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Videotaping Police Interrogation

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Abstract

Drawing on research into audio-visually recorded interrogations in New South Wales, this paper comments on the implications for criminal justice in jurisdictions facing problems and controversies in the questioning of suspects. It considers whether various benefits and harms which were predicted to flow from audio-visual recording have eventuated, focusing on two issues – the interpretation of images and unrecorded questioning. Its conclusion is that audio-visual recording offers significant benefits to criminal justice, but is no panacea (and can even be counterproductive if treated as such). Audio-visual recording has to be part of a comprehensive regulatory regime: the paper concludes by arguing for a renewed commitment to the legal regulation of policing.

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ABSTRACT

Drawing on research into audio-visually recorded interrogations in New South Wales, this paper comments on the implications for criminal justice in jurisdictions facing problems and controversies in the questioning of suspects. It considers whether various benefits and harms which were predicted to flow from audio-visual recording have eventuated, focusing on two issues – the interpretation of images and unrecorded questioning. Its conclusion is that audio-visual recording offers significant benefits to criminal justice, but is no panacea (and can even be counterproductive if treated as such). Audio-visual recording has to be part of a comprehensive regulatory regime: the paper concludes by arguing for a renewed commitment to the legal regulation of policing.



Audio-visual recording as a panacea

Police interrogation has long been a source of controversy in criminal justice around the world. Problems have ranged from unintentional inducement of false confessions, to fabrication of confessions ('verballing'), to torture. Sometimes of equal concern to the authorities has been the making of allegations of abuse which have been false or unverifiable, but which cause delay in the justice process and harm the reputation of police. A series of connected responses developed in English-speaking countries. In the 1960s, the United States Supreme Court interpreted the Constitution to require protection of suspects' rights, notably through access to legal counsel. In the 1980s, detailed statutory regulation of custodial interrogation was introduced in England and Wales. In Australia, the High Court developed the law of evidentiary admissibility, and Commonwealth and state statutory regulation was introduced (Dixon 1997: ch.5).

In the wake of these responses, official concern about interrogation and confessions waned, partly because it was thought that judicial and statutory responses had been adequate, partly because of the shift in public concern from due process to crime control, partly because other issues became more fashionable for policy-makers, grant funding agencies, and academic researchers. However, such concern has been sharply revived in the last decade as false confessions have emerged as a significant source of the miscarriages of justice which have been disclosed by the use of DNA analysis. This is particularly the case in the United States, where the limits of judicial supervision even in capital cases have been exposed by the acknowledgment of a mass of miscarriages of justice through use of DNA. False or coerced confessions have been a significant contributor to the wrongful convictions which should have become a national scandal (Scheck, Neufeld, & Dwyer 2000; Westervelt & Humphrey 2001). Similarly in England, some of the contentious disputes over alleged miscarriages of justice stemming from false confessions have been resolved by DNA analysis (Sekar 1997).

There has been a common theme in many responses to these controversies: police interrogation should be electronically recorded using audio or audio-visual technology. Indeed, audio-visual recording is frequently presented as a solution to the ills of custodial interrogation. Interest in such recording is not new: there have been calls for its use from the time that recording equipment was widely available. However, the contemporary calls for audio-visual recording are more widespread, united and urgent than before.

Notably, calling for the use of electronic recording has become a standard component of proposed programs to avoid miscarriages of justice in the United States (Huff 2002; Leo 2001: 48-9). A prominent example was provided in July 2003 by the state of Illinois. In response to concern about the execution of people who had been wrongfully convicted, Illinois required police to electronically record interviews with murder suspects. The reform was designed 'to restore the integrity of the criminal justice system'. All too often, electronic recording is put forward as a panacea. There is little

¹ Miranda v Arizona 384 US 436 (1966).

² Police and Criminal Evidence Act 1984.

³ Governor Rod Blagojevich, quoted 'Ill. Law 1st to order taping murder confessions' <u>USA Today</u> 18 July 2001, 3A. See also 'Illinois will require taping of homicide interrogations' <u>New York Times</u> 17 July 2003. Taping is required in Alaska and Minnesota as a result of court rulings.

consideration of how or why it will deal with the problem: it is taken for granted that it will.

Criminal justice practitioners and researchers tend to be parochial. In Anglo-American discussions of audio-visual recording, there is little recognition that several Australian jurisdictions have been using audio-visual recording for a decade, not just in field trials, research experiments or selected cases, but routinely for questioning about all indictable offences. This is in contrast to England and Wales, where caution led to reliance on audiotaping, although the sporadic interest in video is now being revived (Newburn et al. 2004). In the United States, audio-visual recording is widespread, but is generally used only for read-backs in the most serious cases (Geller 1993). The Australian experience provides important guidance for other jurisdictions considering the audio-visual recording of police questioning of suspects. This article presents results from research in New South Wales, which has been a leader in the development of audio-visual recording.⁴

The criminal justice context

Criminal justice in Australia is principally the responsibility of the states and territories. The Commonwealth is responsible only for a limited range of criminal offences, of which illegal drug importation is most prominent. While there are increasing pressures for coordination and removal of differences, each state has its own police force, criminal laws, and justice system.

However, it is possible to identify three general characteristics of Australian criminal justice which are relevant here. First, historically, there has been a heavy dependence upon confessional evidence. Stevenson's study of NSW District Court cases in 1979 found that prosecutions depended on confessional evidence much more heavily than in comparable jurisdictions overseas. In her sample, confessional evidence was presented in no less than 96.6% of cases (Stevenson nd: 90). Secondly, the process has relied greatly on the courts to control police malpractice through the exclusion of evidence. State courts have a poor record in accepting this responsibility. Meanwhile, compared to England and Wales, the statutory framework of investigative practice has been underdeveloped. Until 1997, NSW police did not even have a statutory power to detain a suspect for investigative purposes between arrest and charge. Officers had to make do by exploiting loopholes in the common law or simply relying on the courts' reluctance to exclude unlawfully obtained evidence (Dixon 1997: ch.5). When police powers were legislated, a style of soft or presentational regulation was adopted. For example, while a right to legal advice was provided for suspects being questioned by police, no legal aid or duty solicitor schemes were provided. As might be expected, the result is that very, very few suspects see a lawyer before being charged.⁵ Thirdly, and

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⁴ An earlier version of this paper was presented at the International Conference on Police Interviewing, École Nationale de Police du Québec, 9-11 February 2004.

⁵A private lawyer was present in just 2 of the 262 interviews in our samples of recorded interviews (see below for further details). In four others, there was a representative of an Aboriginal legal organization: such organizations must be informed when an Aboriginal person is detained.

finally, criminal justice is dominated by the simplistic rhetoric of law and order politics. Despite politicians' standard genuflection to evidence-based policy, it is very hard even to have open discussion about measures which can be interpreted (or misinterpreted) as favouring suspects.

NSW Police & ERISP

NSW Police describes itself as 'Australia's oldest and largest police organisation and one of the biggest in the English speaking world'. With more than 13,300 officers, it 'serves a population of seven million in the state of New South Wales, an 801,600 square kilometre area comparable in size to Texas in the USA and double the combined geographic areas of England, Scotland and Wales'. This scale has a significant impact on the delivery of policing services. While most people live in towns and cities, provision has also to be made for police officers who are widely scattered in rural areas.

NSW Police introduced its audio-visual program, Electronic Recording of Interviews with Suspected Persons (ERISP), in 1991. The groundwork for this had been laid by two reports from the Attorney General's Criminal Law Review Division. By contrast to ad hoc developments in other states, these CLRD reports provided a substantial basis on which policy and action could proceed (McClintock & Healey 1987: 7). None the less, ERISP was not introduced by legislation: it was essentially a police project, although the Office of the Director of Public Prosecutions and, to a lesser extent, other criminal justice agencies were involved in cooperative or consultative roles. Belatedly, ERISP was given some statutory bite in 1995 when a general reform of the law of evidence made electronic recording a prerequisite for the admissibility of confessional evidence in more serious cases. In practice, this distinction is not very important: while the growth of the summary jurisdiction means that electronic recording is not required for some substantial offences, in practice police routinely use ERISP to record all formal interviews.

The technology in the ERISP system consists of combined video and audio 'hybrid' recorders. They simultaneously record three audio cassettes and one video (VHS format) tape. (More compact triple deck audio equipment is available for use when audio-visual recording is impractical eg interviews conducted in remote locations or overseas). Of the three audio tapes, one (the 'security master tape') is sealed in the presence of the suspect at the end of the interview, a second is given to the suspect, and the third is for the investigator's use. The cassettes are, respectively, yellow, white and blue. The audio-tapes and video tapes are of different lengths, so that they do not finish simultaneously. The video tape is supposed to be left recording while the audio tapes are changed, and during other breaks, eg for toilet visits or drinks, or more commonly at the end of the

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⁶ http://www.police.nsw.gov.au/about/About.cfm

⁷ An admission made in the course of official questioning relating to an indictable offence (other than one that can be dealt with summarily without the consent of the accused person) is not admissible unless a tape recording of the interview is available to the court (unless the prosecution establishes that there was a reasonable excuse as to why a recording could not be made): Criminal Procedure Act 1986 s.108; this section was introduced as Crimes Act 1900 s.424A as part of the reform of the law of evidence in 1995.

interview while waiting for the 'adopting officer' (a notionally independent supervisor, who asks the suspect pro forma questions about the conduct of the interview). A monitor on the ERISP machine allows officers to check that participants are within camera range. Earlier ERISP equipment consisted of a large box sitting on the end of the interview table. Subsequently, more discreet equipment has been installed below the interview desk, leaving only the microphones and camera in view.

Audio and video tapes are bulky, relatively fragile, and awkward to use. Manifestly, they are parts of an outdated technology. The NSW Police is developing digital technology for use in ERISPs. While digitalization has its own problems (Newburn et al. 2004), this should deal with many of the practical problems experienced with tapes. However, its introduction is still some time away.

ERISP was designed in the expectation that audio tapes would be relied upon by police in creating briefs and subsequently by lawyers and courts. A transcript was to be produced when a plea of not guilty was likely or had been made. The video tape was to be held in reserve as confirmation of the authenticity of the audio tape. The ERISP instructions provide:

Police should note that the purpose of the video recording is primarily to show an independent tribunal that the interview was conducted fairly. Unless there is some overriding forensic reason or the defence mandates its use, the DPP will offer the audio master tape into evidence. (NSW Police 1992: 28)

In any case, it was expected that showing of a video in court would be the exception. Most cases would end in guilty pleas. When a trial occurred, 'in many cases where not guilty pleas are entered, the audio tape will be sufficient and more easily edited and accessible' (CLRD 1986: 16). In practice, however, courts insisted on seeing the video tapes. The fact that the ERISP machinery records only one videotape causes problems, notably for defence lawyers who wish to view tapes. They have to make arrangements to view them at police stations or DPP offices. Copying is lengthy and inconvenient. Digitalization will resolve this problem by making the production of copies quick and easy.

Initially, the image on the ERISP video was intended to be of all those sitting at the interview table. However, for reasons to be discussed below, the technology has been adapted, allowing the camera to switch between a close-up of the suspect (for most of the time) and a broader view of the interview room (briefly).

In order to understand ERISP, it is important to appreciate the political context from which it emerged. There had been longstanding concern about the practice of verballing, ie the fabrication of confessions or admissions: 'From the 1940s to the 1970s, credible complaints of unlawful and improper conduct in detaining and questioning suspects had been a recurring feature of policing in NSW (and elsewhere in Australia)' (Alderson 2001: 253). According to a Royal Commission into the NSW Police Service, verballing became 'an art form within certain sections of the NSW Police Service' (Wood 1996: 40). By the 1980s, verballing – actual or alleged - had become a significant problem for the criminal justice process. Public trust and confidence in the police were affected. More instrumentally, challenges to police evidence of confessions were voraciously consuming court time and exacerbating delays in the justice process. In

Stevenson's study, it was reported that 'nearly 50% of the trial time in which witnesses were giving evidence was related to determining the admissibility or veracity of confessional evidence' (nd 4).

The issue was verballing, not miscarriages of justice stemming from confessions which were made, but which subsequently are shown to be false. There have been high profile cases of miscarriages of justice (Carrington et al. 1991). However, unlike the UK and US, these have not involved false confessions.⁸ The priority of ERISP was dealing with verballing - actual or alleged. This meant that the primary focus was not on controlling police questioning, but on providing courts with a record of a confession in a form so that, specifically, it could not be challenged and, generally, that the reputation of police investigations could be renovated. The lengthy and increasingly embarrassing public dispute about verballing and 'the concerns which are widely held about' typed records of interview (NSW Police 1992: 2) could be ended. ERISP addressed the relatively simple question – 'Did the defendant say what police claim he said?' The much more complex question – 'Is the defendant's confession true?' – remains to be addressed. As will be reported below, ERISP has virtually ended public debate and concern about verballing. There has been little external interest in police questioning techniques in recent years. It is to the credit of NSW Police that, despite the lack of external pressure, a program of interview training based on the English PEACE approach has been introduced.

Research projects and methods

The research on which this paper draws comprised a series of four empirical studies. We analyzed two large randomly selected samples of ERISP audio-visual tapes involving interviews about suspected offences. The random selection produced temporal and geographical representativeness. The study is not confined to material from the metropolitan region, but includes smaller towns and rural areas. More importantly, it ensured that the focus is on everyday police work and mundane investigative practice, rather than the dramatic, well-publicized and very serious cases which attract most attention. Such cases are, of course, of enormous significance. However, we have also to take seriously the criminal justice experienced both by the mass of citizens who come into contact with it, and by the overwhelming majority of criminal justice professionals. If we focus only on the exceptional, we are unlikely to produce regulations and training appropriate for the everyday. Lacking relevant guidance, police officers will rely on craft practices and cultural norms. It is a mistake to assume that everyday criminal justice is basically unproblematic and that what is at stake – case clearances and convictions for the

⁸ The main exception is the bizarre case of Evan Pederick. Even here, most attention has been on other aspects of the case, and the authorities continue to treat Pederick's confession as genuine (Anderson 1992).

⁹ Support by an Australian Research Council/ NSW Police Linkage Grant is gratefully acknowledged. The success of the project depended on Gail Travis, my excellent research assistant.

police, punishment and criminal records for suspects – are not significant for those involved.

Firstly, Sample I consisted of 175 electronically recorded video taped interviews with 167 suspects (8 people were interviewed twice). These were randomly selected from all ERISPs conducted in NSW in 1997. Data on 168 variables were collected. Data from this sample provide a general view of how ERISP is used.

Secondly, Sample 2 contained 87 ERISPs, randomly selected from interviews between March 1998 and November 1999 conducted by officers who had received the new style of interview training based on the PEACE program. This part of the study was primarily intended to assess the impact of developments in interview training.

The third element of the project, the 'court sample', was designed to investigate ERISP in the context of judicial proceedings. For this study, we randomly selected 75 District and Supreme Court cases and observed proceedings, viewed ERISP tapes, read prosecution briefs, and interviewed participants (including defendants). Analysis of these data is incomplete at this stage.

Finally, we conducted a questionnaire study of criminal justice professionals in order to understand their perceptions and experiences of policing. Questionnaires were sent to all members of four groups: judges who heard criminal matters in the state district and supreme courts; detective sergeants in operational supervisory positions at local and central levels; crown prosecutors; and criminal defence lawyers, including both public defenders and private lawyers with substantial criminal practices. Cooperation from relevant agencies and the work of a relentless research assistant produced good response rates, particularly from police and prosecutors. The respondents comprised 123 Detective sergeants (response rate 89%); 71 Crown Prosecutors (response rate 91%); 19 Public Defenders and 58 private defence lawyers (response rate 58%); 33 District Court and 16 Supreme Court judges (response rate 69%). In addition, there has been the usual extensive complementary research, including unstructured interviews, documentary analyses, and field observations.

The impact of audio-visual recording

From the perspective of the NSW Police, ERISP has been a great success. Verballing has virtually disappeared as a matter of public debate and political embarrassment. By introducing ERISP, the police took the wind out of the sails of calls for other measures to protect suspects' rights, such as a substantial right to legal advice, corroboration of confessions by independent evidence, and even the prohibition of custodial interrogation (all of which were on the agenda for consideration in the late 1980s: see NSW Law Reform Commission 1990).

(a) Beneficial effects of ERISP

Apart from the principal aim of restoring the integrity of the investigative process, ERISP was expected to have numerous beneficial results. Objective assessment of the extent to which these have been achieved is made difficult and often impossible by two factors. Firstly, there were many other concurrent changes in criminal justice, making identification of the specific effect of ERISP very difficult. Secondly, the records and data needed to make a retrospective assessment of effect proved to be unfortunately

inadequate. Notably, NSW court records from before 1991 do not include information which would make counting voir dires possible. Consequently, our assessment of ERISP's impact on criminal justice relies primarily on our questionnaire study. The problem is, of course, that our respondents were providing subjective assessments. Such assessments can be inaccurate (Vennard 1984). However, the subjectivity has its own value: in criminal justice, perception is often at least as significant as empirical reality.

ERISP was expected to increase the rate of guilty pleas (NSW Police 1992: 2). While it may be impossible objectively to distinguish the impact of ERISP from that of many other contemporaneous changes (notably the abolition of the defendant's right to make an unsworn 'dock statement'), considerable majorities of questionnaire participants in each category had no subjective doubt that ERISP had increased guilty pleas.

Table 1: Effect of ERISP on guilty pleas

	Police %	Prosecutors %	Defence %	Judges %
	(N=123)	(N=71)	(N=77)	(N=49)
Increased	62	73	49	49
Decreased	0	0	4	2
Neither	28	13	21	18
Don't know	11	14	21	20
No response	0	0	5	10

As noted above, concern about the cost (in terms both of resources and legitimacy) of voir dires involving confessional evidence had been a major motivating factor in the introduction of ERISP. There was a widespread perception among judges and prosecution and defence lawyers that the number of voir dires had declined. However, police were more equivocal.

Table 2: 'ERISP has reduced the frequency of voir dires (and other disputes about evidence) relating to police interviews'

	Police % N=123	Prosecutors % N=71	Defence % N=77	Judges % N=49
Agree/ strongly agree	44	90	71	75
Neutral/undecided	29	3	12	12
Disagree/ strongly disagree	20	3	5	6
Don't know	6	4	12	0
No response	0	0	0	6



More guilty pleas and fewer challenges to the admissibility of evidence were expected to save court time and reduce delays in bringing matters to trial. There was general agreement that ERISP had reduced trial length.

Table 3: ERISP's effect on the number of days spent in court on trials

	Police % N=123	Prosecutors % N=71	Defence % N=77	Judges % N=49
Increased	8	4	21	10
Decreased	58	76	61	65
Undecided	18	13	1	0
Neither increased nor decreased	10	7	9	10
Don't know	6	0	6	8
No response	0	0	1	6

There was also widespread agreement that ERISP had increased public confidence in the justice process.

Table 4: 'The introduction of ERISP has had a beneficial impact upon public confidence in the criminal justice system in NSW'

	Police %	Prosecutors %	Defence %	Judges %
	N=123	N=71	N=77	N=49
Agree/strongly	53	85	62	80
agree				
Neutral/undecided	28	8	25	14
Disagree/strongly	9	1	5	2
disagree				
Don't know	9	6	8	2
No response	0	0	0	2

Finally, table 5 presents the main advantages of ERISP perceived by each group of respondents:



Table 5: Main advantages of ERISP perceived by each professional group *

	Police %	Prosecutors %	Defence %	Judges %
	N=123	N=71	N=77	N=49
Reduces	56	8	9	47
allegations,				
disputes, voir dires				
Integrity,	74	19	43	24
reliability of				
record, efficiency				
Shows	31	42	19	33
appearance,				
demeanour, tone				
Controls police,	2	7	25	12
protects suspects				

^{*}Some mentioned more than one such advantage.

In summary, ERISP has been successful in putting an end to the long dispute about verballing, and is perceived by many criminal justice professionals to have increased guilty pleas, reduced trial length, reduced challenges to the admission of confessional evidence, and increased public confidence in the justice process.

(b) Expected negative effects of ERISP

In the 1980s, many police officers expressed outright opposition to mandatory recording schemes, treating the proposal as a slight on their integrity and an inappropriate interference in their business. As pressure grew, the police shifted ground, stressing the practical problems of audio or audio-visual recording: 'The grounds were various, including expense, physical impracticality, the ease of a suspect faking sounds of a scuffle, and the prediction that confessions would be disputed, but on different grounds' (Aronson & Hunter 1998: 334). In addition, police warned of problems relating to mechanical reliability, transcription, the effect on suspects, and the recording of confessions away from police stations (Alderson 2001: 259, 268-9). Some objections were dealt with the way electronic recording was introduced: notably, the incorporation of video recording met the concern that suspects would pretend they were being assaulted. Similarly, the repeated predictions that police would tamper with or improperly edit tapes were countered by the simple measure of providing the suspect with an original audiotape at the end of each interview.

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Fear that police efficiency would be affected by a fall in the confession rate was a familiar objection. Our respondents' views on ERISP's impact on the number of confessions varied.

Table 6: Perceived effect of ERISP on the number of confessions in police interviews

	Police % N=123	Prosecutors % N=71	Defence % N=77	Judges % N=49
Increased	12	21	19	24
Decreased	41	48	25	12
No change	37	7	31	20
Don't know	9	24	22	35
No response	0	0	3	8

While substantial numbers of police and prosecutors thought that confessions had declined in number, this was not (as previously expected) a source of significant complaint. A number of factors accounted for the decrease. Notably, it was suggested that interviews had become more genuinely investigatory, were focused on the offence for which the suspect had been arrested, and were less likely to produce confessions to other offences. In addition, the reduction of 'efficiency' in criminal justice to a quantitative measure was resisted. If there had been some decline in quantity of confessions and admissions, this was more than offset by the increase in quality.

As regards technical problems, some difficulty was certainly experienced in maintaining a large number of ERISP machines for use by officers across NSW who included some who were clumsy or even happy to see the machine breakdown. Analysis of our tape samples indicated a lack of supervision of tape quality. Notably, in sample 1, we identified three stations which produced ERISP tapes suffering from the same major technical problems over extended periods up to one year. Such problems have decreased and should continue to fall as officers increasingly accept and value ERISP, supervision and training is improved, and equipment becomes more reliable (notably when digital recording replaces tapes). However, technical reliability relies on maintenance, upgrading, and replacement. To some extent, ERISP has been a victim of its own success. By pulling police interrogation out of the spotlight of public and political attention, ERISP has also reduced its power to draw resources.

In England and Wales, significant problems have been reported in the accuracy of synopses and transcriptions of interviews (Baldwin 1993; Gudjonsson 2003: 86, 114). In NSW, police do not include their synopses in briefs, relying instead on transcripts produced by an external contractor. While the English experience suggests that quality of transcriptions should be closely checked, this has not been a source of concern so far in NSW.

The ERISP experience suggests that most fears about electronic recording of interviews with suspects were exaggerated or misplaced. As appears to be typical, police resistance to taping faded away as officers appreciated its benefits, were reassured about its detrimental effects, or simply got used to it. The old antagonism has gone: 'The

standard police response nowadays is remarkably different, welcoming recording as a way of rebutting unwarranted slurs by criminals and their lawyers' (Aronson and Hunter 1998: 334).

There are, however, two problematic aspects of ERISP which remain to be addressed – the interpretation of visual images and the proportion of police questioning which is recorded. Any jurisdiction considering the introduction of electronic recording needs to deal with the issues raised here.

(Mis)reading images

The Criminal Law Review Division had acknowledged that using visual images in evidence could be problematic, considering whether 'a record of things such as tattoos, speech, mannerism, dress, demeanour and language' might be prejudicial to some defendants (1986: 15). CLRD's view was that prejudice to the defendant was unverifiable and that it might be counterbalanced by advantages, such as showing the pressures on a suspect (1986: 15). In retrospect, this conclusion appears to be justified, although the balance favours the prosecution. Police officers and prosecutors routinely were enthusiastic about the court being able to see the contrast between the neatly dressed, polite defendant in the dock and the scruffy, abusive suspect pictured on ERISP. On the other hand, our samples included several cases in which, to the defendant's benefit, the ERISP provided information not discernible from a transcript or audiotape, for example that the suspect was affected by drugs during the interview.

However, the CLRD did not foresee that the problem would be not responses to objectively identifiable matter such as dress and tattoos, but subjective interpretations of behaviour – the reading of 'body language' in order to draw inferences and, particularly, to detect deception. This meant that a potential problem of using video was underestimated.

NSW judges have shown considerable interest in interpreting the ERISP image, particularly for the detection of deception. A disturbing encounter early in our research was with a judge who confidently claimed to be able to assess the veracity of witnesses by observing whether they glanced to left or right. Judges' interest in detecting deception provided much of the pressure for the showing of ERISPs in court, the improvement in ERISP picture quality, and, most significantly, the introduction of technology providing an image alternating between a general picture of the interview room and those present to a close-up of the suspect.

Alternating images have both advantages and disadvantages. The most obvious advantage is that for the first time the viewer can see a large, clear image of the suspect's face during the interview. After years of (at times frustrating) attempts to make out how the suspect looks (Are his/her eyes closed? Is he/she falling asleep during some questions? How serious an injury is that mark on the forehead which is a blur from the distance? Is she visibly alcohol affected?), it is good to be offered such a large clear image of his or her face. The size and clarity of this image of the suspect greatly reduces what previously may have remained in the realm of guess work.

Among the disadvantages are that other persons present in the interview are only seen briefly, if at all. The ERISP camera records the whole interview table only for some

20 seconds every three minutes, before reverting to the face of the suspect. For most of the time, the interviewers are not on screen. If ERISP is to be used as a mechanism of supervision and accountability of interviewing officers, something is lost by focusing on the suspect. There is a relatively simple technological solution to this aspect of the problem. Replacing ERISP recorders with units including two cameras which could produce split image or 'picture in picture' images would allow simultaneous recording and presentation of both the suspect's face and the room as a whole. However, this would not deal with the problem of misinterpretations of images.

While both prosecution and defence may gain some advantage from the close-ups showing the suspect's condition, there are grounds for concern about potential interpretations of these images by both prosecutors and judges. ERISP 073 illustrated the potential problem. In close-up, the suspect appeared somewhat shifty as he moved his eyes from side to side. However, the brief wider focus showed that these eye movements were a normal mode of interaction with two interviewers who were both attempting to maintain eye contact with him. Seeing him reacting to questions rather than seeing him as one of three people exchanging questions and answers invited incomplete or inaccurate interpretation.

In our questionnaire study, a majority of both judges and prosecutors reported that they believed that demeanour is an indicator of veracity. By contrast, more police disagreed than agreed with the statement. Direct experience of interviewing suspects and the Police Service's discouragement of pretensions to read deception from body language are presumably responsible for this.

Table 7: 'A suspect's demeanour during the interview indicates whether he/she is telling the truth'

	Police %	Prosecutors %	Defence %	Judges %
	N=123	N=71	N=77	N=49
Agree/Strongly agree	28	56	26	57
Disagree/strongly	32	10	38	20
disagree				
Neutral/undecided	36	28	35	16
Don't know	3	6	1	2
No response	1	0	0	4

This is not the place for a review of the extensive psychological literature on this topic. It is sufficient for present purposes to point out that the research evidence clearly establishes that, whatever a highly trained psychologist may be able to do in detecting deception, a judge (or indeed prosecutor, jury or police officer) cannot do so accurately, and that standard interview training does not increase the capacity to correctly identify deception (Memon et al 1998; Milne & Bull 1999:64; Mortimer & Shepherd 1999: 302; Vrij 1999).

The widespread dissemination of schlock psychology through magazine articles or (as in the case of the judge noted above) brief professional education courses is a matter of real concern, indicating the need for a vigorous program of appropriate education and training for criminal justice professionals, including judges and

prosecutors, in any jurisdiction considering the use of video to record interviews with suspects.

The whole picture?

When it was introduced, ERISP was presented as a technology which would deal with the problems – real and alleged – of police questioning by allowing outsiders to see what happened in the police interview room.

The electronic recording will provide courts with a window into the interviewing process giving opportunity for an objective assessment to be made of the prevailing circumstances surrounding the interview and the substance of any confession or admission arising therefrom (NSW Police 1992: 1)

Through this clear 'objective' window, the court should be able to see how a defendant came to confess. As McConville comments,

What seems to be on offer, for judges, lawyers and juries, is the chance to have the past replayed, enabling the viewer to look on as reality is being constructed. It is that promise which invests the video with such persuasive character (1992: 548).

If, however, the recorded interaction is the product of earlier, unrecorded questioning, then video's promise may be illusory. The danger that video may give a false gloss of authenticity is real. A solicitor interviewed in our court study commented that, simply by virtue being on camera, the interview seems more compelling and tends to be accepted as legitimate. This section addresses the key problem of what is (and should be) recorded and the relationship between rehearsal and recital. ¹⁰

Anyone who feels complacent about police questioning practices in an age of audio-visual recording would do well to read McConville's disturbing account (1992a) of how some English police officers evaded controls on the questioning of suspects and were able to present audiovisually recorded¹¹ accounts which gave no indication of the unrecorded misconduct in 'interviews' which preceded them. While these were not officially recorded, they were captured by cameras and microphones installed in the station as part of a documentary project by a television company.¹² Apparently voluntary confessions given in bland interviews were shown to have been produced by deals,

¹⁰ The issue of preparatory or rehearsal questioning has attracted considerable attention in England. With exception of Irving and McKenzie (1989), 'all of the major post-PACE studies have found substantial evidence that informal interactions have a significant role in police investigations' (Leng 1994: 174).

¹¹ The police force was experimenting with the use of audio-visual recording. In England and Wales, a system based on audio-taping was introduced in the later 1980s: there has been spasmodic interest in videotaping, and it is currently being reevaluated (see Newburn et al. 2004).

¹² The officers 'appeared to forget' that they were being recorded (McConville 1992a: 533)

threats and inducements.¹³ The official record of these interviews gave a misleading account of what occurred in a way that would have been convincing had not an unofficial record been available.

McConville argues that the misrepresentation effected by incomplete recording jeopardizes suspects, and that, far from protecting suspects' rights, electronic recording undermines them. He warns that 'where the police make threats or inducements or strike deals with suspects in private which then lead to a confession in the formal interrogation, the position of a complaining suspect will be weakened rather than strengthened by the supporting videotaped record of the confession because of its apparent ability to capture reality' (1992b: 962).

When the introduction of ERISP was proposed, anti-verbal activists in NSW similarly expressed concern that it would worsen the situation of people in custody: 'police might manipulate taping by using threats and intimidation to secure a recorded confession which would then be impossible to challenge' (Alderson 2001: 266). The preferred option of the Prisoners' Action Group was to require the presence of an independent person during interrogation (PAG 1989). Responding to similar earlier concerns, the Criminal Law Review Division (CLRD) had warned of the danger that ERISP might be used to record rehearsed interviews, and consequently recommended that all questioning should be recorded. (1986:17, 41-2).

However, when the ERISP program was eventually introduced in 1991, this was not done by means of legislation (contrary to the CLRD's recommendation: 1984: i; 1986: 75-6). In part, this was because there would have been an unmistakable irony about legislating to record questioning of suspects whom the police still had no legal authority to detain for such purposes (Dixon 1997: ch.5). There were some benefits from the initial lack of legislation: 'the absence of a legislative framework avoided negative symbolism that might have produced an adverse police reaction and delayed or diluted the introduction of recording in practice' (Alderson 2001: 279). But the cost was introducing electronic recording to an unreconstructed legal regime. The production of regulation – the ERISP Instructions and Guidelines and subsequently a Code of Practice for criminal investigation (NSW Police 1992; 1998) – was left to the police, with external regulation limited to rules regarding the admission of evidence. Despite some (non-coincidental) similarities of language, there is a marked contrast between the status of the PACE Codes of Practice and that in NSW.

As explained above, the priority of the police was to dispel accusations of verballing, not to control police questioning. Consequently, officers have been able to question suspects without electronic recording, so long as any admission or confession which they hope to use in court is subsequently 'adopted' on tape. Not surprisingly, this is not spelled out. The guidelines provided to police are obscure and ambiguous. They appear to discourage unrecorded interviewing, with the Code of Practice instructing officers:

¹³ It should also be made clear that we are not claiming that NSW officers engage in the practices reported by McConville: our point is that research has not been conducted on investigative practice before ERISP in NSW, and we make no claim to knowledge about the full process.

Do not conduct lengthy preliminary interviews with a suspect before a formal electronically recorded interview at a recognised interviewing facility.

Preliminary questioning, other than at a recognised interviewing facility, should be conducted only for the purpose of clearing up any doubt and/or ambiguity, unless delay would be likely to: interfere with or physically harm other people; lead to interference with evidence connected with an offence; lead to the alerting of people suspected of having committed an offence but not yet arrested; hinder the recovery of property. Once the risk has been averted or questions have been put to attempt to avert the risk stop interviewing. (NSW Police 1998: 25).

However, this leaves open the question of 'preliminary questioning' at police stations. Indeed, such questioning is facilitated by providing a procedure for the on-tape adoption of untaped confessions. The ERISP instructions state that 'Any relevant conversation or activity not recorded on ERISP System (sic) should be detailed to the suspect for adoption during the subsequent electronically recorded interview' (NSW Police 1992: 12). The Code of Practice instructs officers 'At the commencement of any subsequent interview read the written record of any earlier confession, admission or statement onto the tape. Invite the suspect to comment about what has been read ... (A)dopt any relevant conversation had with the suspect before the commencement of the interview.' (NSW Police 1998: 26). Such a procedure is a necessary corollary of the evidentiary rule that untaped confessions are normally inadmissible: otherwise, genuine examples of confessions or admissions blurted out at the time of arrest would be lost. However, it leaves ambiguous the official attitude to preparatory interviewing.

The impact of such ambiguity on police practice was evident in our findings. In the questionnaire study, 63% of the police officers reported that, in their most recent case, they had questioned the suspect before the beginning of the ERISP. Almost three quarters (74%, n=126) of suspects in sample 1 and 39% (n=34) of suspects in sample 2 were identified as having been subject to some pre-ERISP interviewing which went beyond formalities of being informed about the allegation, the caution and the option not to participate in an ERISP. Such pre-ERISP interviewer-suspect conversation was typically revealed when reference was made to prior admissions or denials or when general comments about what had happened before were made by the suspect or interviewer. In other cases, there were tell-tale indicators that rehearsed interaction was on view. For example, in 205, the interviewer cautioned the suspect emphatically and laboriously, adding the additional warning 'you understand that what you say may result in you being charged'. It was clear that this was because he knew that the suspect had changed his story since the first interview and was going to confess. In many cases, preliminary interviewing is openly acknowledged: such ERISPs include the lengthy 'adoption' via 'Do you agree that you said that .. ?' questions relating to statements recorded in traditional style in an officer's notebook.

Stated baldly, these figures are alarming, and could be taken as condemnation of the ERISP program. This would be premature. Much of this pre-ERISP interviewing is innocuous. One reason for this takes us back to the points made above about the reality of the interviewing process: far from the dramatic myth, many police investigations and interviews are mundane and not contentious. An assumption that pre-ERISP questioning

routinely involves attempts to coerce or persuade suspects into confessing would distract attention from a less dramatic reality. Typically, officers talk to suspects to find out how they will respond to formal questioning and to prepare themselves for a formal interview. From this perspective, much informal interviewing is part of the process of planning and preparing for the ERISP. At its simplest, it tells an officer how much work he or she is going to have to do for the interview to be successful. In interviews for our court study, a detective answered our query about the purpose of the informal interview:

Basically to find out what their answers are going to be, whether they are going to admit it or deny it, you know, so you can then structure your interview accordingly. Things are going to be a lot easier if they are admitting things. Whereas if they are <u>not</u>, you are going to have to put a lot more questions (on ERISP) to them about trying to pinpoint their places, you know, what they were doing at the time, and putting to them the evidence ...that we have been given by witnesses and informers and those sort of people.. There is a lot more planning that is going to go into an interview where there is denying something than an interview where, you know, it is just free-and-easy.

Equally, the fact that there was pre-ERISP interviewing does not mean the subsequent ERISP is a mere formality. In 244, the suspect had clearly admitted involvement in a robbery: however, the interview was no mere formal repetition, but involved the collection of substantial, detailed, additional information about the offence. Similarly in 098, field notes recorded

there is a sense of 'rehearsed' questions and answers and 'unrehearsed' ones. The general outline of the main body of questions had apparently been explored...At the end of the interview, however, there was a brief series of questions that asked about the suspect's possible involvement in other break and enter offences in the area. Hesitancy and concern shown by the suspect in response to being asked these questions appeared to be spontaneous. There was a sense of viewing the suspect as he was responding to these questions on the spot rather than how he could regurgitate responses or how he could respond to expected questions.

While we are not confident that we identified every case in which there had been pre-ERISP questioning, it is worth noting that such questioning did not have a great impact on the confession rate: while 83% of those in sample 1 who were pre-interviewed confessed, so did 76% of those who were not.

These comments seek to be realistic about the nature of everyday police investigations without being complacent. It is recognized that, as McConville's examples showed in England, an audio-visual record may present a completely misleading picture from which unreliable, unfair and inappropriate tactics used during preparatory interrogation are obscured. Equally, even if such tactics are not employed, a suspect or defendant could allege that they were. The result could be to revive the costly and damaging cycle of allegation and denial which electronic recording was intended to kill off.

In our samples, there were some confessions which may have been obtained entirely properly, but the recording of which raises rather than dispels doubts. For example, in 003 a suspect confessed on a tape to a long series of armed robberies, including several for which he had apparently not been a suspect. On tape were merely the bland confessions, with no indication of the circumstances of their production. The investigating officers were at pains to record the suspect's statement that he had not been offered any inducement. However, incidental references to access to legal advice and entry to a witness protection program indicated that these were important factors in the production of his confession. The potential for conjecture, and for lengthy legal dispute, about the reliability of such confessions is evident.

Similar considerations apply to interaction during unrecorded breaks in interviews. In 229, the suspect claimed that police had told him 'If you help us, we'll help you'. However, when the adopting officer asked if any inducement had been offered, the suspect replied 'Not at any stage'. This answer was clearly the result of discussion between the suspect and police (and possibly the suspect's mother) during an interview break. However, the accuracy and propriety of its production are unknown because the vital exchanges were not recorded. Uncertainty raises doubts, just as it did before ERISP was introduced.

Competing claims have been made about whether malpractice preceding formal interviews can be detected from observing tapes. On one hand, McConville asserts that 'it is not possible to tell from the video recording whether suspects have been the subject of improper pressure' (McConville 1992b: 962). Those of us who are sceptical about the ability of police interviewers to detect deception should be modest in their own claims that they can identify deception by police officers. We were made to reexamine our sense that we understood what we were watching by 067, in which a 'rehearsal' was exposed when the suspect failed to deliver his lines correctly. The flow of an apparently genuine, original interview was disturbed when the suspect stated that he did not know who lived in the house that was burgled. The interviewer interjected: 'Do you agree I spoke to you before this interview about this and you said there was an old lady living at this address?' If the 'correct' answer had been given initially, the rehearsal would not have been apparent.

Baldwin is slightly more optimistic, suggesting that 'a recording is valuable in offering some insight into what has happened when a suspect is questioned and in providing a means by which an assessment might be made of whether a suspect has been bullied or primed beforehand' (Baldwin 1993: 328). One of our court study cases involved a dramatic allegation that the suspect had been 'pistol whipped' by police prior to the recording of the ERISP. The defence argued that this claim was evidenced by the suspect's complaint on ERISP that he had a headache; his pause when asked by the Adopting Officer if he had a complaint to make about the interview; and the fact that he rubbed his head during the interview. However, the prosecution argued that the suspect did not have visible bruising on his head, but that he was drug affected, which accounted for the pausing. Both parties argued that the interview visually confirmed their view as to whether there had been pre-interview police misconduct. This case suggested that identifying pre-ERISP police misconduct was not straightforward, even with the availability of a visually recorded police interview. The ERISP may be valuable in indicating how a suspect has been treated earlier, but it is by no means conclusive.

Baldwin also suggests that 'the techniques of discourse analysis have already been used in the courts in challenges to various forms of confession evidence, and there is no reason why they could not be used to good effect to expose indications of earlier conversations from the transcripts of formal interviews' (1992: 1096). In Australia, doing so might be particularly useful in cases involving Aboriginal suspects, whose speech patterns are often distinctive. An early and much publicized example is the Stuart case, in which it was shown that Max Stuart did not speak in the way reported in his 'confession' (Inglis 1961; see also the recent film *Black & White*).

Discourse analysis will, of course only be a resort available to a small minority of suspects. For most of those who confess and plead guilty, the prospect of obtaining linguistic experts to analyze their interview will be remote. Also, the issues will rarely be as clear-cut as in Stuart's case. In a homicide case in our court study, the defence attempted to use linguistic analysis in order to determine the suspect's level of English fluency at the time of the ERISP recording and thereby question the admissibility of some answers given. Even this seemingly uncontroversial issue of whether the suspect could understand fully what was being asked of him was not clear-cut. Linguistic analysis to assess whether a suspect has been bullied or primed beforehand seems likely to be even more controversial.

It would be naive to think that the need to produce an audio-visual record exerts no influence on officers' behaviour, or that suspects can be coerced into agreeing to anything. Even officers who are prepared to coerce suspects have to be confident that any mistreatment of, pressure on, or deal stuck with a suspect is going to be effective enough to ensure that there is no embarrassing outburst when the ERISP is recorded.

Equally, it would be naïve to suggest that it is only police who prefer some interaction to be unrecorded. Some suspects may be prepared to speak informally, but not to cooperate during the ERISP. Detectives suggested to us that many experienced criminals will talk to the interviewer informally, but will not co-operate when what they are saying is recorded. Perhaps more significantly, suspects may well be reluctant to talk on the record about other people's involvement in offences, or indeed their own involvement in offences other than that for which they were arrested. While conducting research on police questioning in England, I observed several cases in which it was the suspect who insisted that sections of the interview dealing with these matters should not be recorded (Dixon et al 1990: 135-6). A notable feature of interviews in our ERISP samples was how little discussion of other people or other offences was included.

Concentrating on coerced confessions which have been obtained in pre-ERISP questioning would divert our attention from more mundane but significant issues. It would be valuable to pay closer attention to cases in which the pre-ERISP interviewing is openly acknowledged. For example, from a psychological perspective, the compliant and responsive role allocated to the suspect in procedures for adopting previous questions and answers may have significant effects. In one extreme instance in our sample, the suspect was asked no less than 96 'Do you agree ...?' questions in 15 minutes, all of which were answered 'Yes'. The repetition of questions in this form is highly conducive to compliance. In his linguistic analysis of ERISP interviews, Hall reports a 55:1 affirmative response rate (1998: 62).

Psychological and linguistic analysis may demonstrate the subtle reconstruction of statements in these processes. Hall draws attention to the potential for this questioning

style to lead suspects to adopt statements that they did not make. Almost inevitably, a DYA question will contain the officer's paraphrase of the original exchange even if an attempt at contemporaneous note-taking is made (Coulthard 1992). In any case, notebook interviews are often, by necessity, written up after the exchange rather than contemporaneously. The result is that a DYA question 'allows paraphrased speech to be represented as quoted speech, which it then accompanies with an on-the-record agreement to the quotation from those being misquoted' (Hall 1998: 65).

For example, in 031, police asked the suspect a series of DYAs, including one about a cheque. He was then asked 'DYA you said "What, the one at the [X] place? I was going to pay it back." Similarly, in 123, the suspect denied knowing that some material in his possession was stolen. The interviewer confronted him with his pre-ERISP admission:

When I spoke to you earlier do you agree I asked you if you knew it was stolen and you said, 'I had a sneaking suspicion it may have been.' The suspect visibly was shaken as he answered, 'Yes, I did say that, yes, sir.'

Finally, in 216, the suspect insisted that another person had stolen some electrical equipment and that he was not involved. However, the interviewer then sought to adopt material recorded earlier in his notebook. This included the suspect's statement 'We just went to the clinic for needles. And we walked back and saw a girl and guy and we asked to look at their stereo.' The interviewer asked 'Is that right?' The suspect appeared hesitant, but said 'Yes'. The suspect was linked to the offence indirectly, via the officer's representation of words which conflicted with his earlier account and which he accepted hesitantly.

Hall argues that this technique elides the difference between pre- and post-ERISP questioning. Before ERISP, 'interviewing officers would write a paraphrased first person recount of a suspect's version of events and then ask the suspect to 'adopt' this paraphrased version by signing in the margins of the document' (1998: 60). From this perspective, presenting the suspect with statements which he/she is asked to adopt by answering a 'Do you agree..?' question is very similar. The result, according to Hall, is that 'the suspect goes on record as having made statements (orthographically represented as quoted speech) which have been recorded no more or less accurately than they would have been prior to the introduction of electronically recorded interviews, the key difference being that, now, the suspect's adoption is less arguable by virtue of her/his agreement being captured electronically' (1998: 63).

Such incriminating statements may have been accurately recorded, but they echo verballing styles and raise (possibly unfounded) concerns about police integrity which ERISP was intended to allay. The suspect is asked to confirm an account which has been constructed by the police officer. Inevitably, this involves a process of selection and emphasis: it may also involve distortion.

This point must not be overstated. It is certainly better that a suspect is asked to 'adopt' on tape a confession or admission which has been made away from recording facilities than that police are permitted to give evidence of unrecorded confessions and admissions. This was vividly demonstrated by a recent case in which the High Court of Australia unfortunately declared admissible police evidence of an unrecorded, incriminatory comment made by a suspect in police station car park soon after the

conclusion of a recorded interview in which he had denied the offence.¹⁴ This approach simply invites process corruption.

Responding to the problem of unrecorded questioning

It has been suggested here that pre-ERISP interviewing is usually a matter of routine. Nonetheless, it threatens the integrity of the system. ERISP shows that a suspect made confessions or admissions, not how he or she came to do so. As noted above, establishing the reliability of a confession is harder than merely proving that it was in fact made. Given what we know from other jurisdictions about deliberate misconduct and inadvertent influence by interviewers and about apparently irrational responses by suspects, there is no room for complacency. It is necessary to have as much questioning recorded as possible. The problems of recording field interrogations mean that questioning should be conducted in police stations wherever feasible. This should not put unrealistic demands on police. Claims that spontaneous outbursts make recording impracticable echo arguments from the 1980s that electronic recording would be impossible. The response now should be same as then: of course, exceptions must be allowed, but these must be in defined circumstances and/or subject to rigorous scrutiny.

So long as much interviewing is conducted before the ERISP machine is activated, there will be room for controversy about what happened. Such controversy includes doubt about the reliability of recorded confessions. The potential benefits of ERISP are dissipated if it is used to record rehearsed material. It should be stressed that, from all the evidence available, the costs and problems to police of comprehensive recording are minimal. If a police officer feels uncomfortable about using an interviewing technique on tape, then that technique may well not produce reliable results. It should be noted that our suggestion is that the costs are minimal, not that they do not exist. As explained above, there are going to be occasions when recording is impossible or inappropriate – eg when a suspect insists that he/she will not name an accomplice while being recorded. This is not an unusual dilemma in policing: the objective is the minimization of problems, not some problem-free utopia. Police should record all questioning of suspects conducted within police stations and should only interview suspects in police stations (except in cases of exceptional need which fall within specified categories). Wherever possible, suspects should be asked to repeat unrecorded confessions on tape. If they are not asked to do so (or their refusal to do so is not recorded), there should be grave suspicion about such confessions.¹⁵

Scepticism about this insistence on the need for comprehensive recording may be answered by referring to two of the high profile, very serious cases with which this paper is not generally concerned, the prosecutions in Britain of George Heron and of Stephen Miller, Tony Parris and Yusef Abdullahi (the 'Cardiff Three'). In Heron's case, ¹⁶ an important factor in establishing that the confession was unreliable was interview

¹⁶ Unreported, Leeds Crown Court, 1 Nov. 1993; see Dixon 1997: 172-6; Gudjonsson 2003: 96-106.

¹⁴ <u>Kelly</u> [2004] HCA 12. By contrast with this narrow legalism, the High Court took adopted a purposive approach in <u>Nicholls & Coates</u> [2005] HCA 1.

¹⁵ See Kelly op. cit.

transcripts showing how the investigators had provided Heron with cues. For example, in these crucial exchanges, Heron came to confess that he had used a knife in the murder:

- Q Now you'd hit Nikki when she was lying on the floor, you hurt her again didn't you George you hurt her with something...
- A Yes
- Q What did you use? Come on
- A Metal
- Q A metal what?
- A Bar
- Q Bar?
- A Well, a piece of metal
- Q And what did you do with that piece of metal was it a knife, George?.
- A It was sharp
- Q It was sharp, where did you get it from? George... did you have it with you?
- A No
- Q You must have had it with you
- A I don't remember having it with me ... (24/41-2)
- Q ... what sort of metal are we talking about?
- A Sharp
- Q Sharp metal
- A Metal
- Q What are we talking about though, was it an object?
- A Small, sharp, metal... (26/8)
- Q What was this sharp metal object..?
- A Knife (26/9)

If the court had only had a record of Heron repeating his final confession, the problematic nature of its production would not have come to light. Even after his acquittal, the interviewers found it hard to accept that there was a problem in how they obtained the confession. It seems certain that the constitution through suggestion and adoption of key phrases in Heron's confession would not have appeared in evidence had they not been electronically recorded. This is not to suggest that they would have deliberately behaved improperly. Rather, in retrospect, the precise content of these crucial exchanges would not have been remembered or regarded as important.

By contrast in the Cardiff Three's case,¹⁷ the interrogators' approach in interviewing Stephen Miller can only be regarded as oppressive. The relevant issue here is that the Court of Appeal stressed the significance of hearing the tone of the interrogation and hearing all the interviews. If only a rehearsed confession been available, the conviction might not have been overturned. This is important because we now know, not just that the Cardiff Three's guilt was not proved beyond reasonable doubt, but that they were innocent. DNA analysis has subsequently identified the person who committed

¹⁷ [1993] 97 Cr App R 99; Sekar 1997; Gudjonsson 2003: 515-16.

the crime. These cases starkly illustrate the mistake of treating due process as the opponent of crime control. In Heron's case, a suspect against whom there was significant circumstantial evidence avoided conviction not because of a legal technicality, but because poor interviewing produced an unreliable confession. In Miller, Parris and Abdullahi's case, oppressive interrogation resulted in three men being convicted of a murder that they did not commit and the real murderer almost escaping justice.

Dealing with partial recording requires a more general remedy. What is needed is a renewed commitment to the legal regulation of policing by the development of rules, policies and standards (Dixon 1997: ch.7). This does not mean more rules, a message which would find favour with no-one. It means having better rules which (in the terminology of the Policy Studies Institute: see Smith & Gray 1985) become 'working rules', (ie part of the cultural and other norms which guide everyday working practice) rather than 'inhibitory rules' (which are effective only if there is an immediate prospect of their enforcement) or 'presentational rules' (whose main purpose is placate a public audience).

Such rules must be made with statutory authority, not left to the police to produce. None the less, police should be directly involved in the production of the rules in this as in other areas. (For elaboration of this argument, see Dixon 1997: ch.7). While courts will play an important role in interpreting and enforcing rules, they cannot be expected to take the leading role in regulating policing. In their different ways, the experiences of the USA and Australia demonstrate that judicial control is inadequate because it depends on the vagaries of case law, which does not allow for detailed prospective regulation.

One response to this call for statutory regulation is likely to be that the Police and Criminal Evidence Act 1984 is an example of such regulation, and that it facilitated rather than prevented the type of conduct reported by McConville. For McConville, the examples of abuse which he cites provide evidence of the ineffectiveness of PACE which, despite its 'elaborate system of internal supervision and accountability', has 'failed to penetrate police working practices and relationships' (McConville 1992a: 545). This conclusion echoes the findings of his work with Sanders and Leng (McConville et al 1991). From my perspective, this approach is excessively pessimistic. These matters were the subject of a somewhat acrimonious dispute a decade ago (Noaks et al eds 1995). It is unfortunate that the focus of research has moved on and that empirical research on the use of police powers has become unfashionable.

Legal regulation should establish positions from which a variety of pressures are put on the investigatory practice of police officers. Audio-visual recording is just one of those potential pressures. Others include proficient, well-resourced legal advisers (and, for vulnerable suspects, social workers trained to take the role of appropriate adult); rules of evidence in the hands of judges and magistrates who are prepared to be active in the control of policing; and senior officers who are prepared to supervise in order to ensure that investigators work with in the rules and use approved techniques for questioning suspects. None of these is a panacea or a silver bullet. While it is as foolish to think of them as such, it is equally foolish to reject one or the other on the grounds that it will not change police practices (see eg Sanders and Young 2003). Progress may be possible through the combination of various (admittedly flawed) mechanisms, of which audio-visual recording is one.

Conclusion

This assessment of ERISP has returned us to the much broader and more complex issue of regulating police practice. Audiovisual recording is not enough by itself: it must be used as a tool in a general regime of regulation. The recorded interview is just one stage in a suspect's detention. Its reliability and propriety depend substantially on legal regulation of the context in which interviewing takes place. Such problems can only be tackled by much more rigorous regulation of investigative practices and, in particular, by requiring that (with the caveats noted above) all interviews should be electronically recorded in full. There are obvious incentives for officers to question suspects before a formal recorded session. If electronic recording is to have a significant role in controlling police interviewing and ensuring the reliability of confessions by providing more than confirmation of what a suspect said in a rehearsed interview, then effective legal and supervisory regulation of investigative practices is necessary.



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