

Oklahoma Journal of Law and Technology

Volume 9 | Number 1

January 2013

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Recommended Citation

Rose, Kristian Bryant (2013) "Of Principle and Prudence: Analyzing the F.B.I.'s Reluctance to Electronically Record Interrogations," *Oklahoma Journal of Law and Technology*. Vol. 9: No. 1, Article 3.
Available at: <https://digitalcommons.law.ou.edu/okjolt/vol9/iss1/3>

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**OF PRINCIPLE AND PRUDENCE: ANALYZING THE F.B.I.'S RELUCTANCE
TO ELECTRONICALLY RECORD INTERROGATIONS**

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“Believe nothing you hear, and only one-half that you see.”¹
Edgar Allan Poe

I. Intro

On a wintery December night in 1980, three men—Bob Mitchell, Malcolm Harris, and Richard Farmer—drove to Clark Garvin’s home to purchase cocaine.² Finding Garvin away, Mitchell kicked in the door, entered the house, and stole two pounds of marijuana, cocaine, a set of drug scales, and \$14,000 in traveler’s checks.³ Though the drugs were immediately usable, the unendorsed traveler’s checks presented a problem of illiquidity. In what can only be described as a stroke of petty-criminal ingenuity, Harris forged Garvin’s signature, counterfeited an Alaska birth certificate in Garvin’s name, and obtained a matching state identification card.⁴ Harris then flew to Seattle where he proceeded to fraudulently cash most of the checks.⁵

More than five years prior to Harris’ case, the Alaska Supreme Court held in *Mallott v. State* that due process under the Alaska Constitution required the electronic recording of police interrogations.⁶ The officers who obtained Harris’ confession employed “a

¹ Edgar Allan Poe, *The System of Doctor Tarr and Professor Fether*, CLASSIC READER, <http://www.classicreader.com/book/1394/1/> (last visited July 13, 2013).

² *Harris v. State*, 678 P.2d 397, 399 (Alaska Ct. App. 1984), *rev’d sub nom.* *Stephen v. State*, 705 P.2d 410 (Alaska 1985).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ 608 P.2d 737, 743 n.5 (Alaska 1980).

working audio or video recorder . . . during part, but not all, of the interrogation. . . . [and] offered no satisfactory excuse for their clear disregard of the *Mallott* rule.”⁷

At trial, a jury of Harris’ peers found sufficient evidence to convict him to an eight year sentence and included restitution penalties in the amount of \$7,000.⁸ On appeal, Harris’ attorney successfully challenged the admissibility of Harris’ confession to police.⁹ The appellate court remanded the case for retrial with instructions to suppress the statements.¹⁰

Depending on one’s perspective, this outcome might appear either a triumphant preservation of essential due process, or, alternatively, a damnable waste of judicial, police, and taxpayer resources. Such diametrically opposed views perfectly capture the controversy regarding the Federal Bureau of Investigation’s (“F.B.I.” or “the Bureau”) policy of discretionary interrogation recordation.

Currently, the F.B.I. maintains a policy that generally precludes electronically recording interrogations and interviews of suspects.¹¹ Instead, the Bureau relies on “302 reports,” whereby an agent transcribes, by hand, what is said during an interview.¹² This practice is not without exception, however. In certain circumstances, the Special Agent in Charge of a field office may exercise discretion to allow the recording of an interview.¹³

⁷ *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985).

⁸ *Harris*, 678 P.2d at 399.

⁹ *Stephan v. State*, 705 P.2d 410 (Alaska 1985).

¹⁰ *Id.*

¹¹ *United States v. Filler*, No. 8-10396, 2000 WL 123446, at *1 (9th Cir. Feb. 1, 2000) (No. 98–10396) (referenced in a “Table of Decisions Without Reported Opinions” appearing at 210 F.3d 386).

¹² Harvey Silvergate, *Constructing Truth: The FBI’s (Non)recording Policy*, FORBES.COM (July 27, 2011, 2:12 PM), <http://www.forbes.com/sites/harveysilvergate/2011/07/27/constructing-truth-the-fbis-nonrecording-policy/>

¹³ Memorandum from the Fed. Bureau of Investigation Office of Gen. Counsel to all Field Offices at 1627, 1630 (Mar. 23, 2006). Prescribed discretionary factors include: (1) the purpose of the interview; (2) type and seriousness of the crime, including the presence of a *mens rea* element; (3) whether defendant’s own words and appearance would help rebut doubt about the voluntariness of statements made; (4) the sufficiency of other available evidence; (5) the preference of the U.S. Attorney’s office and the applicable

A discretionary allowance appears particularly likely where the partnering United States Attorney or applicable Federal District Court requires such recording.¹⁴

These discretionary exceptions notwithstanding, a growing body of academic literature suggests concern for the improvidence and due process implications of refusing to record custodial interrogations.¹⁵ Part II of this comment argues: (1) that due process under the United States Constitution does not require the electronic recording of custodial interrogations, (2) that video footage fails to achieve maximum evidentiary objectivity, and (3) that courts should leave to law enforcement the freedom to determine investigative best practices. Part III explores the prudence of adopting a policy of video recordation despite a lack of constitutional compulsion. This comment concludes in Part IV.

II. A Matter of Principle: Due Process Does Not Require the Electronic Recordation of Custodial Interrogation

The Fifth Amendment to the federal Constitution provides: “No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.”¹⁶ *Miranda v. Arizona* stands as the seminal case establishing a suspect’s procedural protections beginning at the moment of custody.¹⁷ *Miranda* specifically established police requirements to inform a suspect of

Federal District Court; (6) local laws and practice, particularly if a multi-agency task force is involved and may lead to state prosecution; (7) whether interviews with related subjects in the investigation have been recorded; (8) the potential to use the subject as a cooperating witness and the potential value of such recording; and (9) practical considerations, such as the length of interview, availability of equipment, and available funds to pay for recording and transcription services. *Id.* at 1630.

¹⁴ *See id.*

¹⁵ *See, e.g.,* Tracy Lamar Wright, *Let’s Take Another Look at That: False Confession, Interrogation, and the Case for Electronic Recording*, 44 IDAHO L. REV. 251, 251-53 (2007); Daniel Donovan & John Rhodes, *Comes a Time: The Case for Recording Interrogations*, 61 MONT. L. REV. 223, 223-27 (2000).

¹⁶ U.S CONST. amend. V.

¹⁷ *See Miranda v. Arizona*, 384 U.S. 436 (1966).

his constitutional rights upon arrest.¹⁸ However, the Court later clarified that the use of these “prophylactic” measures was simply a way to ensure the full substantive Fifth Amendment right.¹⁹ That discussion bears great weight on the issue of modern electronic recordings during interrogation.

Some have argued that to enforce due process, “recording is constitutionally necessary” as a “remedy for false confessions.”²⁰ Proponents for recording occasionally look to other democratic countries such as Great Britain, Canada, and Australia, observing that each requires recording for custodial interrogations.²¹ In the end, however, reformers must confront the reality that, within the United States, the overwhelming majority of jurisdictions reject such a requirement.²²

A. Due Process: A Moving Target or a Statued Sentiment?

If the constitutional text makes no mention of electronically recording interrogations, and the Supreme Court has not yet addressed the issue, then just what does due process require of police with respect to the way they handle interviews? First, it might be helpful to address, very briefly, the modern jurisprudential disagreement about what due process the Constitution generally requires. Specifically, does constitutional “due process” incorporate modern contextual realities, or does it simply protect citizens in the same principled way it did when drafted? The divergent answers to that question might

¹⁸ *Id.* at 478-79.

¹⁹ *See, e.g., Oregon v. Elstad*, 470 U.S. 298, 305, (1985) (“The prophylactic *Miranda* warnings therefore are ‘not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.’”).

²⁰ *Donovan & Rhodes, supra* note 15, at 230-31.

²¹ *Id.* at 231.

²² *Id.* at 232.

be termed “originalism” and “dynamism.”²³ The originalist view of substantive due process is well-articulated by Justice Antonin Scalia:

I will not apply so-called Substantive Due Process in the future That means that there are all sorts of new rights that would otherwise be created that I will leave to the democratic process. . . . The Framers were trying to set a bar below which the society cannot go. They didn’t believe that every day we get better and better—the ‘evolving standards of decency that mark the evolution of a maturing society.’ They understood that societies not only mature—they sometimes rot. And they were trying to set a bar to prevent that rotting. *To understand it in any other way, to mean whatever some future society wants it to mean, is to deprive it of all its effect.*²⁴

Consistent with Justice Scalia’s view, inferring a suspect’s right to have interrogations video recorded would represent a false extrapolation of the Fifth Amendment’s original meaning. Rather than grant a new right, an originalist would simply enforce the baseline due process protection in light of its historical context.

Alternatively, other jurists, such as the late Justice Felix Frankfurter, view due process as necessarily evolving with time and culture.

“[D]ue process,” unlike some legal rules, is *not a technical conception with a fixed content unrelated to time, place and circumstances*. . . . “[D]ue process” cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, “due process” is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. *Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.*²⁵

²³ William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2363 (2002).

²⁴ Jerry de Jaeger, *Justice Scalia Comes Home to the Law School*, RECORD ONLINE, Spring 2012, <http://www.law.uchicago.edu/alumni/magazine/spring12/scalia> (emphasis added).

²⁵ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 US 123, 162-63 (1951) (Frankfurter, concurring) (emphasis added). Justice Scalia’s remarks addressed Substantive Due Process, while Justice Frankfurter spoke primarily of Procedural Due Process. These are two sides of the same coin, however, and one might

Where Justice Scalia’s originalism cautions restraint in creating new rights under due process, Justice Frankfurter’s dynamic and expansive view dictates that the Court must respond to shifting realities within which the state exercises its power. Justice Burke of the Alaska Supreme Court echoes Justice Frankfurter’s perspective. In writing the majority opinion for the landmark case *Stephan v. State*, Justice Burke stated: “The concept of due process is not static; among other things, it must change to keep pace with new technological developments.”²⁶

B. The Undivided Circuits: Due Process Does Not Require Electronic Recordation

Regardless of which jurisprudential philosophy ultimately prevails, the United States Circuit Courts of Appeals have spoken with complete unanimity on this question. When asked whether due process requires the recording of interrogations, their answer resounds clearly and with consistent pitch: no.

The issue emerged as early as 1977 when the Ninth Circuit Court of Appeals took up the question in *United States v. Coades*.²⁷ In *Coades*, the appellant urged the court to suppress testimony of an F.B.I. agent because the agent had not electronically or stenographically recorded his interrogation.²⁸ Appellant proffered no authority to support his position, and the court opted for judicial restraint, explaining: “The need for the rule

reasonably argue that mandatory video recording could fall on either side. It seems perhaps most in line with *Miranda*, which specifically addressed *procedural* due process. Quite like *Miranda*, the government’s electronic recording would arguably create a more advanced *prophylactic* protection of the Fifth Amendment right against self-incrimination. Although Justice Scalia’s originalist sentiment in note 22, *supra*, addressed substantive due process, his dissent in *Dickerson v. United States*, placed the same emphasis on procedural due process. There, he criticized the Court’s “judicial overreaching” when deciding *ex post* that a violation of *Miranda* was a violation of the Constitution. *Dickerson v. United States*, 530 U.S. 428, 455, 465 (2000). In part, Justice Scalia reasoned that history fails to support such an expansive view of procedural due process as applied to the Fifth Amendment. *Id.* at 447. Whether video recordation is classified ultimately as a substantive or procedural due process issue, the originalist and dynamist will maintain the same essential disagreement.

²⁶ 711 P.2d 1156, 1161 (1985) (incorporating an affirmative state constitutional requirement that police record interrogations).

²⁷ 549 F.2d 1303, 1305 (9th Cir. 1977).

²⁸ *Id.*

suggested by appellant and the particular form such a rule should take are appropriate matters for consideration by Congress, not for a court exercising an appellate function.”²⁹

The Ninth Circuit continues to maintain this view, as evidenced in the 2003 case, *United States v. Huber*.³⁰ There, appellant argued that “for *Miranda* . . . to have any teeth, an electronic recording must be made.”³¹ While the court acknowledged possible benefits of a recording policy, it found “no legal basis for imposing such a requirement.”³²

The Sixth Circuit Court of Appeals likewise held in *Brown v. Mckee* that “[n]either federal nor Michigan law requires suppression solely on the basis that a police interrogation was not electronically recorded.”³³ In that case, a defendant alleged that the interrogator failed to read his Miranda rights and unlawfully coerced a confession.³⁴ Because no electronic record of the interrogation was preserved, the defendant argued, the evidence should have been excluded.³⁵ Citing cases from the Sixth and Tenth Circuits, the court refused his motion to suppress.³⁶

In 1991, the Tenth Circuit Court of Appeals considered whether an F.B.I. agent was required to tape record statements elicited during interrogation when well equipped to do so.³⁷ The court noted the potential wisdom of recording interrogations, but ultimately held that it was not constitutionally required.³⁸ In so holding, the court acknowledged a trial court’s prerogative to accept the credible testimony of a federal agent over and

²⁹ *Id.*

³⁰ 66 Fed. App’x. 123, 124 (9th Cir. 2003).

³¹ *Id.*

³² *Id.*

³³ 231 Fed. App’x. 469, 475 (6th Cir. 2007).

³⁴ *Id.* at 473.

³⁵ *Id.* at 475.

³⁶ *Id.*; *see also* *United States v. Gray*, No. 3:09 CR 182, 2010 WL 1487218, at *4 (N.D. Ohio Apr. 13, 2010) (holding that the Sixth Circuit has consistently refused to recognize a federal right of recorded interviews, and that where the F.B.I. only preserved an interview through 302 reports, “arguments as to the lack of electronic recording [were] without merit”).

³⁷ *United States v. Short*, 947 F.2d 1445, 1451 (10th Cir. 1991).

³⁸ *Id.*

against that of a criminal defendant, even in the absence of electronic recordings.³⁹ Again in 1999 the court found “no Supreme Court precedent (or, for that matter, any other court precedent)” that due process required electronically recorded interrogations.⁴⁰

As a final example of the far reaching and unanimous federal appellate voice declaring no due process right to an electronically recorded interrogation, consider an appeal of a military court martial in the 2007 case *United States v. Jarvis*.⁴¹ There, appellant contended that an investigator’s failure to record his inculpatory statements violated his due process rights. The court applauded the well-constructed argument, stating:

Trail [sic] defense counsel filed an exceptional motion at trial arguing that “[t]o fully protect a service member's Fifth and Sixth Amendment rights, the time has come to apply a bright line, constitutionally based, prophylactic rule: an unreasonable failure to electronically record the entirety of a suspect's interrogation violates the suspect's constitutional rights and renders any statement purportedly obtained from such interrogation inadmissible.”⁴²

However, because “[n]o [such] requirements exist under either federal law or the United States Constitution,” the court “decline[d] to extend such a rule to military courts-martial.”⁴³ To date, a court from every federal circuit has issued at least one opinion holding no due process right to the electronic recording of custodial interrogations.⁴⁴

Because the Circuit Courts maintain complete agreement on the matter, it is extremely

³⁹ *Id.* (“In ruling against Defendant at the suppression hearing, the court obviously felt the Government's witnesses were more credible than the defense witnesses.”).

⁴⁰ *Trice v. Ward*, 196 F.3d 1151, 1170 (10th Cir. 1999).

⁴¹ *United States v. Jarvis*, No. ACM 36502, 2007 WL 2300889, at *4 (A.F. Ct. Crim. App. May 31, 2007).

⁴² *Id.* at *1.

⁴³ *Id.*

⁴⁴ *See, e.g.*, *United States v. Meadows*, 571 F.3d 131 (1st Cir. 2009); *United States v. Boston*, 249 Fed. Appx. 807 (11th Cir. 2007); *United States v. Tykarsky*, 446 F.3d 458 (3d Cir. 2006); *United States v. Williams*, 429 F.3d 767 (8th Cir. 2005); *United States v. Montgomery*, 390 F.3d 1013 (7th Cir. 2004); *Yang Feng Zhao v. City of New York*, 656 F. Supp. 2d 375 (S.D. N.Y. 2009); *United States v. Faultry*, No. H-05-00109, 2006 WL 1544512 (S.D. Tex. June 1, 2006).

unlikely that the Supreme Court will even address the question. Therefore, criminal defendants desiring an electronic recording of their confessions will not soon find comfort beneath due process.

Federal district court judges should recognize this precedential reality and limit their unsolicited criticism accordingly.⁴⁵ Justice Thurgood Marshall aptly counseled that “[j]udges are not free, in defining ‘due process,’ to impose on law enforcement officials [their] ‘personal and private notions’ of fairness and to ‘disregard the limits that bind judges in their judicial function.’”⁴⁶

C. The Ostensible “Objectivity” of Video Footage

Justice Byron White once opined that “the right to an impartial decision-maker is required by due process.”⁴⁷ A vocal minority of scholars and practitioners believe that “recording provides what due process requires.”⁴⁸ This logic employs a fatal flaw, however. Video cannot transform a fallible, human decision-maker into an objective assessor of truth. It simply changes the basis for subjective bias. As one proponent of forced recording conceded:

While such vivid sounds and images can provide a great advantage, some caution may be warranted because recordings might introduce emotional biases into jury decision making. Even jurors who seek to be fair-minded have pre-conceived prejudices and sympathies regarding the appearance (dress, tattoos, hair styles, clothing, jewelry, race, or physical prowess, for example) as well as language and culture, which might affect a decision that should be based on fact and evidence.⁴⁹

⁴⁵ See *infra* Part III.B (quoting Judge James G. Carr’s discontentment with current F.B.I. policy).

⁴⁶ *United States v. Lovasco*, 431 U.S. 783, 790 (1977).

⁴⁷ *Arnett v. Kennedy*, 416 U.S. 134, 197 (1974) (White, J., concurring in part and dissenting in part).

⁴⁸ *Donovan & Rhodes*, *supra* note 15, at 245.

⁴⁹ Julie Renee Linkins, *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, 160 (2007).

Video images undoubtedly present an *enhanced* perspective to courts as to what occurred in a given interrogation. It is far from a foregone conclusion, however, that an enhanced perspective always yields greater impartiality. Imagine a scenario where an investigating agent bears a striking resemblance to, say, David Beckham: tall, blond, well-groomed, excellent hygiene, and impeccable style. The suspect, on the other hand, wears tattoo sleeves all the way up his arms, displays a large Nazi swastika on his chest, which is visible through an open, black leather vest unobscured by the absence of an undershirt. Further, he appears to have blood on his face. Would anyone contend that a juror would not be immediately biased upon viewing the juxtaposition of that dyad?

Additionally, depending on the depth and breadth a particular video can provide, other biases may emerge:

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.⁵⁰

Fully eliminating such inherent gaps and biases would essentially require a panoramic view of the entire custodial space, including simultaneous coverage of each participant's face—agents and suspects alike. Incorporating that level of coverage would surely minimize the natural biases created by video recording, but would also increase the cost of implementation to preposterous levels.

⁵⁰ Brian Parsi Boetig, David M. Vinson & Brad R. Weidel, *Revealing Incommunicado: Electronic Recording of Police Interrogations*, FBI L. ENFORCEMENT BULL., Dec. 2006, at 1, 7-8 (vol. 75, no. 12).

Even assuming an agency's ability to purchase and position the most comprehensive and state-of-the art equipment (a dubious assumption indeed), there still exists a fundamental problem with presenting video evidence as the great hope for juror objectivity. "Nearly all evidence presented by attorneys at trial is 'prejudicial' in the sense that it is offered to induce the jury to reach a decision unfavorable to one's opponent."⁵¹ That truth will remain constant despite whatever marginal increases in objectivity electronic recording might deliver. In the final analysis, all evidence will be prejudicial in some sense, and, in fact, is used by every attorney for that very purpose! That is not to say that video evidence renders juror decisions *less* objective. Rather, video will simply change the *subjective* basis upon which jurors decide.

Still, some advocates for mandatory recording encourage courts, in the name of due process, to adopt each and every technological innovation that emerges. Julie Renee Linkins, a law professor and former F.B.I. employee, suggests that "courts should not feel reluctant to adopt a technological advance that will aid truth telling and fact finding, just as they adopted various forensic advances in times past."⁵² This reasoning presents a frightening future when taken to its logical conclusion. While the proposal might be an acceptable principle in measure, the consequence of courts agreeing to adopt *en masse* all new truth-telling technological advances for the sake of due process, which Linkins seems to advise, looms both costly and invasive. Presume, for instance, that science could produce a reliable truth-telling serum.⁵³ Should courts then automatically require its administration to all testifying agents and investigators as a component of constitutional

⁵¹ SHEILA K. WYATT, COLORADO EVIDENCE LAW § 403:3 (2012) [hereinafter COLORADO EVIDENCE LAW] (vol. 23 of West's Colorado Practice Series).

⁵² Linkins, *supra* note 49, at 171.

⁵³ See generally Linda M. Keller, Article, *Is Truth Serum Torture?*, 20 AM. U. INT'L L. REV. 521 (2005) (discussing truth serums and their various uses in criminal investigations).

due process because it facilitates greater transparency? Certainly not! Or presume nanotechnology⁵⁴ became affordable and scalable to the point that the government could implant each federal officer with a real time video transmitter. Would such an Orwellian surveillance be justified under color of due process in order to protect citizens' rights? The concept of adopting every new technology that portends even a marginal increase in government transparency as a constitutionally required prophylactic is patently absurd—particularly for a federal government facing \$16 trillion in national debt.⁵⁵

Consider by analogy another technological innovation that arrived to criminal justice as a harbinger of complete scientific objectivity: hair and fiber analysis. Early forensic reports presented this analysis as a fool-proof safeguard for criminal investigation and fair trial.⁵⁶ Today, it is increasingly maligned and lampooned. Michael J. Saks, a professor of law and psychology at Arizona State University, recently labeled it “faith based” science.⁵⁷ Despite its *apparent* objective value, senior federal-appeals-court judge Harry T. Edwards observed that “[i]t sounds like there is a lot of impressionistic and subjective examination going on.”⁵⁸ Judge Edwards’ comment is somewhat prescient. Any time new technologies emerge to enhance the ostensible fairness of trials they will *always* contain certain fatal flaws. Such is the inherent reality of technology designed and marshaled by fallible people. In that regard, polygraphs,⁵⁹ fiber analysis, video

⁵⁴ See generally Susan W. Brenner, *Nanocrime?*, 2011 U. ILL. J.L. TECH. & POL'Y 39 (discussing the development of nanotechnology).

⁵⁵ *The Debt to the Penny and Who Holds It*, TREASURYDIRECT.GOV, <http://www.treasurydirect.gov/NP/BPDLLogin?application=np> (last visited Mar. 29, 2013).

⁵⁶ See Jeffrey Toobin, *The CSI Effect: The Truth About Forensic Science*, NEW YORKER (May 7, 2007), http://www.newyorker.com/reporting/2007/05/07/070507fa_fact_toobin.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See generally Jeffrey Philip Ouellet, Note, *Posado and the Polygraph: The Truth Behind Post-Daubert Deception Detection*, 54 WASH. & LEE L. REV. 769 (1997) (discussing the evidentiary relevance and admissibility of polygraphs).

recordings, and truth serums all belong together. Each possesses some potential benefit to truth finding, and none pays its way into the constitutional requirement of due process.

Finally, even if video could in fact produce a consistently more objective view of police interrogations, the exposure of the state's investigative techniques would cripple police strategy. Though law enforcement might realize some modest value from its ability to use videos for training and assessment, so might criminals. Every degree of increased effectiveness that an investigator gains by reviewing "game tape" would conceivably be counteracted by the criminal watching the same recording. Once investigative techniques became widely disseminated through video recordings, sophisticated criminal syndicates would immediately gain access to the state's "playbook." It is not difficult to imagine that career criminals would quickly develop video-based training modules designed to teach suspects how to "beat the seat" by counteracting police technique. Additionally, with the knowledge that an interview was being recorded, a suspect could manipulate juror sympathy by feigning meekness, confusion, or intimidation for the camera.

D. Deference to Law Enforcement as the Best-Positioned Decision Maker

The United States courts, in conjunction with the Executive branch, maintain the responsibility for ensuring the full measure of due process for the protection of criminal suspects. Where no due process right exists, however, courts should concede investigative policy to law enforcement. In this case, the unanimity of federal holdings indicates that no constitutional issue exists. Therefore, courts should give law enforcement broad discretion within the bounds of constitutional due process. Evidencing an overwhelming rejection of electronic recording, only "a small percentage of the total

number” of police agencies nationwide, given the choice, has voluntarily adopted the policy.⁶⁰

Proponents for the mandatory recordation policy argue that the electronic record will decrease police misconduct and disincentivize procedural violations.⁶¹ While that may be so, the constant video monitoring would also create a corollary chilling effect on *lawful* police conduct—particularly with aggressive techniques that might offend jurors’ sensitivities. Moreover, the constant electronic monitoring could disrupt suspect rapport and willingness to talk. “In New York City . . . where the district attorney’s office conducts recorded interviews in high-profile cases, suspects have been known to become tense and awkward even after having previously expressed willingness to talk; introduction of a video camera and technician to run the equipment changes the dynamics in the room.”⁶²

One of the greatest risks of private interrogation lies in unscrupulous officers’ ability to abuse suspects through unlawful tactics or physical coercion. However, as Justice John Marshall Harlan wrote in his dissent to *Miranda*, “[t]hose who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers.”⁶³ While some may view video as the cure to Harlan’s unethical officer problem, in reality it provides only an additional, minimal obstacle. Those capable of abusing a prisoner or lying about waivers will become equally adept at eschewing necessary good faith requirements of recording or exploiting other applicable

⁶⁰ Linkins, *supra* note 49, at 157-58.

⁶¹ *Id.* at 150.

⁶² *Id.* at 158-59.

⁶³ *Miranda v. Arizona*, 384 U.S. 436, 505 (1966).

exceptions.⁶⁴ Might recording possess the power to *reduce* opportunity for officer abuse?

Almost certainly, yes. Could the policy *cure* human depravity and the attendant

inclination to disobey and cheat, which is the essential illness truly at play?

Unquestionably not.

Because the United States Constitution does not require video recording as a component of due process, courts must defer to law enforcement as the best positioned decision makers on investigative policy. If time and technological advances have in fact brought this matter into the realm of constitutional fairness, Congress should recognize that new reality and reflect its importance in the United States Code.

III. A Matter of Prudence: The F.B.I. Should Adopt a Policy of Electronic Recording for All Custodial Interrogations

Despite clear and consistent federal court rulings that constitutional due process does not require the electronic recording of interrogations,⁶⁵ the F.B.I. should begin implementing broad video recording programs. Even though the current non-recording policy passes constitutional scrutiny, the government stands to benefit from voluntarily utilizing technology during custodial interviews.

A. A Cupertino Culture, Technological Ubiquity, and the CSI Effect

To say that the technological landscape has changed immensely since the time of *Miranda* is a gross understatement. In 1966, the year that Chief Justice Earl Warren delivered the now famous *Miranda* opinion, the most powerful computer in the world

⁶⁴ See, e.g., Linkins, *supra* note 49, at 168 (“Likewise, using electronic recordings to protect the Fifth Amendment right against self-incrimination would be subject to logical exceptions for, say, good faith error or equipment failure, non-custodial interviews, spontaneous utterances, and the like.”) (internal citations omitted).

⁶⁵ See *supra* Part II.B.

was an IBM System/360 Model 91, owned by NASA.⁶⁶ It took up the space of an entire room.⁶⁷ Today, the average American carries inside his pocket a smartphone with more computing power.⁶⁸ In fact, the exponential increase in technological innovation over the past five years led one commentator to suggest that Apple, Inc.’s latest iPhone 5—which contains a five megapixel camera capable of holding hundreds of hours of video footage—simply bored consumers with its seemingly pedestrian specifications.⁶⁹

Society has become technologically inundated. Average Americans are increasingly accustomed to complete electronic saturation.⁷⁰ So much so, in fact, that modern jurors will likely take for granted a federal investigator’s ability to video record an interrogation. At least one litigation practice guide notes the courts’ general propensity to admit highly emotive media into evidence.⁷¹ The change has resulted from a general “rise in ordinary jurors’ exposure to and tolerance for this kind of material in other media.”⁷² In other words, today’s juries expect media to comprise at least part of their experience in trial.

⁶⁶ *The IBM 360/91*, COLUMBIA U., <http://www.columbia.edu/cu/computinghistory/36091.html> (last visited Nov. 1, 2012).

⁶⁷ *See id.*

⁶⁸ John Markoff, *The iPad in Your Hand: As Fast as a Supercomputer of Yore*, N.Y. TIMES (May 9, 2011, 3:45 PM),

<http://bits.blogs.nytimes.com/2011/05/09/the-ipad-in-your-hand-as-fast-as-a-supercomputer-of-yore/?smid=tw-nytimesbits&seid=auto> (“When they finish their project, though, Dr. Dongarra estimates that the iPad 2 will have a Linpack benchmark of between 1.5 and 1.65 gigaflops (billions of floating-point, or mathematical, operations per second). That would have insured that the iPad 2 could have stayed on the list of the world’s fastest supercomputers through 1994.”).

⁶⁹ *See generally* Matt Honan, *The iPhone 5 Is Completely Amazing and Utterly Boring*, WIRED (Sept. 12, 2012, 5:02 PM), <http://www.wired.com/gadgetlab/2012/09/the-iphone-5-is-boring-and-amazing/> (examining the underwhelming innovation on the latest iPhone, in light of consumer expectations for rapid and substantive technological improvement).

⁷⁰ *See id.* (noting the ostensible boredom among consumers in response to new iterations of handheld technology).

⁷¹ COLORADO EVIDENCE LAW, *supra* note 51, § 403:3.

⁷² *Id.*

For example, a recent poll of Louisiana jurists demonstrated that every judge surveyed felt that the popular television show “CSI” had, to some degree, influenced at least one of their juries.⁷³ Though the academic literature reflects disagreement regarding the supposed “CSI effect,”⁷⁴ much of the research is startling.⁷⁵ The Maryland Supreme Court examined the “CSI effect” and noted one particular study that “found a significant positive relationship between viewing crime dramas and the expectation of forensic evidence in every trial.”⁷⁶ In some cases, district attorneys feel the need to temper these juror biases during *voir dire* by commenting on the possible effects of jurors’ exposure to popular media.⁷⁷

The point here is not to divine how television affects juror appetite for forensic science, but to note a measurable shift in societal exposure to technology and the way it impacts a criminal trial. Even though due process does not require the video recordation of custodial interviews, if jurors expect it, the state would do well to provide it. By not providing video, the state allows jurors to negatively infer—perhaps even unconsciously—that the omitted footage would have somehow supported the accused.

The constitutional guarantee to a jury is a specific commitment to allow representatives of the public to make decisions about individual guilt. As one of the few vestiges of direct democracy in our system, some regard it as the quintessential example of this country's democratic ideals. The concept of popular sovereignty in

⁷³ Toobin, *supra* note 56.

⁷⁴ Compare Tom R. Tyler, Review, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1076-83 (2006) (arguing that the “CSI effect” is overstated or illusory), with Andrew P. Thomas, *The CSI Effect: Fact or Fiction*, 115 YALE L.J. 70, 70-71 (Supp. 2006) (contending that prosecutors in Maricopa County, Arizona see the effect at work regularly).

⁷⁵ See, e.g., Hon. Donald E. Shelton et al., *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the “CSI Effect” Exist?*, 9 VAND. J. ENT. & TECH. L. 331, 353 (2006) (demonstrating that juror expectations are significantly affected by exposure to portrayals of criminal justice in popular media).

⁷⁶ *Stabb v. State*, 423 Md. 454, 469 (2011) (citing Amber L. Ferris, Examining the “CSI Effect”: The Impact of Crime Drama Viewership on Perceptions of Forensics and Science (Aug. 2011) (unpublished Ph.D. dissertation, Kent State University)).

⁷⁷ *Goff v. State*, 14 So. 3d 625, 652-53 (Miss. 2009).

the United States includes a constitutional commitment that decisions about justice in individual cases should reflect the values of popular culture. Contrary to complaints about the effects of trends in popular culture on criminal juries—even trends perceived to be the result of a particular television program—the jury system dictates that those trends will be reflected in individual cases. It is the government and the judicial system which must respond and adapt to those trends. Changes in popular culture will continue to have a “tech effect” on juror expectations of and demands for scientific evidence. And so they should.⁷⁸

Juries do not decide what is *legally* required to fulfill due process. But they do decide what is *practically* required. Federal prosecutors must ultimately have the ability to proffer evidence that jurors find reasonable, regardless of what the law considers necessary.

What is “reasonable” evidence to expect from the prosecution today is very different from what it was twenty or even ten years ago. Ultimately, the legal system leaves the issue of defining “proof beyond a reasonable doubt” to the jury. They appear to have decided that today it is reasonable to expect more from the prosecution in the way of scientific evidence than they have expected in the past.⁷⁹

Today’s juries maintain heightened expectations for “scientific” evidence.⁸⁰ They also possess modern assumptions about the availability and propriety of technology—in particular, the commonness of video recordation of important events.⁸¹ To the extent that the federal government continues a counter-cultural policy of unrecorded interrogation, it will likely meet increasing suspicion and resistance from increasingly technologically

⁷⁸ Shelton, *supra* note 75, at 367.

⁷⁹ *Id.* at 365.

⁸⁰ See Thomas, *supra* note 74.

⁸¹ See Shelton, *supra* note 75, at 366 (“The technology and information revolutions are thoroughly integrated into popular culture. Popular culture in turn is directly reflected in the courts, which is as it should be in a system that puts its faith in the people to decide the outcome of cases.”).

fluent citizens—most importantly, those twelve very important citizens sitting in the jury box.⁸²

B. Calls for Reform

In addition to the heightened technological expectations of jurors, the call for interrogation-policy reform is reaching a fever pitch amongst judges, practitioners, and academics alike.⁸³ The Innocence Project, a well-known advocate for the falsely convicted, urges the broad adoption of mandatory recordation policies amongst federal law enforcement. Their website states: “The electronic recording of interrogations, from the reading of Miranda rights onward, is the single best reform available to stem the tide of false confessions.”⁸⁴ Innocence points to a 2004 Illinois study suggesting that once implemented, police departments overwhelmingly embrace mandatory recording policies.⁸⁵

Thomas P. Sullivan, perhaps the most prolific author on the topic of interrogation reform, began publishing articles as early as 2003.⁸⁶ Sullivan notes the irony of such a modernized federal law enforcement system remaining “sorely out of date” with interrogations.⁸⁷ He observed that “[f]ederal agents are familiar with using modern

⁸² In 2005, a Philadelphia bond trader was charged with making false statements to F.B.I. agents during an interview. At trial, he was acquitted due to lack of evidence. Commenting on the conflicting testimony between the defendant and the agents, one juror stated: “My advice to the FBI would be to tape their interviews.” *FBI's Policy Against Taping Interviews Key in Acquittal*, PITTSBURGH POST-GAZETTE, Feb. 6, 2005, at B1, available at http://www.epluribusmedia.org/documents/DOJDocsPt4-1070319_epm.pdf.

⁸³ See, e.g., Boetig, Vinson & Weidel, *supra* note 50, at 8; Thomas P. Sullivan, *The Department of Justice's Misguided Resistance to Electronic Recording of Custodial Interviews*, 59 FED. LAW. 62, 66-67 (2012) [hereinafter Sullivan, *Misguided Resistance*] (quoting various judges calling for change); Linkins, *supra* note 49, at 173.

⁸⁴ *False Confessions & Mandatory Recording of Investigations*, INNOCENCE PROJECT, <http://www.innocenceproject.org/fix/False-Confessions.php> (last visited Nov. 1, 2012).

⁸⁵ *Id.*

⁸⁶ See, e.g., Thomas P. Sullivan, *Three Police Station Reforms to Prevent Convicting the Innocent*, CBA REC., Apr. 2003, at 30, 31.

⁸⁷ Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1137 (2005).

electronic equipment [including] wiretap devices and hidden microphones.”⁸⁸

Accordingly, the “ongoing resistance to recording custodial interrogations is baffling.”⁸⁹

Sullivan submits that the best avenue for reform lies in congressional action, but that short of legislation, courts should step in.⁹⁰ He points to judicial sentiment as a motivating factor for the change.⁹¹ Oklahoma Federal District Court judge S.P. Friot, once shared in personal correspondence:

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 is at stake.⁹²

While Judge Friot spoke in relatively polite terms, Sullivan notes that others, such as District Judge James G. Carr from the Northern District of Ohio, do not share his restraint or gentleness.

I am deeply disturbed that the FBI continues its incomprehensible policy of not recording interviews. We spent this week for one reason and one reason only in this case, because the Bureau does not record interviews. Shame on the Bureau. It makes no sense. It gives the Bureau an unfair advantage. You come in here in your coat and tie and say I'm from the F.B.I. and I do not lie, and everybody believes it. You already come in with an overwhelming advantage because of the Bureau you work for and the esteem and respect in which we all hold it, myself included. . . . But you get in an interrogation room with nobody else except a 20 year old defendant, and your Bureau sees fit at that moment, the most crucial moment of any investigation, not to record what he says and what you say . . . [a]nd that's shameful. It's intolerable in any society under any government that values the rights of its citizens to a fair trial. . . . But quite simply, somebody has to tell the Bureau, there's at least one federal judge in whose estimation the

⁸⁸ *Id.* at 1138.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1131-35.

⁹¹ *See id.* at 1138-40.

⁹² Sullivan, *Misguided Resistance*, *supra* note 83, at 65.

FBI diminishes when it comes in the courtroom and it says, we didn't record the statement.⁹³

Sullivan concludes that in view of the judicial and juror preference for recording, as well as the vast availability of such technology, “federal . . . agents, as well as their supervisors, have a professional responsibility to make electronic recordings of all custodial interviews.”⁹⁴

Somewhat surprisingly, demands for reform are coming not only from outside academics and judges, but from employees within the F.B.I. itself. In 2006, Special Agent Brian Parsi Boetig coauthored an article in the *FBI Law Enforcement Bulletin*, calling for mandatory recordation of interrogations.⁹⁵ In 2007, Julie Renee Linkins, then a *Juris Doctor* candidate at the Georgetown University Law Center and a full-time F.B.I. employee, published an article urging legislatures, agencies, and courts to require routine electronic recording of custodial interviews.⁹⁶ Given the array of voices counseling against the current F.B.I. non-recordation protocol, the Bureau should, at a minimum, reexamine its position for the sake of maintaining a favorable public image. In addition to saving face before an increasingly skeptical legal community, the F.B.I. stands to benefit from technological efficiency and long-term cost control.

C. Long Term Benefits of Recording Interrogations

The F.B.I. currently maintains fifty-six field offices and over 400 related resident agencies throughout the United States.⁹⁷ Undoubtedly, the purchase and implementation

⁹³ *Id.* at 66.

⁹⁴ *Id.* at 69.

⁹⁵ Boetig, Vinson & Weidel, *supra* note 50, at 8.

⁹⁶ Linkins, *supra* note 49.

⁹⁷ See Memorandum from the Fed. Bureau of Investigation Office of Gen. Counsel to all Field Offices at 1629 (Mar. 23, 2006).

of a video recording system that large would be costly.⁹⁸ However, considered in light of the significant long-term savings of both time and money, the initial cash outlay seems reasonable.

One of the major problems with the lack of recording during interrogations has been defendants challenging the voluntariness of confessions.⁹⁹ Mandating recording will reduce the overall administrative cost of those challenges in two ways. First, defendants will be less likely to advance dishonest claims of police malfeasance. Therefore, the Bureau will incur far fewer expenses defending against spurious complaints. Second, special agents who might otherwise succumb to the temptation of overreaching during investigations will face inherent accountability via the detailed record.¹⁰⁰ In that way, the new technology will help to both increase overall agency integrity and expedite the disposition of actual agent misconduct.

Additionally, juries will be greatly assisted in their task of weighing “he said, she said” testimony regarding disputed confessions. Moreover, by automatically providing empirical evidence to simplify the judicial task, the F.B.I. can presumably win increased favor with courts. That should produce a more collegial working environment for agents and prosecutors alike. It may also secure a more sympathetic and gracious adjudicative body in instances when procedural missteps inevitably occur.

Finally, investigators would be freed from the distractions of taking handwritten notes during interviews. The resulting available attention span would allow agents to direct

⁹⁸ See *State v. Lockhart*, 4 A.3d 1176, 1183 (2010) (discussing the various costs—financial and otherwise—involved in adopting a mandatory recording policy).

⁹⁹ See, e.g., *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985) (finding that “unexcused failure to electronically record” interrogation violated defendants’ due process rights).

¹⁰⁰ See e.g., *United States v. Acosta*, 111 F. Supp. 2d 1082, 1085-90 (E.D. Wis. 2000) (examining credibility issues for an F.B.I. agent with a history of investigatory misconduct, particularly with respect to a previous case where a video recorded interrogation helped the court uncover the agent’s malfeasance), *aff’d sub nom.*, *United States v. Olson*, 450 F.3d 655 (7th Cir. 2006).

more immediate focus on a suspect’s statements—including any nonverbal communication that might be missed while writing. It is far easier to think critically and analytically about a message when not fettered by the frenetic task of transcription. The Bureau would assuredly save hundreds of man hours annually by releasing agents from the burden of further translating their handwritten notes into typewritten reports. By integrating now-common dictation software with the recording, the entire conversation could be transcribed in real time.¹⁰¹

D. Preparing for Change

Federal courts agree that due process does not require electronically recorded interrogations.¹⁰² Congress is not currently considering the matter.¹⁰³ Nonetheless, federal procedural requirements could change in a moment—either by legislative act or judicial fiat. As a 2006 edition of the *F.B.I. Law Enforcement Bulletin* aptly noted: “Each U.S. law enforcement agency not already electronically recording interrogations is, quite possibly, only one judicial . . . decision away from the requirement, which could come in the next session or in 10 years.”¹⁰⁴

Strikingly, the *Bulletin* presumes that mandatory electronic recording is not a question of *if*, but *when*. “Waiting until the law requires [recording], and without knowing when that time will occur, will prevent agencies from maximizing the many benefits electronic

¹⁰¹ While agents would assuredly need to check any automated transcription for accuracy, that would presumably still constitute a less stringent time demand than a full transfer by hand. But even if such technology netted no time savings whatsoever, the enormous benefit of freeing investigators’ attention and focus during interrogations would remain.

¹⁰² See *supra* Part II.B.

¹⁰³ The Custodial Interrogation Recording Act appears to be the only recent bill even remotely related to mandatory recording of custodial interviews. However, it merely proposed grants to state and local governments for their acquisition and implementation of recording equipment: “To amend the Omnibus Crime Control and Safe Streets Act of 1968 to authorize the Attorney General to provide grants to States and units of local government for the video recording of custodial interrogations.” Custodial Interrogation Recording Act, H.R. 3750, 112th Cong. (2011). It did not purport to introduce a requirement for federal law enforcement. In any event, the bill appears to have stalled in committee.

¹⁰⁴ Boetig, Vinson & Weidel, *supra* note 50, at 5.

recording can provide in the interim.”¹⁰⁵ Previous Supreme Court reasoning on matters of due process certainly provides ample justification for such a view. The Court stated in *Miranda* that it “has always set high standards of proof for the waiver of constitutional rights.”¹⁰⁶ Requiring electronically recorded proof of Fifth Amendment waivers would not be an illogical progression of modern jurisprudence.¹⁰⁷

Though only fifteen states and the District of Columbia presently require mandatory recordation, the temperature of public and legislative sentiment might be changing.¹⁰⁸ Should a change come suddenly and catch federal law enforcement unprepared, its immediacy would exacerbate the cost. A better course of action is for the F.B.I. to begin a measured deployment of mandatory recording now. Not only would this provide the incremental benefit of the technology during implementation, it would go a long way in combatting the public perception that the F.B.I. is “slow to adapt.”¹⁰⁹ Instead of being the subject of yet another pejorative headline, the F.B.I. should take the posture of an early adopter and work to restore its well-deserved reputation for nimbleness, proactivity, and progressive tactics.

IV. Conclusion

In attempting to achieve a balance between individual liberty and societal safety, a natural and necessary tension exists. For every unit of individual liberty granted, the state risks increased vulnerability. Likewise, the state often secures greater measures of security at the expense of personal freedom. The goal is to preserve a culture free from

¹⁰⁵ *Id.* at 3.

¹⁰⁶ 384 U.S. 436, 475 (1966).

¹⁰⁷ *See, e.g.,* *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (holding the *Miranda* warning *itself* a matter of constitutional necessity that cannot be superseded legislatively).

¹⁰⁸ Sullivan, *Misguided Resistance*, *supra* note 83, at 63-64.

¹⁰⁹ David Johnston & Don Van Natta Jr., *Wary of Risk, Slow to Adapt, F.B.I. Stumbles in Terror War*, N.Y. TIMES, June 2, 2002, <http://www.nytimes.com/2002/06/02/us/wary-of-risk-slow-to-adapt-fbi-stumbles-in-terror-war.html?pagewanted=all&src=pm>.

both tyranny and terrorism. To accomplish this, courts must allow a reasonable application of police procedure within the bounds of due process. The Constitution does not require federal law enforcement to electronically record custodial interrogations. However, the citizens that such federal agencies are tasked with protecting increasingly expect technological competency and procedural transparency. Additionally, federal courts face growing needs for efficiency and predictability. For those reasons, the F.B.I. should begin implementing systematic video recordation when interrogating suspects. By doing so, the Bureau may well cede a measure of enforcement control. But that is the price it must pay to operate effectively in the technological reality of the twenty-first century. What the F.B.I. loses in control, it will gain in long-term cost savings and public good will. Analog police practices must adapt to succeed in a digital culture.

American pop-music astutely observed in the early 1980s that “video killed the radio star.”¹¹⁰ For better or worse, technology’s imperialistic reach continues unabated throughout modern society, devouring all that it encounters. It leaves none unaffected, including well-worn and historically respected police practices. Though our Constitution permits the F.B.I. to continue on its present course, modern prudence beckons a change.

¹¹⁰ THE BUGGLES, *Video Killed the Radio Star*, on THE AGE OF PLASTIC (Island Records 1980).