TARGETING BAILOUT FRAUD

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Few subjects are more important in police work than detectives conducting interrogations of arrested felony suspects. They take place daily in police facilities throughout the country. Typically, the suspect is alone in a room in a station with one or two detectives, has waived rights to legal representation, has no writing materials, and is not free to leave. The detectives control the interview.

We know that human memory is fallible, with a tendency to diminish over time. Hence, whether intentional or not, it is inevitable that testimony given by detectives and suspects as to what was said and done will be incomplete and is likely to be partially inaccurate. We also know that detectives’ contemporaneous handwritten notes are incapable of recording everything that was said and done.

BY THOMAS P. SULLIVAN
To a large extent, our state criminal justice systems depend upon the confidence that judges, jurors, prosecutors, defense lawyers, the media, and the public have in the evidence as to what occurred in these closed-door sessions. That is why during the past decade, electronic recordings of custodial interrogations have become the preferred way to obtain a record of what was said and done, and thus put an end to testimonial disputes. It is now widely acknowledged by police, prosecutors, judges, and defense lawyers that recording interrogations of felony suspects, from the *Miranda* warnings to the end, should be instituted in all state and local law enforcement departments. While audio is good, audio/video is better because it captures actions, facial expressions, and the many other variables that help determine veracity.

The benefits accrue to both the prosecution and innocent suspects. Detectives, unburdened with note taking, better concentrate on their questions and suspects' answers and demeanor. They also tend to conduct themselves with greater professionalism. When no untoward police practices are recorded, motions to suppress diminish sharply, and pleas of guilty and convictions increase, saving enormous amounts of time and money. Recordings deter rogue detectives, who otherwise may elicit false confessions and expose local communities to large damage awards. When cases with recorded questioning go to trial, there are no longer testimonial disputes about what transpired; the tapes are placed in evidence. Trial court judges no longer must evaluate conflicting testimony, and appellate court judges no longer must pore over transcripts to decide where the truth lies. In the end, the relatively modest costs of recording systems are eclipsed by savings in time and expense to all concerned, and greater factual accuracy is achieved.

For these reasons, recording custodial interrogations has been endorsed by, among others, the American Bar Association, International Association of Chiefs of Police, National District Attorneys Association, and National Association of Criminal Defense Lawyers.

In light of the widespread agreement that recordings of custodial interrogations are a valuable tool for our system of criminal justice, an issue remains as to how the practice should be instituted. There are two schools of thought: Some contend recordings should be adopted pursuant to guidelines (a.k.a. best practices), recommended by state law enforcement authorities and/or state police and sheriff associations. Others contend it is preferable to have a state statute or state supreme court rule that provides for recording under circumstances that apply uniformly throughout the state. This article examines both proposals and the reasons that favor state statutes and supreme court rules.

**Inevitable Defects in Recommended Guidelines**

Although guidelines are proposed with good intentions, they have been shown to be inferior to legislation or supreme court rules for the following reasons:

1. Guidelines are merely recommendations, no matter what officer or organization proposes them. Each law enforcement department in the state retains unfettered discretion as to whether or not to adopt any guidelines.

2. In each department choosing to adopt guidelines, officials are not required to enact any particular provisions—for example, whether the recordings are made by audio or audio/video, which crimes warrant recording, the circumstances that excuse recording, and duplication and preservation. The inevitable result is a jumble of differing regulations among departments, which each may alter or repeal at any time.

3. The inevitable disparities among recording practices within a state create a serious vulnerability to prosecutors. A defense lawyer cross-examining a detective about an unrecorded interrogation may demonstrate that other departments in the state would have recorded the interrogation, thus inviting the judge or jury to draw an unfavorable inference as to the reliability of police verbal descriptions. As we become accustomed to recordings in everyday life, this risk to the prosecution increases.

4. Guidelines provide no sanctions for noncompliance, and therefore are unenforceable. As law enforcement personnel well know, potential adverse consequences provide strong encouragement to comply.

The result of guideline regimens is that some departments will have no recording provisions while the rest will be a conglomeration of rules, differing from department to department, that may be altered at any time and carry no meaningful consequence for noncompliance. This is unsound law enforcement policy.

These defects are not hypothetical. In five states, leading law enforcement agencies have recommended rather than required enactment of guidelines by all departments. The results illustrate the futility of this approach in achieving statewide uniformity and compliance.

**Arizona (more than 100 police, tribal, and sheriff departments).** In 2002, the Attorney General’s Law Enforcement Advisory Board adopted a protocol urging that suspect interviews in criminal cases be video or audio taped whenever feasible, including “informing a suspect of his constitutional rights, the waiver of those rights by the suspect, and all questions and answers of that suspect during interrogation whenever feasible.” (NACDL, *Custodial Interrogation Recording*, (Jan. 15, 2014), http://tinyurl.com/kfu7y4f).

In 2004, the attorney general’s office sent a written survey to all law enforcement agencies “to determine current procedures with regard to recording suspect interviews.” *(Id.)* Only 59 responded. Of those, 87 percent reported that all interrogations by detectives were audio recorded, while 10 percent reported that all were not. In 2010, the Arizona Justice Project—a volunteer organization devoted
to assisting in correcting errors and injustices in the criminal justice system—sent a survey to 40 departments, requesting information about their practices in recording custodial interrogations: 38 percent responded that they record all custodial interrogations; 40 percent that they record more than 75 percent of the time; and 18 percent that they record 50–75 percent of the time.

Thus, there is no official information as to the recording practices followed in nearly half of Arizona’s departments, and, of those that responded to the surveys, many reported that they do not adhere to the attorney general’s guidelines.

**Iowa (more than 420 law enforcement departments).** In 2006, the Iowa Supreme Court issued an opinion expressing a strong preference for custodial interviews to be recorded in the future (State v. Hajtic, 724 N.W.2d 449, 454 (Iowa 2006)): “We are aided in our de novo review in this case by a complete videotape and audiotape of the Miranda proceedings and the interrogation that followed. ... This case illustrates the value of electronic recording, particularly videotaping, of custodial interrogations.”

Reacting to the court’s statement, the Iowa attorney general wrote: “Although the court stated that it is ‘encouraging’ the practice of electronic recording, the attorney general’s office believes that the Hajtic decision should be interpreted as essentially requiring this practice. ... [T]he Court apparently wanted to reach out to law enforcement with the message that it should implement such recording.” (T. Miller, Cautions Regarding Custodial Issues, 39 IOWA POLICE J. 1-15 (2007).)

In March 2007, the Department of Public Safety (DPS) adopted a general order requiring “the electronic recording of all custodial interrogations conducted by its officers in detention facilities and all [DPS] occupied buildings, when feasible.” This order did not apply to local departments.

In 2009, the Iowa State Bar Association’s Criminal Law Section Council convened a stakeholders meeting of state and local law enforcement agencies and defense lawyers. There was general consensus about the merits of recording custodial interrogations, but “the extent to which law enforcement departments were already recording or had the capability of doing so [were] factors which were then unknown.” The council undertook a telephone survey, supplemented by e-mail, of all law enforcement agencies, to assess their policies, practices, and capabilities relating to electronic recording. State law enforcement agencies encouraged the local departments to respond. In December 2011, the council reported that responses were received from less than half of the departments. Of those, 99 departments (23.5 percent statewide) reported they are in compliance with the attorney general’s admonition to record custodial interrogations; 78 (18.5 percent statewide) reported the decision to record was left to the discretion of the interrogating officers; and 21 (5 percent statewide) reported they record depending on the crime charged and the level of offense. No information was obtained as to the crimes that trigger recording, excuses for not recording, or related regulations.

Thus, there is no official information as to the practices of over half of law enforcement departments in the state, and half of those that responded to the most recent survey acknowledged they do not record interrogations as recommended by the attorney general.

**Massachusetts (more than 360 local police and sheriff departments, plus state police and state agencies).** In 2004, the Supreme Judicial Court directed that if testimony of an unrecorded confession was offered into evidence, the trial judge was required to give the jury a cautionary instruction:

> [T]he State’s highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that, because of the absence of any recording of the interrogation ..., they should weigh evidence of the defendant’s alleged statement with great caution and care. Where voluntariness is a live issue ... the jury should also be advised that the absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt.

(Commonwealth v. DiGiambattista, 813 N.E.2d 516, 533–34 (Mass. 2004.).)

This ruling was publicized to all departments in the state by the Massachusetts Chiefs of Police Association (MCOPA). In September 2006, the attorney general and the Massachusetts District Attorneys Association (MDAA) issued a Justice Initiative Report that states in part: “Law enforcement officers shall, whenever it is practicable and with the suspect’s knowledge, electronically record all custodial interrogations of suspects and interrogations of suspects conducted in places of detention.”

The same month, the MDAA, the MCOPA, and the Massachusetts State Police distributed to all state law enforcement agencies the attorney general’s recommended improvements to the criminal justice system, which included the following: “It is the policy of the [police] department [instituting the policy], to electronically record all custodial interrogations of suspects or interrogations of suspects conducted in places of detention whenever practical.”

Since that time, an MCOPA official sent a survey to more than 300 police chiefs and received 100 responses, almost all of which confirmed that recordings are made of custodial felony interviews unless the suspect objects. Virtually all contain positive reports about the practice. However, as to the remaining 200-plus departments, there is no official information as to their compliance with the Supreme Judicial Court’s admonition, the Justice Initiative Report, or the attorney general’s recommendation. Since that time, law enforcement departments have not been surveyed to learn which record interrogations and which do not, nor which crimes trigger recordings, what factors excuse recordings, and related matters. Thus, there is no official information as to compliance by law enforcement departments with
the Supreme Judicial Court's admonition, the Justice Initiative Report, or the attorney general's recommendation. New York (more than 600 local and county police and sheriffs, college/university, park, and railway police departments). Several cases involving false confessions brought pressure on state law enforcement agencies to consider recording. In 2010, the state associations of district attorneys, sheriffs, chiefs of police, and the New York City Police Department announced their support for "the practice of video recording interrogations of suspects who are in custody in their entirety," embodied in New York State Guidelines for Recording Custodial Interrogations of Suspects (available at http://tinyurl.com/kyfto2h), with the following comments:

On a voluntary basis, where resources permit, law enforcement agencies around the state are embracing video recording of interrogations as an enhancement to the criminal justice system.

Thus, adopting guidelines and their content was specifically left to the discretion of each department.

In July 2013, Governor Andrew Cuomo announced that funds were to be provided to law enforcement agencies for recording equipment, but he anticipated variations among departments as to cases in which recordings will be made: "In addition to administering the grant funds, district attorneys must partner with police agencies in their counties to develop video recording protocols to detail, among other things, the type of crimes with which an individual is charged that would require the interview to be recorded."

In answer to a query from this author, a representative of the state Criminal Justice Services stated that "[New York State] does not track whether individual agencies have adopted" the best practices adopted by the state associations. Thus, no official information as to the recording practices of departments exists; disparities in guidelines among departments are explicitly invited; and no agency is tasked with tracking compliance with whatever regulations or protocols have been adopted.

Vermont (75 state and local police and sheriff departments). In 2010, the legislature adopted a bill directing that the Law Enforcement Advisory Board (LEAB) develop a proposal requiring law enforcement agencies to record custodial interrogations conducted of felony suspects in places of detention. In January 2011, LEAB reported the results of a survey of state law enforcement agencies' recording practices. About a third of the agencies responded. LEAB also determined that "[audio and video recording of custodial interrogations whenever practicable is a best practice that should be adopted by all [Vermont] law enforcement agencies." A "Best Practices Statement" was attached to the report, which tracked portions of the language of several state statutes, with the following end note:

This document provides recommendations for electronic recording of custodial questioning. No document can address all the circumstances and exigencies which officers may encounter, and this model is not intended to be a comprehensive treatment of all the factors involved in criminal investigations. While it is a general guide outlining methods for custodial questioning, the recommendations are intended to be used as guidelines, and are not intended to create any substantive or procedural rights.

Several years ago, a training manual dealing with electronic recording of custodial interrogations was distributed to Vermont agencies. As with New York, Vermont officials have no information as to the degree of compliance with LEAB's Best Practices Statement, nor do they know of any mechanism in place to track compliance.

Uniformity through Legislation and Supreme Court Rules

The experiences in these five states show that the result of recommending guidelines for recording custodial interrogations yields either no guidelines or differing guidelines throughout the state. There is also a lack of official information about what procedures or regulations are followed in many departments.

This is a crucial area of law enforcement. The treatment of arrested felony suspects during custodial questioning should not depend upon the fortuity of which officer makes the arrest, or the location of the station where the interrogation takes place. Rather, the same rules should apply to all suspects in all departments throughout each state. This point was made in the final report of a New York Justice Task Force, appointed in May 2009 by the chief judge of the state's highest court, to study and recommend measures to guard against wrongful convictions. In January 2012, after more than two years of study, and receipt of oral and written statements from many experts, the majority recommended adoption of rules applicable statewide for electronic recording of custodial interrogations in specified felonies. The report contains a pointed refutation of disparate recording guidelines within the same state: "[T]he Task Force ultimately determined that electronic recording of interrogations was simply too critical to identifying false confessions and preventing wrongful convictions to recommend as a voluntary, rather than mandatory, reform." (N.Y. STATE JUSTICE TASKFORCE, RECOMMENDATIONS REGARDING...
The drafting committee reporter wrote: “The hope of the Act’s drafters is that putting the prestige of the ULC . . . behind the electronic recording process would accelerate its widespread national adoption, improve uniformity, and improve the quality and efficiency by which interrogation occurs.” (Andrew E. Taslitz, High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statute on Videotaping Custodial Interrogations, 7 NW. J.L. & SOC. POL’Y 400, 401–02 (2012).)

The benefits of a uniform state law or rule were explained by another commentator:

Using legislation to establish recording policies provides several advantages. These include opportunities for public participation in decision making through elected representatives, development of research-based solutions, and uniformity.

Another benefit of legislative action includes ensuring uniformity throughout the jurisdiction. When a law is passed, all agencies covered by it are subject to the same rules . . . Such uniformity also secures equal protection to all defendants within the jurisdiction. (Julie Renee Linkins, Note, Satisfy the Demands of Justice: Embrace Electronic Recording of Custodial Investigative Interviews through Legislation, Agency Policy, or Court Mandate, 44 AM. CRIM. L. REV. 141, 154, 156 (2007).)

Conclusion

In support of voluntary guidelines systems, it has been contended that each department in each state should make its own rules because legislated or court-ordered procedures do not allow for experimentation, improvement, or comparative study of the varying capabilities and needs of departments of different sizes in different locations. While this reasoning may have application to some aspects of police procedures, it is not relevant to interviewing criminal suspects in places of detention, which has been a part of police work for well over a century in this country, and needs no further study or experimentation. Our law enforcement agencies are quite familiar with the use of highly sophisticated electronic equipment in criminal investigations.

Statewide recording rules applied to custodial questioning have proven successful in thousands of departments located in every corner of our country, from small towns to big cities, in communities with diverse populations, and in departments with less than 10 officers to those with thousands. This is the most effective, sensible, and economic way to improve the accuracy of a critical aspect of our nation’s criminal justice system.