 14-36.

<sup>26</sup> T.M. Williamson, “From Interrogation to Investigative Interviewing: Strategic Trends in Police Questioning,” *Journal of Community and Applied Psychology* 3, (1993): 89-99.

<sup>27</sup> Supra note 8.