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Written Records of Statements and Fairness

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I. INTRODUCTION

THE FOCUS OF this contribution is on *written* records of statements (confessions, other statements of an accused person, witness testimony) and their relationship to fairness. In general, a number of recording formats exist, from various types of written records (content only or with non-verbal behaviour also included, verbatim or summarisation, with or without reference to the questions asked) to audio or video recordings. Each of these formats has advantages and disadvantages with regard to the aim of ensuring fairness. The research in this area has focused predominantly on investigating interviewing techniques and the related risks of producing false evidence, thereby infringing the fundamental standards of fairness. Methods of recording statements are discussed only marginally. In civil law jurisdictions, such as Switzerland, Germany, France or the Netherlands, the use of written records produced directly during the investigative interview, rather than audio or video recordings, is the rule.[1] These records are generally summarised and only partially verbatim, if at all. There has undoubtedly been a strong movement towards audio or video recording of investigative interviews, especially of police interviews of suspects in custody.[2] However, the use of electronic recordings is still

[1] In Scotland too, there is no general published guidance to audio record police interrogations, contrary to England and Wales, where the Police and Criminal Evidence Act 1984 requires audio recording of offences which are indictable or triable. J Chalmers, 'Recording of Police Interviews' in J Chalmers, F Leverick and A Shaw (eds), *Post-Corrobation Safeguards Review Report of the Academic Expert Group* (The Scottish Government, Edinburgh, 2014) 118–23; G Roussel, *Les procès-verbaux d'interrogatoire. Rédaction et exploitation* (Paris, Harmattan, 2005); M Komter, 'From Talk to Text: The Interactional Construction of a Police Record' (2006) 39 *Research on Language and Social Interaction* 201; J Blackstock, E Cape, J Hodgson, A Ogorodova and T Spronken, *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions* (Cambridge, Intersentia, 2013) 371; N Capus, '"Ich ermördere Dich. Es gibt keine Gesetze für Vito. Vitogesetze"—Theorie und Empirie zur Herstellung von Schriftprotokollen' (2014) 3 *Richterzeitung* 1.

[2] AE Taslitz, 'High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statute on Videotaping Custodial Interrogations' (2012) *Northwestern Journal of Law and Social Policy* 400; S Thompson Guerra, 'Judicial Gatekeeping of Police-Generated Witness Testimony' (2013) *Journal of Criminal Law & Criminology* 329, 360; BL Garrett, 'The Substance of False Confessions' (2010) *Stanford Law Review* 1051 (promoting videotaping) 1059; RA Leo et al, 'Bringing Reliability Back' in *False Confessions and Legal Safeguards in the Twenty-First Century* (2006) *Wisconsin Law Review*

not a general and customary practice in all countries within adversarial criminal law systems; even less so in inquisitorial countries. In reality, although audio or video recordings are the best way of authentically preserving what has been said and done during investigative interviews, it is questionable whether they will become the prevailing form in the future; it is far more time consuming to listen to or watch audio or video recordings than to read a written record. Hence, as summarised or verbatim written evidential records generated through police and prosecutorial investigative interviews are widespread and common, and in view of the fact that they are likely to remain the most common recording technique in the future, I begin with an attempt to evaluate this recording technique with respect to the traditional principles of orality and immediacy. Whilst slightly comparative, the focus is on Switzerland as an example of a rather inquisitorial criminal law jurisdiction (section II. A.), and on the right to a fair trial as guaranteed by Article 6 of the European Convention on Human Rights (ECHR) (section II. B.). I then go on to draw attention to Swiss academic opinion and jurisprudence as an example of the reasoning behind the production of written records within an inquisitorial criminal law system as an instrument for safeguarding the fairness of criminal proceedings (section III.). Finally, I explain how written records could potentially turn into obstacles to fairness (section IV.), and subsequently analyse the use of written records in the decision-making process (section V.) before drawing conclusions (section VI.).

II. IS DIRECT KNOWLEDGE REQUIRED INSTEAD OF READING AUTHORITY-GENERATED WRITTEN RECORDS?

A. Written Records and the Principles of Orality and Immediacy

Written records are a particularly important component of criminal case files. Once '*preserved*', ie made permanent, written records can be recycled at every stage of the legal process, from the very first police questioning up until the final judgment.[3]

479, 524 N 301; RA Leo, *Police Interrogation and American Justice* (Harvard, Harvard University Press, 2008) 237, 291–305; RA Leo et al, 'Promoting Accuracy in the Use of Confession Evidence: An Argument For Pretrial Reliability Assessments to Prevent Wrongful Convictions' (2013) 85 *Temple Law Review* 759–838; American Bar Association (ABA), 'Achieving Justice: Freeing the Innocent, Convicting the Guilty: Report of the ABA Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process' (Paul C Giannelli and Myrna S Raeder, eds, 2006) reprinted in (2008) *Southwestern University Law Review* 763, 11–22; The Justice Project, *Electronic Recording of Custodial Interrogations: A Policy Review* (2007). In 2014, the Department of Justice outlined new policies related to electronic recording, establishing a presumption in favour of electronically recording custodial interviews, with certain exceptions, and encouraging agents and prosecutors to consider taping outside of custodial interrogations. A slight move towards electronic recording can also be observed in continental European countries such as Germany, Switzerland and France: see, eg, A Nack et al, 'Gesetzesvorschlag der Bundesrechtsanwaltskammer zur Verbesserung der Wahrheitsfindung im Strafverfahren durch den verstärkten Einsatz von Bild- und Tontechnik' (2011) *Neue Zeitschrift für Strafrecht* 310; N Capus and M Stoll, 'Lesen und Unterzeichnen von Einvernahmeprotokollen im Vor- und im Hauptverfahren' (2013) *Schweizerische Zeitschrift für Strafrecht* 195; J Beaume, *Rapport sur la procédure pénale « Rénovation de la procédure de l'enquête pénale »*, Report for the Minister of Justice (July 2014).

[3] K Aronsson, 'Social Interaction and the Recycling of Legal Evidence' in N Coupland et al (eds), '*Miscommunication' and Problematic Talk* (Newbury Park, Sage Publications, 1991) 215, 238.

In many European jurisdictions, the court is presented with written records from the prosecution or the police of suspect or witness interviews. Because judges in civil law jurisdictions are assigned an active role, written records are regarded as suitable documents to allow the judges to prepare and familiarise themselves with the pre-trial records of the case file in advance.[4] Continental judges may cite a witness to attend the trial, but will then question and weigh the oral testimony against the written records of previous statements. Similarly, they will also confront defendants with what they have said in their previous statements, according to the written record.[5]

Criminal law judges in civil law jurisdictions might even make decisions based exclusively on the written material, including the written records of previous statements, without hearing witnesses themselves.[6] Indeed, written records take on even greater importance in criminal proceedings in which the principles of orality and immediacy are not strongly practised.[7] In both common and civil law jurisdictions, the principles of orality and immediacy at the trial stage have traditionally been seen as an important way of countering the risk of imbalanced decision making, allowing judges to arrive at their own conclusions in an undistorted manner. The primacy of oral statements is intended to protect oral statements against the authority of written documents at the trial. However, both systems have undergone major changes within the last 30 years, in that oral (public) trials occur less frequently.[8] This is not to say that common law jurisdictions adhere to the dossier (case file) system, which is the hallmark of inquisitorial or mixed justice systems.[9] However, an American judge, for example, must read the confessions in the written records of police interviews as well formally endorse a plea bargain procedure,[10] which is the procedure applied in the majority of criminal cases in the Anglo-American criminal justice system.[11] In addition, within other common law jurisdictions without a dossier system, such as England and Wales,[12] criminal law proceedings also comprise of a series of procedural events, which are basically linked by practices of reading and writing.[13] Thus, while the orally staged testimony at trial is decisive, it is nevertheless variously

[4] B Schuenemann and W Bandilla, 'Perseverance in Courtroom Decisions' in H Wegener et al (eds), *Criminal Behavior and the Justice System: Psychological Perspectives* (New York, Springer, 1991) 181; R Grunewald, 'The Narrative of Innocence, or, Lost Stories' (2013) 25 *Law & Literature* 366, 371, 381.

[5] M Komter, 'The Suspect's Own Words: The Treatment of Written Statements in Dutch Courtrooms' (2002) 2 *Forensic Linguistics* 168.

[6] M Komter and M Malsch, 'The Language of Trials in an Inquisitorial System: The Case of the Netherlands' in P Tiersma, L Solan (eds), *The Oxford Handbook of Language and the Law* (Oxford, Oxford University Press, 2012) 408–409.

[7] S Trechsel, *Human Rights in Criminal Proceedings* (Oxford, University Press, 2009) 305.

[8] J Jackson and S Summers, *The Internationalisation of Criminal Evidence Beyond the Common Law and Civil Law Traditions* (Cambridge, Cambridge University Press, 2012) 28.

[9] Blackstock et al (n 1) 84.

[10] Grunewald (n 4) 369.

[11] J Jedick, 'A Change in the Environment of Plea Bargaining: Using the Inspiration of Administrative Procedural Safeguards Like NEPA to Add Process Protections' (2014) *Washington University Law Review* 1325.

[12] Blackstock et al (n 1) 362.

[13] T Scheffer, 'The Microformation of Criminal Defense: On the Lawyer's Notes, Speech Production, and a Field of Presence' (2006) 39 *Research on Language and Social Interaction* 303; T Scheffer, 'The Duplicity of Testimonial Interviews: Unfolding and Utilising Multiple Temporalisation in Compound Procedures and Projects' (2007) 8 *Forum Qualitative Sozialforschung* Art 15; T Scheffer et al, *Criminal*

bound to written documents. The written mode prevails throughout the pre-trial, and the paper trail enters the trial in adversarial systems.[14] Evidence introduced orally at trial is received with distrust, as is clearly revealed in the case law in England and Wales where courts are allowed to draw adverse inferences when suspects do not tell the police during the investigative interview a fact later relied upon by the defence at trial.[15] Although tape recording has become mandatory with the introduction of the Police and Evidence Act in 1984,[16] it is established that the written format does prevail in practice. Indeed, once produced, the 'transcript'—not entirely verbatim[17]—is admissible as a 'copy' of the original evidence (ss 133 and 134(1) Criminal Justice Act 2003), and audiotapes are rarely played; the written, rather than the taped version, is relied upon.[18] Both parties read the written record and prepare their interventions under the impression of the written record. Furthermore, parties know that their counterpart disposes of the police protocol and will cross-examine the defendant or the witness based on the agreed-on version: 'Barrister and client, instead of breaking new ground, perform the original story that came out of the documented police interview as binding for the upcoming trial'.[19] The same working procedure between client and lawyer is visible in the French pre-trial phase. The (re)construction of what occurred is conducted by comparing current client statements with the written statements in the file: '[…] the pre-trial relationship of lawyer and client during judicial investigation is built up around the dossier with client and lawyer negotiating a way between the relative truths and realities as set out in it and as asserted by the client'.[20] A shift has also occurred in international criminal trials, where changes in procedural rules allow written transcripts or statements to be introduced in lieu of oral testimony, and has resulted in the gradual erosion of the preference for oral testimony at trial.[21]

A thorough and empirical investigation of the practical application of the principles of orality and immediacy alongside concrete recording practices would be

Defence and Procedure: Comparative Ethnographies in the United Kingdom, Germany, and the United States (Houndmills, Palgrave Macmillan, 2010); T Scheffer, *Adversarial Case-Making. An Ethnography of English Crown Court Procedure* (Leiden, Brill, 2010).

[14] Scheffer, *Adversarial* (n 13) xxvi.

[15] GW O'Reilly, 'England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice' (1994) 85 *Journal of Criminal Law & Criminology* 402, 404 f; Blackstock et al (n 1) 79.

[16] For empirical findings about this audio recording practice, see J Baldwin, 'Police Interview Techniques. Establishing Truth or Proof?' (1993) *British Journal of Criminology* 325; see also Blackstock et al (n 1) with regard to England and Wales, 75 and with regard to Scotland, 370 f where records are mainly written due to a lack of 'tape-trained' police officers.

[17] K Haworth, 'Police Interviews in the Judicial Process. Police Interviews as Evidence' in M Coulthard and A Johnson (eds), *The Routledge Handbook of Forensic Linguistics* (London, Routledge, 2010) 169–81, 172.

[18] Haworth (n 17) 169–170; J Baldwin and J Bedward, 'Summarising Tape Recordings of Police Interviews' (1991) *The Criminal Law Review* 671–672.

[19] Scheffer, 'The Microformation' (n 13) 314.

[20] S Field and A West, 'Dialogue and the Inquisitorial Tradition: French Defence Lawyers in the Pre-Trial Criminal Process' (2003) 14 *Criminal Law Forum* 261.

[21] Y McDermott, 'The Admissibility and Weight of Written Witness Testimony in International Criminal Law: A Socio-Legal Analysis' (2013) 26 *Leiden Journal of International Law* 971; Jackson and Summers (n 8) 126.

necessary to allow for an in-depth comparison amongst different countries to be conducted. Therefore, I will restrict my analysis to the law and practice of written recording in Switzerland. The criminal justice system of Switzerland is characterised as a hybrid system leaning towards the inquisitorial paradigm.

Before the Federal Code of Penal Procedure (*Schweizerische Strafprozessordnung*, StPO) came into force in 2011, it was common in various Swiss cantons for live witnesses' testimony to be substituted with summarised or verbatim written evidence. Following harmonisation on the federal level, the immediacy principle has been applied in an even more restrictive way in ordinary trials (Article 343 StPO): 'The court shall only take *new* evidence and *add* to evidence already taken if it is incomplete'.[22] Evidence already gathered by the police or the prosecutor shall only be taken again if it was not taken in the proper manner in the preliminary proceedings. Finally, evidence that was taken in the proper manner during preliminary proceedings might be taken again if direct knowledge of the evidence appears necessary to enable the court to reach a decision, for example because the credibility of the witness must be scrutinised or further inquiry is necessary.[23] This practice is called the '*restricted immediacy principle*'.[24] The Swiss practice shows quite clearly that many judgments, if not the majority, are based solely on written records. However, it must also be borne in mind that in many cases defence attorneys and prosecutors may be quite happy with the substitution of oral testimony with the written record. Indeed, the in-person appearance in court of the person testifying will not always be favourable, especially if a long period of time has elapsed. The giving of evidence is a high-risk matter in criminal proceedings, and both defence attorneys and prosecutors are often content to address the written version of the previous deposition—a version that is fixed and static.

Finally, it must be considered that due to the current tendency to speed up criminal proceedings, records of investigative interviews become more important because in summary penalty order proceedings, prosecutors are entitled to reach a decision based on investigative interview records without conducting a hearing with the *accused* person.[25] Obviously, the more judges rely on previous investigative interviews, the more important the written records become, and the more attention must be paid to questions such as how to ensure the reliable production and the diligent reception of written records.[26]

[22] For example, with regard to a testimonial statement, the court might be of the opinion that the witness has not been questioned in relation to all relevant aspects; B Gut and T Fingerhuth, 'Art 343' in A Donatsch et al (eds), *Kommentar zur Strafprozessordnung*, 2nd edn (Zürich, Schulthess, 2014) N 27.

[23] W Wohlers, 'Die formelle Unmittelbarkeit der Hauptverhandlung: Notwendigkeit und Grenzen eigener Beweiserhebungen durch Strafgerichte' (2013) 131 *Schweizerische Zeitschrift für Strafrecht* 318, 331, 333 f.

[24] N Capus and P Albrecht, 'Die Kompetenz zur Einvernahme im Vorverfahren' (2012) *forumpoenale* 361; P Albrecht, 'Was bleibt von der Unmittelbarkeit?' (2010) 128 *Schweizerische Zeitschrift für Strafrecht* 180; F Riklin, *StPO-Kommentar*, 2nd edn (Zürich, Orell Füssli, 2014) 'Art 343' N 1.

[25] Given a confession or sufficiently clarified circumstances of the case, a further investigative interview is not necessary anymore; N Schmid, *Handbuch des Schweizerischen Strafprozessrechts* (Zürich, Schulthess, 2009) N 1357.

[26] Report of the Swiss Government (Begleitbericht zur Vereinheitlichung für eine Schweizerische Strafprozessordnung) Bern 2001, 70.

B. Written Records in the Light of Article 6 ECHR

Whether the right to a fair trial as guaranteed by Article 6 of the ECHR would be undermined by this type of evidence-taking, mediated through written records, is not clear. Article 6 ECHR guarantees everyone charged with a criminal offence a fair and public hearing; an independent and impartial tribunal; the presumption of innocence; the right to be informed promptly, in a language which they understand, and in detail of the nature and cause of the accusation; the right to defend themselves through legal assistance of their own choosing or, if they do not have sufficient means to pay for legal assistance, to be given free legal assistance when the interests of justice so require; to examine or have examined witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them; and to have the free assistance of an interpreter if they cannot understand or speak the language used in court.

These are some of the basic fair trial guarantees which apply irrespective of whether the legal system of the country conforms to an adversarial model or an inquisitorial model. These guarantees constitute the minimum requirements for a trial. However, Article 6 ECHR does not explicitly say whether fairness is dependent on the direct knowledge of the testimony and whether the alternative—the written record of previous investigative interviews—meets the standards of fairness as well. The European Court of Human Rights insists, however, that evidence be examined at trial, and some commentators argue that this reflects the Court's opinion that direct knowledge of testimonies is rooted in Article 6 ECHR.[27]

III. WRITTEN RECORDS AS A GUARANTEE OF FAIRNESS

I will now describe the prevailing Swiss legal academic opinion and jurisprudence, according to which the function of written records is that they ensure the fairness of criminal proceedings. This legal point of view is based on the idea of *reflection*—the very foundation for using written records in criminal proceedings. According to this *reflection* approach, the spoken word is perceived as the 'original' version, which should be reflected as completely and literally as possible by the written record.[28]

A. Written Records as a Means of Ensuring Judicial Control

The following recorded information, in particular, is deemed to help ensure fairness: a written record should provide *information* about:

— the circumstances of the investigative interviews;
— in relation, for instance, to the person charged with a criminal offence, it should show that she or he has been informed promptly, in a language, which he or she

[27] Trechsel (n 7) 305.

[28] R Hauser et al, *Schweizerisches Strafprozessrecht*, 6th edn (Basel, Helbing Lichtenhahn, 2005) § 44 N 24a; J Aeschlimann, *Einführung in das Strafprozessrecht* (Bern, Haupt, 1997) N 723 ff; BGer 1P.399/2005 8 May 2006, E 3.1.

understands, and in detail, of the nature and cause of the accusation against him or her (Article 6(3)(a) ECHR);
— that he or she was informed of the right to remain silent and to refuse to cooperate in the proceedings; and
— that he or she was informed of his or her entitlement to appoint a defence lawyer or if appropriate, to request the assistance of a duty defence lawyer as well as the assistance of an interpreter (Article 158, para 1 StPO, Article 6(3)(e) ECHR).

Hence, according to criminal justice practice, written records provide a means of controlling whether the recorded investigative interviews have been conducted properly and also the manner in which the questioning was conducted (ie without undue pressure or suggestive questions). The written record can provide proof of any shortcomings regarding the aforementioned guarantees. Evidence obtained before a caution was provided, for instance, is inadmissible according to Swiss law (Article 158, para 2 StPO). Consequently, as it is presumed that written records allow for such control, they invoke the self-control of the interviewing persons. The same preventive effect is assumed of the reading and correction of the interviewee, an effect which is further enhanced by the fact that the interviewee must sign the record.[29] In the literature, this preventive effect is called the '*psychological effect*'.[30]

B. Written Records and the Right to be Heard

The Swiss Federal Court has showed consistency in ruling that the duty to record investigative interviews is not only rooted in the legal duty to document all procedural steps not conducted in writing (Article 76, para 1 StPO) and to provide access to files, but also makes up part of the fundamental right to be heard according to Article 29, para 2 of the Swiss Constitution (*Bundesverfassung der Schweizerischen Eidgenossenschaft*, BV).[31] In fact, the underlying idea is that all participants in criminal proceedings should not become objects of the procedure, but should remain subjects.[32] Hence, as a free subject, the person subjected to an investigative interview is to be able to articulate what he or she wants to say, exercise the rights that are guaranteed to him or her and be capable of understanding the proceedings.[33] One important aspect of this right to be heard is in fact to offer suspects the ability to express in their own words the facts that seem important to them. It seems natural to assume that interviewed persons tell their story.[34] However, story-telling in criminal

[29] Capus and Stoll (n 2) 205.
[30] R Hauser, 'Die Protokollierung im schweizerischen Prozessrecht' (1966) 82 *Schweizerische Zeitschrift für Strafrecht* 158–159.
[31] BGE 130 II 473 E 4.2; 124 IV 389 E 3; Capus and Stoll (n 2) 210; Y Jeanneret and A Kuhn, *Précis de procedure pénale* (Bern, Stämpfli, 2013) N 4056 referring BGE 126 I 15, E 2.
[32] A Donatsch et al, *Strafprozessrecht*, 2nd edn (Zürich, Schulthess, 2014) 23 f.
[33] PJA Ritter von Feuerbach, *Betrachtungen über die Öffentlichkeit und Mündlichkeit der Gerechtigkeitspflege* (Giessen, GF Heyer, 1821) 295.
[34] E González Martínez, 'Just Telling What is Going to Happen: The Initial Phase of a Judicial Social Investigation Interview' (2011) 50 *Nottingham French Studies* 154, 161.

proceedings is a sophisticated task. Stories are not just told by one person, but are interactively constructed and, in criminal proceedings, told in an institutional setting. Stories are also not voluntarily told, with the questioner—policeman, prosecutor or judge—becoming a co-author.[35] The actors must communicate effectively with one another, and many of the rules governing speech and action in a criminal proceeding are foreign to the central participants, ie the witness, the suspects or the accused person.[36] Written records are very close to the social practice of story-telling and simultaneously fulfil various legal requirements; in view of this they can be regarded as constituting a core element in the necessary intermediation process between legal and social practices.[37]

Written records add an additional dimension to this story-telling setting: the story is not only being told to the people present at the investigative interview. There are always invisible others because the written version of the deposition will subsequently be distributed to others, such as the prosecutor or the judge. Hence, the particular setting is such that the stories are not only being spoken, but are also being recounted to be written down.[38] The procedure of writing is at least the obvious signal that this is going to happen. The communication itself is conducted in an artificial way to ensure the quality of the written version of the communication: the protocol includes interruption, deceleration, repetition and even language changes in the German-speaking part of Switzerland from Swiss German to High German. The writing is interwoven with the speech.

Given the fact that the record is taken in the context of this laborious procedure, the person being interrogated becomes aware of the invisible audience, the importance of his or her oral account, and the fact that certain things are selected and recorded while others are left aside.

Thus, written records disclose to some extent the dual nature of investigative interviews because interviews in criminal proceedings are not only aimed at gathering information in the interview situation but also account for the manner in which they are later received. This gathering of information involves decisions about the inclusion or exclusion of information in the written record and the manner of presentation. The interviewer can thereby coordinate the interviewing style and the manner of record-taking following his or her specific objectives.[39] Consequently, the aforementioned rule that written records must be read and signed by those being interrogated is apparently intended to make them aware of the receptive perspective and to allow them to control to some extent the manner in which the interview in the

[35] TC van Charldorp, *From Police Interrogations to Police Records* (Oisterwijk, Uitgeverij BOXPress, 2011) 117 f.

[36] L Bennett, 'Storytelling in Criminal Trials: A Model of Social Judgment' (1978) *The Quarterly Journal of Speech* 1, 1.

[37] If not a social act in itself such as the 'speech act'; see, with reference to the general act of documentary work, B Smith, 'How to Do Things with Documents' (2012) *Rivista di Estetica* 1–2 f.

[38] van Charldorp (n 35) 119.

[39] W Holly, 'Der doppelte Boden in Verhören. Sprachliche Strategien von Verhörenden' in W Frier (ed), *Pragmatik. Theorie und Praxis* (Amsterdam, Rodopi, 1981) 275 ff.

written version is being presented. It is, however, difficult if not impossible to control and compare the written version with what was effectively said.[40]

IV. TURNING POINTS: UNDER WHICH CIRCUMSTANCES DO THE PRODUCTION OR RECEPTION OF WRITTEN REPORTS CONSTITUTE OBSTACLES TO FAIRNESS?

In the previous section, it was argued that according to Swiss criminal justice practice and legal thinking, good written records may substitute oral testimonies without impacting on fairness—in contrast, they might even have the potential to enhance fairness. However, written records could also turn at some point into obstacles to fairness.

In the following subsections, I will exemplify how written records could potentially turn into obstacles to fairness, first, in the context of the production of written records, and second, in relation to their use as evidence.

A. Obstacles to Fairness within the Production of the Written Record

Considering the aforementioned importance of records for the right to be heard and the power of the clerk or interviewer to construct a certain recording style, as well as the important probative function of written records, it follows quite naturally that the production should be as authentic as possible. However, the production of written records is undoubtedly influenced by expectations concerning the manner in which the documents are likely to be used: the interviewer anticipates the type of information that the prosecutor or the judge will need to make his or her decision about further investigation, the indictment or the discontinuation of the case.[41] Hence, even if the interviewer is not in charge of writing the record him or herself, he or she will generally follow this process very closely and control the information that will be recorded and subsequently incorporated into the proceedings.[42]

Such anticipation of the future needs of the evidence-gathering process and the discontinuation of the proceedings is one (although not the only) source of various modifications, leading to a distorted picture of the investigative interview.[43]

[40] See, for critics of this fiction especially related to the supposed verification of the cautioning, N Capus, M Stoll and D Studer, 'Die Belehrung über das Schweigerecht. Ein leeres Versprechen?' (2016) 1 *Monatsschrift für Kriminologie* 42.

[41] E González Martínez, 'The Interweaving of Talk and Text in a French Criminal Pretrial Hearing' (2006) 39 *Research on Language and Social Interaction* 229; M Komter, 'La construction de la preuve dans un interrogatoire de police' (2001) 48 *Droit et société* 367; R Lévy, 'Scripta manent: la rédaction des procès-verbaux de police' (1985) 4 *Sociologie du travail* 408; T Scheffer, 'Übergänge von Wort und Schrift: Zur Genese und Gestaltung von Anhörungsprotokollen im Asylverfahren' (1998) *Zeitschrift für Rechtssoziologie* 230.

[42] van Charldorp (n 35) 203 ff.

[43] J Banscherus, *Polizeiliche Vernehmung: Formen, Verhalten, Protokollierung* (Wiesbaden, BKA Forschungsreihe, 1977) 86 f.

For instance, written records might include precise information about the location of the offence that was not part of the conversation[44] or information about the suspect's psychosocial situation. Conversely, the events leading up to the criminal act that might be considered important from a real-life perspective might be given less weight in the written record because from the perspective of the police, they are not of relevance to the evidence-gathering procedure.[45] In short, many empirical studies have identified processes of selection and modification of statements.[46]

In this context, it must be underlined that the competence to control what is included in or excluded from the written recorded rests one-sidedly upon the police or the prosecution, thereby seriously undermining the control of the judiciary. The above-mentioned duplicity has the effect that the interviewee might think that he or she is being questioned '*here and now*', while at the same time the interviewer is feeding the wider process with durable discursive facts.[47] Discourse is thereby circulated and used at different stages of the proceeding, in different contexts. This context can taint people's perceptions and judgements, and the mere fact of the changes of format (from spoken word to text) and of the movement from the police interrogation room to the courtroom, presumably affects the integrity of the evidence.[48]

B. Obstacles to Fairness in the Use of the Written Record (as Evidence): Signs of Hazards to Fairness

In the use of the written record as evidence, there are various details and potential hazard signs that should be considered with regard to possible negative impacts on fairness.

i. Modified Presentation of the Interaction

The presentation of the interaction in the written record is a powerful instrument for framing statements. For instance, questions are not always typed fully—or typed at all. The lack of knowledge of the interviewer's questions obscures the intended meaning of the answers and leads to opacity as the input of the interviewer is omitted. The same opacity occurs when questions and answers are interwoven, ie the question-answer-pair 'Did you then take this knife from the table?' 'Yes' appears then, for example, as one sentence: 'Then, I took the knife from the table'.

[44] F Rock, 'Witnesses and Suspects in Interviews. Collecting Oral Evidence: The Police, the Public and the Written Word' in M Coulthard and A Johnson (eds), *The Routledge Handbook of Forensic Linguistics* (London, Routledge, 2010) 126, 136.

[45] L Jönsson and P Linell, 'Story Generations: From Dialogical Interviews to Written Reports in Police Interrogations' (1991) *Text* 419, 436.

[46] See, for an overview of the state of research, N Capus et al, 'Protokolle von Vernehmungen im Vergleich und Rezeptionswirkungen in Strafverfahren' (2014) 34 *Zeitschrift für Rechtssoziologie*, 225.

[47] Scheffer, 'The Duplicity' (n 13) para 2.

[48] Haworth (n 17) 169 f even uses the wording 'contamination' of verbal evidence. See also S Kassin et al, 'The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions' (2013) 2 *Journal of Applied Research in Memory and Cognition* 42 speaking about 'forensic confirmation biases'.

This process might result in the impression that the interviewee told his or her story smoothly and—when conducted excessively—in a narrative style, a fluent monologue. In Switzerland, for instance, this type of record was produced by the examination judges (*juges d'instruction*) in the French-speaking Cantons of Vaud and Geneva: the questioning appears entirely as a monologue on the part of the interviewee.

ii. Language Issues

Studies have uncovered a tendency for vague statements and expressions marking insecurity ('I do not exactly remember', 'perhaps') to be excluded from written records, contrary to elements supporting the coherence of the story.[49] This can have the effect of considerably changing the language and speech style. For instance, the person taking the record can include a blunt verbal statement literally without making changes, or he or she can make the person speak fluently and correctly in a standardised language.[50] Moreover, speech pauses, pause fillers (such as 'uh', 'am', 'ah'), break-off sentences and repetitions are usually not mentioned in written records. A written version of the investigative interview without signs of hesitation and problems of verbalisation implies that vague indications might have been transformed into precise information.[51] The same results were obtained from omitting vague statements. In contrast to verbal speech, statements in written form are more clearly structured and presented in chronological order. Written records are limited in their ability to capture prosodic features (eg, volume and speed of the voice) and non-verbal communication (eg, laughing or shaking of the head).[52] Because such information is largely missing in written records, they are less emotional compared to verbal speech.[53]

The importance of these modifications regarding the potential of written records to turn into obstacles for fairness in criminal proceedings becomes clear when considering that even the *writing style and formal features of the written record* itself (leaving aside the unequal level of information in the written record compared to the real investigative interview or to its audio or video recording) has an impact on the perception of the investigative interview, the interrogator and the interviewee.

To understand the impact of writing styles and formal features of the written record on the perception and subsequent decision-making procedure, an interdisciplinary research group at the law faculty of the University of Basel sent various styles of the same police interrogation record to 2691 judges in Switzerland; 645 persons

[49] Jönsson and Linell, (n 45) 431 f; Scheffer (n 41) 253 f.

[50] D Eades, 'Verbatim Courtroom Transcripts and Discourse Analysis' in H Kniffka et al (eds), *Recent Developments in Forensic Linguistics* (Frankfurt am Main, Peter Lang, 1996) 241; J de Keijser et al, 'Written Records of Police Interrogation: Differential Registration as Determinant of Statement Credibility and Interrogation Quality' (2012) 18 *Psychology, Crime & Law* 613; Jönsson and Linell (n 45) 429; AG Walker, 'Language at Work in the Law: The Customs, Conventions, and Appellate Consequences of Court Reporting' in JN Levi and AG Walker (eds), *Language in the Judicial Process* (New York, Springer, 1990) 203, 217 f.

[51] Jönsson and Linell (n 45) 431.

[52] Walker (n 50) 208.

[53] Jönsson and Linell (n 45) 432.

participated in this study (24 per cent).[54] All of the judges received a questionnaire and a short case description, in which it is stated that the interrogation was led by a Swiss-German speaking policeman and that the written record (a real one) is written in German. The policeman interrogates a man. His wife—from whom he lives separately—has filed charges of bodily harm/ injury. According to her, the assault occurred a few weeks earlier while she was handing over the children.

The original written record was distributed randomly to one group of judges. It contains the following sequence:

> Q: In addition, the files say that your wife prepared herself to face a further attack by adopting a 'kickboxing'-position. You're reproted to have grabbed her foot and pushed her backwards. What do you say about that?
>
> A: Rubbish. She came at me with a stretched foot towards me. I was able to catch the fot and to push it aside. Thereupon she hit the floor.

This written record includes questions and answers, grammatical errors and a few other mistakes ('reproted' instead of reported; 'fot' instead of foot) in the writing as well as some informal language ('hit the floor' instead of 'fell to the ground'). Another group of judges received a version of the record in the monologue style used in some Swiss cantons: in this style of transcript, the questions are interlaced into the answer of the interrogated accused person, so it finally appears as a type of monologue. The tone is rather official and institutional ('You're telling me …'), and features 're-contextualisation phrases' that give the records a static and official style:[55]

> You're telling me that the files state that my wife prepared herself to face another attack from me and for this reason adopted a 'kickboxing'-position and I'm reported to have pushed her backwards. This is rubbish. She came at me with a stretched foot. I was able to catch the foot and to push it aside. Thereupon she fell to the ground.

A third group received a dialogue that was similar to the original, but the manner of the investigative interview has been enhanced; that is, the staging of the questions is more confrontational, such as 'I don't believe you …':

> Q: I don't believe you. Your wife describes the situation in a totally different manner: you're saying that she attacked you with shear force. But your wife has stated that you attacked her first and that the 'kickboxing'-position was a preventive measure in order to repel further attacks from you. You then took her foot and pushed her backwards, whereupon she fell to the ground.
>
> A: Rubbish …

Preliminary results show that when the interrogator presents him or herself as being harsh (in the confrontational style of dialogue), judges assess the fairness and competence of the investigative interview in a significantly less positive manner. With regard to the interviewee, the judges rated his credibility significantly lower when reading a confrontational style written record. In general, we concluded that indeed

[54] N Capus and F Hohl Zürcher, 'Einvernahmeprotokolle: Der Stil beeinflusst die Richter' (2014) 32 *Plädoyer* 30.

[55] See also van Charldorp (n 35) 86 ff.

even formal features of written records led to changes in the perception of its readers. Hence, written records are powerful instruments for casting oneself as the interrogator and the manner of the investigative interview, rather than for representing the person being interrogated.

V. THE USE OF WRITTEN RECORDS

As already mentioned, written records serve as pieces of evidence. In particular, when written by officials from criminal justice institutions, they are afforded a certificated status.[56] Moreover, this status is enhanced by the fact that the interviewee is asked to counter-check and to sign the record (see section III. A.). In concrete terms, there are two documentary evidence assumptions at work: a negative and a positive one. According to the negative documentary evidence assumption, it is imperative that what is not recorded is undone (*quod non est in actis non est in mundo*).[57] To overrule this assumption, one would have to prove the contrary, ie that something occurred or did not occur, even though it is otherwise recorded. According to the positive documentary evidence assumption, the real course of action is considered as having been recorded.[58] This fictional approach is supported by the idea that records provide a one-to-one reflection of the events that occurred during the investigative interview. In fact, at least according to practice recommendations and law books, minute takers and clerks are asked to provide—even though it may not be complete—an unbiased account of the interview.[59] These assumptions have the potential to turn (the use of) written records into obstacles to fairness. Indeed, against this background, it is unfair to bind the person being interrogated in such a strict way as required by the legal rules and scholars. By signing the written record, the interviewee declares that the record correctly reflects the statements made[60]—although in the asymmetrical setting in which investigative interviews are conducted, only a few clients are up to the task of counter-checking effectively and correcting the record (that is to demand that corrections be made) before signing.[61]

However, once the record has been signed, it is extremely difficult to appeal against the written record; if the interview claims, for instance, to have been 'verballed', he

[56] A Steinwenter, *Beiträge zum öffentlichen Urkundenwesen der Römer* (Graz, Verlag von Ulr. Mosers Buchhandlung, 1915) 56.

[57] N Capus, 'Schriftprotokolle im Strafverfahren: "der todte Buchstabe ist noch immer nicht das lebendige Wort selbst"' (2012) 6 *Basler Juristische Mitteilungen* 173, 188–90; J Estermann, 'Quod non et in actis non est in mundo. Standards und Modi der Sachverhaltsfeststellung in gerichtlichen Verfahren' in J Estermann (ed), *Interdisziplinäre Rechtsforschung zwischen Rechtswirklichkeit, Rechtsanlayse und Rechtsgestaltung. Beiträge zum Kongress in Luzern* (Beckenried, Orlux Verlag, 2009) 180–181; C Vismann, *Akten. Medientechnik und Recht* (Frankfurt am Main, S. Fischer Verlag, 2000) 89.

[58] Hauser (n 30) 180; P Naepfli, *Das Protokoll im Strafprozess unter besonderer Berücksichtigung des Entwurfs zur Schweizerischen Strafprozessordnung und der Zürcher Strafprozessordnung* (Visp, Rotten-Verlag, 2007) 2 f; Aeschlimann (n 28) 205; Capus (n 57) 188; Capus and Stoll (n 2) 206.

[59] E Eschenbach, 'Die Kunst des Protokollierens' (1958) *Kriminalistik* 86; Capus and Stoll (n 2) 207.

[60] U Donk, 'Als ob es die Wirklichkeit wäre. Die formale Sicherung polizeilicher Beschuldigten-Protokolle' in J Reichertz and N Schroeer (eds), *Polizei vor Ort. Studien zur empirischen Polizeiforschung* (Stuttgart, F. Enke, 1992) 85, 103.

[61] van Charldorp (n 35) 17 ff.

or she bears the risk of being assessed as lacking credibility.[62] The consistency of depositions is of high value in criminal proceedings: changing previous statements is closely connected with the risk that the credibility of the person or if her or his deposition is lowered, and judges lose faith in the validity of the written statement. Deviating from previously recorded statements is therefore often to the person's own disadvantage.[63] Moreover, as stated above, the refusal to sign the record does not have the consequence that the written record becomes an inadmissible piece of evidence: by simply recording the refusal to sign, the refusal itself becomes incorporated, and the probative function of the document is not affected. The relevance given to the written records is also reflected in the fact that judges directly cite previous statements—even though the interviewed person did not type that statement, did not choose the words used, did not decide or realise what was included and what was excluded, and either might not have appreciated the significance of the word choices and omissions or could have been too resigned and overcome with mental fatigue to challenge the detectives. In spite of this, our own research indicates that judges consider written records to constitute useful instruments in assessing the credibility of statements and the credibility of the person who was interrogated. This is rather disturbing from a scientific point of view when we consider the whole process that occurs from spoken word to text! Uniquely relying on the credibility of the written records is highly problematic and unfair because converting a complex investigative interview into a written form within a short time is a very challenging process. As already exemplified above, empirical research has identified processes of selection and modification during transformations from spoken word to text.[64] Moreover, psychologists emphasise that while the evaluation of the credibility of statements is possible to a certain extent, this must be performed exclusively on the basis of direct interviews, audio records or verbatim transcripts.[65]

[62] M Coulthard, 'The Official Version: Audience Manipulation in Police Records of Interviews with Suspects' in CR Caldas-Coulthard and M Coulthard (eds), *Texts and Practices: Readings in Critical Discourse Analysis* (London, Routledge, 1996) 166–167.

[63] N Luhmann, *Legitimation durch Verfahren* (Frankfurt am Main, Suhrkamp, 1969/1983) 44 f, 93 f.

[64] R Cauchi and MB Powell, 'An Examination of Police Officers' Notes of Interviews with Alleged Child Abuse Victims' (2009) 11 *International Journal of Police Science and Management* 505; M Coulthard, 'Whose Voice Is It? Invented and Concealed Dialogue in Written Records of Verbal Evidence Produced by the Police' in J Cotterill (ed), *Language in the Legal Process*, 3rd edn (Basingstoke, Palgrave Macmillan, 2004) 19; G Hyman et al, 'A Comparison of US Police Interviewers' Notes with their Subsequent Reports' (2011) 8 *Journal of Investigative Psychology and Offender Profiling* 203; Komter (n 41) 367; ME Lamb et al, 'Accuracy of Investigators' Verbatim Notes of their Forensic Interviews with Alleged Child Abuse Victims' (2000) 24 *Law and Human Behaviour* 699; M McLean, 'Quality Investigation? Police Interviewing of Witnesses' (1995) 35 *Medicine, Science and the Law* 311; R Lévy, 'Scripta manent: la rédaction des procès-verbaux de police' (1985) 4 *Sociologie du travail* 408; F Rock, 'The Genesis of a Witness Statement, Forensic Linguistics, the International Journal of Speech' (2001) 8 *Speech, Language and the Law* 44; Rock (n 434) 126; AG Walker, 'Context, Transcripts and Appellate Readers' (1986) 3 *Justice Quarterly* 409; Walker (n 50) 203.

[65] V Kling, 'Das fachgerechte Glaubhaftigkeits-Gutachten' (2003) *Aktuelle Juristische Praxis* 1116; R Ludewig, D Tavor and S Baumer, 'Wie können aussagepsychologische Gutachten Richtern, Staatsanwälten und Anwälten helfen?' (2011) *Aktuelle Juristische Praxis* 1415, 1426.

VI. CONCLUSION

Without any doubt, the mode of record-taking can be decisive for the outcome of criminal proceedings and this can result, taking account of the various reasons that have been explored above, in unfairness. Moreover, a series of studies have shown that the way in which statements are recorded strengthens the position of law enforcement parties and weakens the position of the defence.[66] In fact, record-taking can even result in wrongful convictions, as was for example revealed by the Investigation Committee on the French Outreau case, in which criminal proceedings resulted in six wrongful convictions. The public became aware of the status of oral words in criminal proceedings, and scholars warned that if the status of oral words was not thoroughly reformed, situations similar to the Outreau case were likely to occur in the future.[67]

From the analysis, it follows that in relation to the impact of written records on the decision-making procedure of judges—the way in which the records are constructed, used, and impact on the perception of judges—the most basic principles of the fairness of the proceeding are at stake: the principle of impartiality and the separation of powers.

There is no impartial decision-making on the part of judges if the decision-making process relies exclusively on the prosecutorial gathering of evidence because the gathering and appreciation of the evidence are accordingly mainly police- or prosecution-oriented.[68] Although the law does foresee that suspects and their defence attorneys are allowed to counter the police and prosecutorial work, it is often not possible or even not reasonable from a defence point of view to react too actively before the indictment reveals the prosecutorial material. Hence, it is up to the court to ensure the revelation of the counter story during the trial and provide, in doing so, a fair and solid basis for judgment.

It can be concluded that more empirical studies on the manner in which criminal proceedings are conducted and investigative interviews are produced and used are needed. Legal provisions regulating the writing of records should be based less on assumptions and speculation and more on the findings of empirical studies. Innovation with regard to the production of written records is restricted, but the use of written records as evidence should definitely be carefully rethought.

[66] Coulthard (n 62) 166; Haworth (n 17) 173; A Hooke and J Knox, 'Preparing Records of Taped Interviews' (1995) *Great Britain Home Office Research and Statistics Department Research Findings* 1, 4 (prosecution bias, in particular when police officers instead of civilians typed the record); Jönsson and Linell (n 45) 437 f.

[67] E Serverin and S Bruxelles, 'Enregistrements, procès-verbaux, transcriptions devant la Commission d'enquête: le traitement de l'oral en questions' (2008) *55 Droit et cultures* 149–80, 149; For an account of similar miscarriages of justice in the UK, see Coulthard (n 62) 166–78.

[68] A Kaufmann, *Das Unmittelbarkeitsprinzip und die Folgen seiner Einschränkung in der Schweizerischen Strafprozessordnung* (Zürich, Schulthess, 2013) 61 ff; additionally, this 'affirmation bias' has to be considered following Schuenemann and Bandilla (n 4) 181–92; Kassin et al (n 48) 42–52.