Watching the Detectives: Electronic Recording of Custodial Interrogations in Iowa

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In late 2006, the Iowa Supreme Court issued its opinion in *State v. Hajtic* that "encouraged" the electronic recording of custodial interrogations.[1] While some read the court's statement as a mandate, others have not viewed it as such. Subsequent efforts to clarify a responsibility to record via the legislative process yielded no results. Although the court reiterated its "encouragement" in a recent case,[2] it has not yet explicitly required recording or delineated the scope of any requirement. As a result, the recording of interrogations remains an unsettled area in Iowa state law,

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1. State v. Hajtic, 724 N.W.2d 449, 456 (Iowa 2006).

2. *See* State v. Madsen, 813 N.W.2d 714, 721 (Iowa 2012).

and new data reveals a lack of consistency in law enforcement practices and policies.

Compelling reasons exist for Iowa to establish a clear requirement that custodial interrogations be recorded. This Essay begins by examining the phenomenon of false confessions and the risks of wrongful convictions, and considers how recording interrogations addresses these problems. The Essay next shows how recorded interrogations can increase the integrity of convictions in other ways and surveys recording requirements in other jurisdictions.

The Essay then examines how interrogation recording has been addressed in Iowa to date, beginning with the *Hajtic* opinion, and details attempts by stakeholders in the criminal justice system to clarify a recording requirement through the legislative process. These efforts included the collection of data, presented here, on the recording practices and policies of Iowa law enforcement agencies. The Essay concludes by discussing current prospects for a recording law and making recommendations for future action.

I. WHY RECORD?

A number of reasons exist to require the electronic recording of custodial interrogations. The most significant of these reasons is to prevent the possibility that a false confession by an innocent person will lead to his or her wrongful conviction. However, electronic recordings are also beneficial to law enforcement officers, prosecutors, and the judicial system. This Part provides a brief overview of why false confessions occur and the benefits recording of interrogations. It then identifies the additional justifications for recording and examines national requirements for interrogation recording.

A. UNDERSTANDING FALSE CONFESSIONS

A confession is powerful evidence and is given great weight in a criminal trial. In fact, a noted writer observed that "the introduction of a confession makes the other aspects of a trial in court superfluous."[3] However, it is not only the guilty who confess.[4] Individuals offering detailed

3. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 148, at 316 (2d. ed. 1972).

4. The conventional wisdom was that an innocent person would not confess to a crime he or she did not commit. Wigmore wrote in 1923 that "[t]he only real danger and weakness of a confession—the danger of a false statement—is of a slender character, and the cases of that sort are of the rarest occurrence." 2 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 835, at 162–63 (Edward W. Cleary et al. eds., 2d. ed. 1923). He concluded that "it is scarcely conceivable that an innocent man would confess falsely. . . ." *Id.* § 835, at 162.

confessions to crimes have later been proven innocent.[5] Forty of the first 250 individuals exonerated through the use of DNA in the United States—sixteen percent—involved a false confession.[6] According to Richard Leo, "false confessors whose cases are not dismissed pretrial will be convicted (by plea bargain or jury trial) 78 to 85 percent of the time, even though they are completely innocent."[7]

Social scientists have attempted to explain why an innocent person would confess to a crime he or she did not commit. Saul Kassin and Lawrence Wrightsman proposed a taxonomy which distinguishes among three types of false confessions: voluntary, coerced-compliant, and coerced-internalized.[8] Voluntary false confessions are given without prompting or pressure from authorities, such as those given by individuals seeking notoriety or trying to cover other actions.[9] A confession given in the hope that it will end a long interrogation is an example of a compliant false confession. The individual confesses for instrumental purposes, believing that the short-term benefits outweigh the long-term costs.[10]

The last type of confession, the internalized false confession, is the most difficult to understand. In these situations "innocent but vulnerable suspects, under the influence of highly suggestive interrogation tactics, come not only to capitulate in their behavior, *but also to believe that they committed the crime in question.*"[11] The innocent suspect will sometimes fabricate false memories in the process.[12] Kassin and Gisli Gudjonsson describe how an innocent suspect can undergo "a chilling transformation from adamant denial through confusion, self-doubt, conversion . . . and eventual utterance of a full confession" that may include specific details.[13]

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5. Frank Stirling, for example, provided a confession that included key facts of the crime. He was convicted and served over eighteen years in prison before DNA evidence exonerated him and identified the real perpetrator. Brandon Garrett, *False Confessions*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/False-Confessions.php (last visited Oct. 8, 2013).

6. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 18 (2011).

7. RICHARD A. LEO, POLICE INTERROGATION & AMERICAN JUSTICE 267 (2008).

8. Saul M. Kassin & Lawrence S. Wrightsman, *Confession Evidence*, *in* THE PSYCHOLOGY OF EVIDENCE & TRIAL PROCEDURE 67, 76–78 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985).

9. Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of False Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 49 (2004).

10. *Id.*

11. *Id.* at 50 (emphasis added).

12. *Id.*

13. Richard A. Leo & Steven A. Drizin, *The Three Errors: Pathways to False Confession and Wrongful Conviction*, *in* POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 12–13 (G. Daniel Lassiter & Christian A. Meissner eds., 2010).

Kassin and Gudjonsson have identified a number of dispositional and situational factors that can increase the risk that an innocent person will confess to a crime he or she did not commit.[14] Personal risk factors include: the personality characteristics of the suspect, the individual's age, the existence of intellectual impairment, and psychopathology such as free-floating guilt associated with depression.[15] Situational risk factors include: physical custody and isolation, the process of confrontation, and minimization tactics—suggesting that the alleged actions were accidental, provoked, or driven by other external factors.[16]

Researchers have also examined the factors that lead law enforcement officers to elicit a false confession. Richard Leo and Steven Drizin have identified three sequential errors by investigators that combine to produce a false confession:

> (a) investigators first misclassify an innocent person as guilty; (b) they next subject him to a guilt-presumptive, accusatory interrogation that invariably involves lies about the evidence and often the repeated use of implicit or explicit promises and threats, as well; and (c) once they have elicited a false admission, they pressure the suspect to provide a postadmission narrative that they jointly shape, often supplying the innocent suspect with the (public and nonpublic) facts of the crime.[17]

Leo & Drizin refer to these confession-producing errors as misclassification, coercion, and contamination, respectively.[18]

Although a false confession typically occurs early in the criminal process, it is a significant step on the road to a wrongful conviction. "[A]s soon as a police-induced false confession is accepted as true by the police, the risk that the false confession will lead to a wrongful conviction is substantial."[19]

Two processes allow a false confession to be accepted by the various actors in the criminal justice system and result in a wrongful conviction.[20] First, police detective investigators can intentionally or unintentionally feed unique, nonpublic crime facts to the suspect.[21] When these facts appear in the suspect's narrative, they are believed to demonstrate he or she possesses

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14. Kassin & Gudjonsson, *supra* note 9, at 53.

15. *Id.* at 51–53.

16. *Id.* at 53–55.

17. Leo & Drizin, *supra* note 13, at 12–13.

18. *Id.* at 13.

19. WELSH S. WHITE, *MIRANDA*'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER *DICKERSON* 185 (2001). Certain factors often lead law enforcement officers to elicit a false confession. Leo & Drizin, *supra* note 13, at 12–13.

20. These actors include: police, prosecutors, defense attorneys, judges, and juries.

21. Leo & Drizin, *supra* note 13, at 22.

information that only the true perpetrator could know.[22] Second, actors in the criminal justice system fall victim to the psychological phenomena of tunnel vision and confirmation bias. In the criminal context, tunnel vision refers to the tendency to focus on one suspect and filter evidence that supports the theory of guilt while ignoring contrary evidence.[23] Confirmation bias is the "tendency to seek out and interpret evidence in ways that support existing beliefs, perceptions, and expectations and to avoid or reject evidence that does not."[24] Tunnel vision and confirmation bias are just two of the mechanisms that produce *corroboration inflation*, the tendency for confessions to generate an illusion of other supportive evidence.[25] Additionally, a confession may drive other actors in the criminal justice system to presume guilt and become motivated to help the police or prosecutor find evidence of the subject's guilt.

B. RECORDING AS A TOOL TO PREVENT WRONGFUL CONVICTIONS

Recording of custodial interrogations is one way to address this problem of false confessions leading to wrongful convictions. Leo and Drizin state that "the only meaningful policy reform to counteract the problem of police contamination is mandatory electronic recording of interrogations in their entirety."[26] They point to a large body of scholarship showing that interrogation recording is critical to ensuring that a false confession does not lead to a wrongful conviction.[27] Garrett writes that this is the easiest way to avoid the risk of contamination,[28] and the Innocence Project calls recording "the single best reform available to stem the tide of false confessions."[29]

Recording creates an objective record of any intentional or unintentional contamination during the course of an interrogation.[30] It makes it possible for the reviewer to identify points at which an investigator

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22. *Id.* at 23–25.

23. *Id.* at 23 (citing Dianne L. Martin, *Lessons About Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 848 (2002)).

24. *Id.* at 23 (citing T. GILOVICH, HOW WE KNOW WHAT ISN'T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE (1991)).

25. Saul M. Kassin, *Why Confessions Trump Innocence*, 67 AM. PSYCHOL. 431, 440 (2012).

26. Leo & Drizin, *supra* note 13, at 27.

27. *Id.*

28. GARRETT, *supra* note 6, at 43.

29. *False Confessions & Mandatory Recording of Interrogations*, INNOCENCE PROJECT, http://www.innocenceproject.org/fix/False-Confessions.php (last visited Oct. 8, 2013).

30. For a discussion of scientific research on the best practices for recording interrogations, see G. Daniel Lassiter et al., *Videotaping Custodial Interrogations: Toward a Scientifically Based Policy, in* POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS, *supra* note 13, at 155–56.

may intentionally or unintentionally suggest or imply facts of the crime to the suspect.[31] Recording can also help prevent or identify coercion error during an interrogation.[32]

Although some experts have pointed to the need for better training and education for investigators and others in the criminal justice system, even with better training the errors associated with interrogations will still occasionally occur.[33] These errors can then lead to contamination. Leo and Drizin assert that contamination error is "perhaps the most dangerous of all because it is the least visible, and once a suspect's postadmission narrative has been contaminated . . . the damage may be irreversible."[34]

Indeed, Brandon Garrett has shown that in nearly all DNA exonerations involving false confessions, the confession was contaminated with unique, nonpublic facts.[35] Washington, D.C., detective Jim Trainum describes how he fell into this "classic trap" during a murder investigation.[36] "We ignored evidence that our suspect might not have been guilty, and during the interrogation we inadvertently fed her details of the crime that she repeated back to us in her confession."[37] While it may be impossible to eliminate human error, mandating electronic recording of interrogations in their entirety allows contamination to be detected after the fact and reduces the risk that a false confession will lead to a wrongful conviction.

C. ADDITIONAL BENEFITS OF RECORDING

In addition to reducing the risk of wrongful convictions resulting from false confessions, additional compelling reasons exist to require the electronic recording of custodial interrogations. For instance, recording ensures that other constitutional rights of a criminal defendant have been respected. An electronic record can help confirm that a factually true confession by the actual perpetrator was voluntarily made following proper *Miranda* warnings.[38]

Recording also provides substantial benefits to law enforcement officers, prosecutors, and courts in performing their jobs with greater efficiency and precision. A recorded confession protects law enforcement officials from false accusations of improper tactics or abuse.[39] It also helps

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31. Leo & Drizin, *supra* note 13, at 27.

32. *Id.* at 17–19.

33. *Id.* at 26–27.

34. *Id.* at 27.

35. GARRETT, *supra* note 6, at 19.

36. Jim Trainum, Op-Ed., *Get It On Tape*, L.A. TIMES, Oct. 24, 2008, at A23.

37. *Id.*

38. *See, e.g.*, Stephan v. State, 711 P.2d 1156, 1161 (Alaska 1985); State v. Lockhart, 4 A.3d 1176, 1193 (Conn. 2010).

39. *Stephan*, 711 P.2d at 1161; *Lockhart*, 4 A.3d at 1194.

the prosecution because the recording carries strong evidentiary value for the prosecution. "Listening to a defendant be inculpated by his or her own voice has a persuasive power unrivaled by contradictory testimonial evidence."[40] Recording also allows investigators to focus on the suspect rather than on taking notes.[41]

Mandatory recording of custodial interrogations can also conserve judicial resources by assisting in the resolution of motions to suppress.[42] This may reduce the number of contested hearings before trial judges and simplifies the review process for appellate judges. Recording also serves the public interest by encouraging honest and effective law enforcement[43] and shields taxpayers from costly civil rights litigation over claims of police misconduct.[44]

D. RECORDING REQUIREMENTS NATIONALLY

Eighteen states and the District of Columbia have adopted some requirement of electronic recording of custodial interrogations. Thirteen states have adopted a requirement for electronic recording of custodial interrogations by statute[45] and five by judicial decision.[46]

State recording requirements take a variety of forms. Some require recording in all situations, while others are limited to particular crimes or

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40. State v. Barnett, 789 A.2d 629, 632 (N.H. 2001).

41. *Lockhart*, 4 A.3d at 1194; Thomas P. Sullivan, *The Wisdom of Custodial Recording*, *in* POLICE INTERROGATIONS & FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS, *supra* note 13, at 130.

42. *Lockhart*, 4 A.3d at 1194.

43. *Stephan*, 711 P.2d at 1161.

44. *Lockhart*, 4 A.3d at 1194.

45. In 2003, Illinois became the first state to require recording by statute. *See* 725 ILL. COMP. STAT. 5/103-2.1 (2010) (originally went into effect in 2005). The Illinois law requires that all custodial interrogations in homicide cases must be recorded. *Id.* This statute was expanded in 2013 to require recording in eight categories of violent felonies. Dan Hinkel, *Quinn Signs Bill Expanding Recording of Police Interrogations*, CHI. TRIB. (Aug. 26, 2013) http://www.chicagotribune.com/news/local/ct-met-ct-met-videotaped-interrogations-law-20130827,0,4894506.story. Unrecorded statements are subject to a presumption of inadmissibility, which may be overcome by evidence that the statement was voluntary. Thirteen jurisdictions legislatively require electronic recording of custodial interrogations: Connecticut (CONN. GEN. STAT. § 54-10 (2013)), the District of Columbia (D.C. CODE § 5-116.01 (2010)), Illinois (725 ILL. COMP. STAT. 5/103-2.1 (2010)), Maine (ME. REV. STAT. ANN. tit. 25, § 2803-B(i)(k) (West 2007 & Supp. 2012)), Maryland (MD. CODE ANN., CRIM. PROC. § 2-402 et seq. (West 2011)), Michigan (MICH. COMP. LAWS ANN §§ 763.7–763.11 (West 2000 & Supp. 2013)), Missouri (MO. ANN. STAT. § 590.700 (West 2011)), Montana (MONT. CODE ANN. §§ 46-4-406 to -411 (2011)), Nebraska (NEB. REV. STAT. §§ 29-4501 to -4508 (2008)), New Mexico (N.M. STAT. ANN. § 29-1-16 (2013)), North Carolina (N.C. GEN. STAT. § 15A-211 (2011)), Oregon (OR. REV. STAT. § 133.400 (2011)), and Wisconsin (WIS. STAT. § 972.115 (2011–12)).

46. These states are: Alaska (*Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985)), Arkansas (ARK. R. CIV. PRO. 4.7), Indiana (IND. R. EVID. 617), Minnesota (*State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994)), and New Jersey (N.J. R. CRIM. P. 3:17).

classes of crimes. Sanctions range from exclusionary rules to jury instructions to civil penalties. The Supreme Court of Massachusetts, for example, requires that unrecorded statements offered into evidence are accompanied by an instruction informing the jury that the court has expressed a preference that interrogations be recorded when practicable.[47] In some states, interrogations must be video recorded, while in others audio alone will suffice. Generally, requirements implemented by court action have been more stringent than those enacted through the legislative process.

For those requirements adopted by judicial decisions, courts have based their decisions on either the due process clause of its state constitution or as part of the court's supervisory power.[48] For instance, in 1985 the Alaska Supreme Court held that the failure to electronically record a custodial interrogation in a place of detention violated the due process clause of its state constitution.[49] The court held that statements obtained in violation of this requirement were inadmissible.[50] In contrast, the Minnesota court did not find that recording was necessary under the state constitution.[51] Instead, it based the recording requirement on its "supervisory power to insure the fair administration of justice."[52] Like Alaska, it adopted an exclusionary rule to be applied on a case-by-case basis.[53]

II. ELECTRONIC RECORDING IN IOWA

In the context of the growing number of states that require recordings of custodial interrogations, Iowa has taken steps toward the development of its own policy. The Iowa Supreme Court began this effort in *State v. Hajtic*. This Part traces the recording issue in Iowa in recent years and examines recording practices and policies that law enforcement agencies have developed. It also examines legislative efforts and proposals by the Iowa State Bar Association to enact recording legislation. Finally, this Part concludes by recommending future action in Iowa

A. STATE V. HAJTIC

As with many states, the issue of recording was addressed by the Iowa Supreme Court in the mid-2000s. Unlike most, however, the issue was not raised by a defendant arguing for the suppression of an unrecorded

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

48. *Id.* at 530.

49. *Stephan*, 711 P.2d at 1159.

50. *Id.* at 1164.

51. *Scales*, 518 N.W.2d at 592.

52. *Id.*

53. *Id.*

statement. Instead, it was seized on by the court in a case where an electronic recording of an interrogation existed.

Following his confession, Arif Hajtic, a Bosnian immigrant, was convicted of multiple counts of burglary.[54] On appeal, he argued, that his statements to the police were not admissible because the state failed to show they were knowingly, intelligently, and voluntarily made, and that they were not the product of intimidation, coercion, or deception.[55] Factors such as Hajtic's ability to understand the questions and his familiarity with the American legal system were thus relevant to his challenge to the voluntariness of his confession.

The Iowa Supreme Court issued its opinion in *State v. Hajtic* on December 1, 2006.[56] The court began its discussion of the confession issue by noting that it was aided in its review of the record by a complete electronic recording of Hajtic's *Miranda* waiver and interrogation.[57] Based on the record, the court determined that Hajtic "clearly understood the questions asked" and that his *Miranda* waiver was valid.[58] It ruled that his confession was made voluntarily, knowingly, and intelligently, and affirmed his convictions.[59]

Although the validity or admissibility of Hajtic's interrogation recording was not at issue in the case, the court's opinion addressed the issue of recording at length. It noted that the case "illustrates the value of electronic recording, particularly videotaping, of custodial interrogations."[60] The court then embarked on an examination of authorities supporting recording. It pointed out that the Eighth Circuit had favorably discussed recording in the context of the protection of the defendant's rights.[61]

In addition, the *Hajtic* court discussed the law in other jurisdictions that already require recordings. For example, it observed that in *Stephan v. State*[62] the Alaska Supreme Court mandated recording and adopted an exclusionary rule "because law enforcement officials and lower courts had not heeded the court's suggestions in earlier cases that custodial interrogations should be recorded when feasible."[63] It emphasized the

54. State v. Hajtic, 724 N.W.2d 449, 451 (Iowa 2006).

55. *Id.* at 453.

56. *Id.* at 454.

57. *Id.* The waiver of the right to self-incrimination was the subject of *Miranda v. Arizona*, 384 U.S. 436 (1966).

58. *Hajtic*, 724 N.W.2d at 454, 456.

59. *Id.* at 456, 458.

60. *Id.* at 454.

61. *Id.* (citing Hendricks v. Swenson, 456 F.2d 503, 505–07 (8th Cir. 1972)).

62. *Id.* at 454 (discussing Stephan v. State, 711 P.2d 1156 (Alaska 1985)).

63. *Id.* at 454–55.

Alaska court's finding that the advantages of recording go beyond protection of the defendant's rights.[64]

The court also addressed the Minnesota Supreme Court's adoption of a recording requirement pursuant to its supervisory powers.[65] It then quoted an article by Steven Drizin and Marissa Reich advocating for interrogation recording, focusing on the strategic risk that investigators and prosecutors could face presenting non-recorded statements to a jury.[66] The court also presented verbatim the American Bar Association resolution urging the adoption of laws requiring the videotaping of custodial interrogations.[67]

After reviewing this range of authorities, the court concluded with a strong call for recording in Iowa. It wrote: "We believe electronic recording, particularly videotaping, of custodial interrogations should be encouraged, and we take this opportunity to do so."[68]

B. REACTION TO HAJTIC

While some viewed the Iowa Supreme Court's call for electronic recordings in *Hajtic* as a mandate, others viewed it as a suggestion.[69] Regardless, it prompted changes to policies among prosecutors and law enforcement agencies and encouraged legislative action. Soon after the decision, the Iowa County Attorneys Association e-mailed Iowa's 99 county attorneys that "While the court says that it is 'encouraging' the practice of electronic recording, the Attorney General's office believes that this decision should be read as essentially mandating the practice from this time forward."[70] Iowa Attorney General Tom Miller confirmed this position in a 2007 article in the Iowa Police Journal, writing that "the *Hajtic* decision should be interpreted as essentially requiring this practice."[71]

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64. *Id.*

65. *Id.* (discussing the Minnesota Supreme Court's adoption of a recording requirement pursuant to its supervisory power in *State v. Scales*, 518 N.W.2d 587 (Minn. 1994)).

66. *Id.* at 455–56 (quoting Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 DRAKE L. REV. 619, 638–39 (2004)).

67. *Id.* at 456 (citing N.Y. CNTY. LAWYER'S ASS'N, ABA, REPORT TO THE HOUSE OF DELEGATES (Feb. 2004), *available at* http://www.nycla.org/siteFiles/Publications/Publications112_0.pdf).

68. *Id.*

69. The ruling begged the question: Was the court's "encouragement" simply dicta, or was it putting law enforcement on notice as the Alaska court had done? One criminal defense expert wondered, "[h]as the Iowa Supreme Court sent us a message[?] Will Iowa become the third state to mandate recording of custodial interrogations?" *State v. Hajtic – Is it time . . .*, IOWAPUBLIC DEFENDER.COM, http://www.iowapublicdefender.com/index.php?option=com_content&task=view&id=61&Itemid=32 (last visited Oct. 8, 2013).

70. Scott Ehlers, *Recording Custodial Interrogations: 2007 Update*, CHAMPION, Dec. 2007, at 53 (internal quotation marks omitted).

71. Tom Miller, *Cautions Regarding Custodial Issues*, 39 IOWA POLICE J. 15, 15 (2007).

The *Hajtic* opinion prompted action among some Iowa law enforcement agencies. Less than four months after the opinion was issued, the Iowa Department of Public Safety ("DPS") adopted a general order on electronic recording.[72] It specifically acknowledged *Hajtic* and established a policy requiring the electronic recording of all custodial interrogations conducted by DPS officers in detention facilities and DPS-occupied buildings.[73] The order directed officers to record interrogations in their entirety including the administration of *Miranda* warnings and waivers, and indicated that video and audio recording was preferred.[74]

While many followed the advice of the Attorney General and the example of DPS, others viewed *Hajtic* as nothing more than a suggestion made in passing.[75] Undoubtedly, some law enforcement agencies were not even aware of the opinion. In any event, *Hajtic* did not provide specific guidance as to what should be required and when. Should law enforcement record every custodial interrogation, including simple misdemeanors? Or only felony interrogations? Would audio recording alone be sufficient? Would it matter what equipment was owned by or accessible to the agency? And what would happen if an agency that generally abided by *Hajtic* elected not to record in a particular case?[76]

Many saw legislative action as the logical next step following the *Hajtic* decision. In late January 2008, an electronic recording bill was introduced in the Iowa House of Representatives by Representative Kurt Swaim, Chair of the House Judiciary Committee, as House Study Bill 580.[77] The proposal required recording in all situations and included an exclusionary rule.[78] While a number of prosecutorial and law enforcement interests registered against the bill,[79] some indicated that this was due to deficiencies in the language of the proposal rather than opposition to recording in principle. The proposal was assigned to a three-person subcommittee where concerns about the definitions used and the appropriateness of the remedy were

72. IOWA DEP'T OF PUB. SAFETY, ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS, DPS DEPARTMENT OPERATING MANUAL 23-02.15, at *1 (Mar. 27, 2007).

73. *Id.*

74. *Id.* at *2.

75. In conversations with the author during the spring of 2007, several law enforcement officials indicated that in their view *Hajtic* did not impose any requirement to record. The DPS policy itself stated that it did not create any statutory or constitutional rights or imply that any remedy existed for failure to record.

76. IOWA DEP'T OF PUB. SAFETY, *supra* note 72, at *1.

77. H. STUDY B. 580, 82nd Gen. Assem. (Iowa 2008), *available at* http://coolice.legis.iowa.gov/CoolICE/default.asp?Category=BillInfo&Service=Billbook&ga=82&hbill=HSB580.

78. *Id.*

79. *See Lobbyists Declaration Results: HSB 580*, IOWA LEGISLATURE, *available at* http://coolice.legis.iowa.gov/CoolICE/default.asp?Category=Lobbyist&Service=DspReport&ga=82&type=b&hbill=HSB580.

heard. The subcommittee asked that the Attorney General's office and State Public Defender's office work to produce broadly acceptable language. No revision resulted, however, and the proposal died in subcommittee.

After the close of the legislative session, the Iowa State Bar Association's Criminal Law Section Council ("Council") decided to pursue the recording issue in the hope of producing a new and cleaner proposal acceptable to its diverse membership.[80] Based on concerns raised during the discussion of House Study Bill 580, the Council's proposal provided that the remedy for failure to record would be a jury instruction. The proposal was adopted by the Council and forwarded to the Bar Association's Board of Governors. The Board did not act on the proposal, but instead asked that the Council meet with other stakeholders to assess their positions on the issue and attempt to find common ground.

In July 2009, the Council convened a meeting that included broad representation by prosecutorial, law enforcement, and criminal defense interests.[81] While general agreement existed about the merits of recording, concerns were raised about the potential financial burden of a recording requirement. Questions were also asked about the need for legislative action given the fact that some agencies were already recording on a voluntary basis. This begged the question of how many agencies were actually recording already or had the capacity to do so. The stakeholders agreed that data on law enforcement practices and policies would be useful in their discussions.[82]

C. OTHER DEVELOPMENTS SINCE HAJTIC

1. Survey of Law Enforcement Practices and Policies

The Council agreed to conduct a survey of law enforcement agencies in Iowa to determine their recording practices, policies, and capabilities. This new data reveals a lack of consistency in law enforcement practices and policies and supports the argument that recording should be legally mandated .

Law enforcement professional associations agreed to facilitate the survey by encouraging their members to respond. The Iowa Law Enforcement Academy provided contact information for 421 Iowa law

80. Brian Farrell, *Preliminary Report—Survey of Electronic Recording of Interrogations Shows Usage Varies*, IOWA LAW., Sept./Oct. 2013, at 12.

81. Entities represented included the Iowa Attorney General, the Polk County Attorney, the Iowa County Attorneys Association, the Iowa Division of Criminal Investigation, the Iowa Law Enforcement Academy, law enforcement professional associations, the Innocence Project of Iowa, the State Public Defender of Iowa, and the Iowa Association of Criminal Defense Attorneys. *Id.* The first author served as a co-convener of the meeting on behalf of the Council.

82. *See id.*

enforcement agencies.[83] In 2010 and 2011, law student volunteers administered the survey under the direction of the Council. The survey was conducted by telephone using a standard flowchart. Responses were received from 167 or the 255 Iowa agencies with five or more officers, and from 38 of the 166 agencies with four or fewer officers.[84]

The responses from agencies of five or more, shown below in Table I, reveal that while most agencies do in fact record at least occasionally, less than half have a written policy on recording custodial interrogations and only half record in all situations. More than one-third leave the decision to record to the discretion of the investigating officer. At the same time, only one of the 167 agencies reported owning neither video nor audio recording equipment.[85] More than 99% owned both.[86]

TABLE I

RESPONSES FROM AGENCIES WITH FIVE OR MORE OFFICERS[87]

Existence of Policy	
Written policy	46%
Unwritten policy	33%
No policy	21%
Recording Practice	
Record All Interrogations	51%
Recording at Discretion of Officer	35%
Recording Depends on Level of Offense	10%
Does Not Record	>1%

The responses from agencies with four or fewer officers, shown in Table II, show that fully half of these agencies have no policy on recording interrogations. Just over one-third record in all situations, and half leave the decision to officer discretion. Of the smaller agencies, five reported that they did not own any recording equipment, but all five indicated they have access to equipment through other agencies.[88]

83. *Id.* This number included all agencies with certified officers, with the exception of county conservation boards.

84. *Id.* The first author coordinated the survey on behalf of the Council.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

TABLE II

RESPONSES FROM AGENCIES WITH FOUR OR FEWER OFFICERS[89]

Existence of Policy	
Written policy	21%
Unwritten policy	29%
No policy	50%
Recording Practice	
Record All Interrogations	37%
Recording at Discretion of Officer	50%
Recording Depends on Level of Offense	13%
Does Not Record	0%

2. The Uniform Act

As the Council was continuing its law enforcement survey, the National Conference of Commissioners on Uniform State Laws approved its Uniform Electronic Recordation of Custodial Interrogations Act ("Uniform Act") in July 2010.[90] As the survey data was compiled in 2011 it became clear that a significant number of agencies were *not* already recording on a voluntary basis, suggesting that further action might indeed be warranted.

Based on this data, the Council decided to continue its efforts and to substitute the Uniform Act for the proposal it had approved in 2008. It began the process of tailoring the alternatives offered in the Uniform Act to reflect the general consensus that had begun to emerge in earlier conversations with stakeholders. Additional input was received from law enforcement organizations, in particular the Iowa State Sheriffs and Deputies Association.

3. *State v. Madsen*

Following the Council's data collection and the introduction of the Uniform Electronic Recordation of Custodial Interrogations Act, the Iowa Supreme Court again broached the recording issue in April 2012. In *State v. Madsen*, the appellant argued that the State's failure to electronically record his *noncustodial* interrogation rendered it inadmissible.[91] The court rejected his claim, agreeing with the district court that while the failure to record was bothersome, it did not require suppression under the circumstances.[92] It highlighted the observation by the court of appeals that whatever *Hajtic*

89. *Id.* at 3.

90. *See generally* UNIF. ELEC. RECORDATION OF CUSTODIAL INTERROGATIONS ACT (2010).

91. State v. Madsen, 813 N.W.2d 714, 721 (2012).

92. *Id.*

might require, *Hajtic* specifically referred to custodial interrogations and Madsen's interrogation could be distinguished as a noncustodial situation.[93]

After distinguishing *Madsen*'s situation from *Hajtic*, the court took the opportunity to repeat its earlier position. "We reiterate our admonition in *Hajtic* encouraging videotaping of custodial interrogations. Since *Hajtic* was decided, 'the use of video recordings as evidence at trial has become a common practice . . . to further the truth-seeking process.'"[94] As it had done regarding custodial interrogations in *Hajtic*, the *Madsen* court encouraged the recording of noncustodial interrogations, but declined to adopt a per se rule because noncustodial interrogations take place under a variety of circumstances.[95]

Sensing that the court's reiterated admonition might be an invitation for legislative action, the Council pressed forward with its Uniform Act-based proposal. This proposal was again forwarded to the Board of Governors in 2012 but was not approved. Perhaps reflecting the shifting attitudes which were also noted by the *Madsen* court, comments suggested that the revised proposal—which was the product of considerable consensus-building and contained compromises to enhance its acceptability to law enforcement—was now viewed as being too lax. A revised proposal addressing these concerns was approved by the Board of Governors in September 2013 as part of the bar association's affirmative legislative agenda for the 2014 legislative session.[96]

D. THE ROAD AHEAD

The Iowa Supreme Court has now twice "encouraged" the electronic recording of custodial interrogations. Its first pronouncement occurred at a time when only a few states required interrogation recording. When it repeated its call in 2012, the court referred to its earlier statement as an "admonition" and pointed out that since that time recordings have become commonly used by courts. Iowa would no longer be breaking new ground by requiring recording as it would have been in 2006. Now, nearly two-fifths of the states mandate recording. Significantly, South Dakota is the only state contiguous to Iowa that does not require recording.

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93. *Id.*

94. *Id.* (quoting People v. Kladis, 960 N.E.2d 1104, 1110 (Ill. 2011)).

95. *Id.* at 722.

96. The Iowa Supreme Court's December 2012 opinion in *State v. Howard* may also provide an indication of how it will approach the recording of custodial interrogations in the future. *See* State v. Howard, 825 N.W.2d 32 (Iowa 2012). While *Howard* turned on the propriety of a promise of leniency, the court's analysis was framed by its concern with "protect[ing] the innocent from a police tactic that can induce false confessions." *Id.* at 34. It seems likely that this concern with the prevention of false confessions will influence future recording cases before the court.

Given developments since *Hajtic*, Iowa is ready and the court is poised to impose a recording requirement. If it does, its actions will have been foreshadowed by its references in *Hajtic* to the Alaska Supreme Court's frustration with its unheeded warnings. The court may sense even greater urgency in light of data showing that less than half of larger Iowa law enforcement agencies have a written policy on recording, and only half of them record in all situations. Even if the right case does not present itself, the court could opt to follow the examples of the New Jersey and Indiana high courts and invoke its supervisory jurisdiction by promulgating a court rule requiring the recording of custodial interrogations.

Iowa's policymakers and stakeholders in the criminal justice system should therefore consider whether it is in their interest to take proactive steps to craft a recording law through the legislative process. Since it seems as though there is little opposition to recording in principle, some stakeholders might regret sitting on the sidelines now only to discover that they are not fond of the requirements of a judicial mandate down the road, which could include terms such as the immediate video recording of all levels of crime with an exclusionary sanction for violations.

Through proactive, collaborative efforts, Iowa stakeholders can work toward adoption of a law that achieves the important objectives of recording with the least burden to law enforcement. For example, legislation could provide that recording is only required for certain classes of crimes. It might provide an exception that allows audio-only recording for agencies under a certain size, or agencies that do not currently own equipment. It could allow delayed implementation or even contemplate funding for agencies to purchase recording equipment. It might recognize that a jury instruction is an adequate remedy for noncompliance. The Uniform Act provides a useful framework for a bill that can accommodate these types of agreed preferences.

The Iowa Supreme Court should mandate recording in the absence of legislative action. The opportunity still exists, however, for the stakeholders who will be most impacted by a recording law to play a part in shaping that law through the legislative process.