The Evolution of Law Enforcement Attitudes to Recording Custodial Interviews*

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Keywords: custodial interviews, police, sheriff, law enforcement, recording, interrogation, confession

"Life is not what one lived, but what one remembers and how one remembers it in order to recount it.”

“The first notion to get rid of is that memory is primarily or literally reduplicative, or reproductive….remembering appears to be far more decisively an affair of construction rather than one of mere reproduction….condensation, elaboration and invention are common features of ordinary remembering …. Remembering…is an imaginative

*The author thanks Andrew W. Vail, Jennifer S. Senior, Jo Stafford and Maggie A. Webb for their valuable assistance in the preparation of this article.

1 GABRIEL GARCIA MARQUEZ, LIVING TO TELL THE TALE, (Knopf 2003), Prologue. The author’s observations were playfully illustrated by Lerner and Loewe in the musical Gigi: He: We met at nine. She: We met at eight. I was on time. No, you were late. We dined with friends. We dined alone. A tenor sang. A baritone. That carriage ride. You walked me home. You lost a glove. I lost a comb. Ah yes! I remember it well.
reconstruction, or construction, built out of the relation of our attitude towards a whole active mass of organized past reactions or experiences....”

**Summary**

Year in and year out, in criminal trials throughout the country, trial court judges and juries listen to police and defendants testify to conflicting versions of what occurred when the defendants – then suspects – were brought to the stationhouse and questioned about their alleged participation in crimes.

Detectives conduct stationhouse interviews of persons arrested on suspicion of committing crimes in rooms set aside for that purpose. Most suspects are without funds to retain lawyers, and agree to proceed without legal representation. Later, after the suspects are indicted and have lawyers appointed, questions are presented about what occurred: Were the required *Miranda* warnings given at the outset? Were the suspects’ requests for lawyers ignored? Were coercive tactics used? What was actually said and done behind those closed doors?

A step removed from trial court settings, reviewing court judges are required to read and ponder transcripts of these same conflicting versions, to determine whether proper procedures were followed by the police, and appropriate conclusions drawn by the trial courts and juries.

A movement is underway throughout the country to adopt a readily available and inexpensive method of putting an end to these disputes: making electronic recordings of the events that occur during the interrogations. Law enforcement agencies throughout the country have begun to install electronic equipment, audio, video or both, to produce recordings of the entire sessions.

As recordings of custodial interviews become more common, detectives, their supervisors and prosecutors gain experience with the process and its results, and learn the tremendous benefits they attain. They acknowledge that recordings yield a far better record of what occurred than participants’ testimony, even those who are doing their best to be honest and even handed.

The defense bar has for years been urging that stationhouse interrogations be recorded, to prevent detectives from using improper tactics to obtain confessions, or inaccurately testifying about what suspects said and did during closed, unrecorded sessions. They point out that police have complete control over the rooms in which unrepresented suspects are questioned, hence use of recording machinery is a matter


of police choice. They continue to be supportive of electronic recordings, even though in many instances their clients make damaging admissions or confessions, leaving little or no room for credible claims of innocence.

Members of the judiciary support recordings of stationhouse questioning for obvious reasons: trial court judges are relieved of evaluating conflicting testimony, and appellate judges no longer pour over typewritten questions and answers when reviewing trial court proceedings.

Recordings of custodial interrogations almost always yield an incontestable record of what was said and done. They are therefore becoming recognized as a major improvement, which leads to more accurate and just results, and cost savings to all concerned. As a result, an increasing number of state legislatures have been enacting laws, and state supreme courts have begun issuing rulings which either require or strongly urge that electronic recordings be made of custodial interviews in major felony investigations. As Bob Dylan sang, the times they are a’changin!4

1. Introduction

My interest in this subject was initially piqued by the strong opposition of the Illinois police, sheriff and state’s attorney associations to proposed legislation requiring recordings to be made of custodial questioning of suspects in capital-eligible homicide cases. This proposal was made to the Illinois General Assembly in 2002, based on a recommendation of the Illinois Governor’s Commission on Capital Punishment (I served as co-chair), formed by gubernatorial Executive Order, after the 13th defendant on Illinois’ death row was released, including several cases in which the defendant had “confessed” during police questioning.

After strenuous negotiations during the 2003 session of the Illinois General Assembly, the Illinois mandatory electronic recording statute was passed and approved by the governor.5 This was the first time that recording of custodial interviews was required by a state statute.6

Observing this contretemps, I became perplexed as to why the Illinois law enforcement community was so vigorously opposed to a reform that the Commission members thought was designed chiefly to benefit law enforcement? Why would police, sheriffs

4 Bob Dylan, The Times They Are A-Changin’ (Columbia 1964).
5 705 ILL. COMP. STAT. ANN. 405/5-401.5 and 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2009), effective July 2005. These statutes are limited to custodial interviews of homicide suspects. Then Illinois Senator Barack Obama was chief sponsor and a leader of the negotiations.
6 The supreme courts of Alaska and Minnesota had earlier ruled that custodial interviews must be recorded under the laws of those states. See Stephan v. State, 711 P.2d 1156, 1162 (Alaska 1985); State v. Scales, 518 N.W.2d 587, 591 (Minn. 1994).
and prosecutors resist installation of recording facilities in stationhouse rooms, and thus diminish unwarranted claims that \textit{Miranda} warnings were not given, that confessions had been obtained through unlawful tactics, or that the investigators were testifying falsely as to what took place? Why would prosecutors oppose obtaining exact evidence of what was said and done?

In 2003, my associates and I set out to learn the answers to these questions. We acted on our own, without outside funding (or interference).\textsuperscript{7} Because there are thousands of police and sheriff departments in the United States, we did not attempt to conduct a nationwide survey. Instead, we began with a list of ten departments we were told recorded custodial interviews, contacted them, asked whether they recorded custodial questioning of suspects, and if so, what their experiences had been. If they did not record, we asked their reasons. We asked them all to identify other departments that recorded.

During the past years, we have spoken with over 800 officers employed in police and sheriff departments in every state that make it a regular practice to record custodial interrogations of felony suspects. We have also talked to about 200 that do not customarily record custodial interrogations. Our interviews have yielded amazingly consistent responses:

- Those that make recordings a regular practice describe their experiences in glowing terms. For a variety of reasons, they enthusiastically support the practice.

- Those that do not record express fears of negative consequences arising from a litany of anticipated problems. The departments that have given recording a fair try have not experienced these problems, and do not consider them to be valid reasons for not recording.

2. The growing acceptance of electronic recordings

We have published the results of our inquiries in a number of law enforcement and legal journals.\textsuperscript{8} Based on the first hand testimony of experienced detectives and their

\textsuperscript{7} The firm of Wicklander-Zulawski & Associates of Downers Grove, Illinois, which trains law enforcement officers, assisted us by asking their trainees to complete a survey form as to their recording practices.

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supervisors, we have recounted how and why electronic recordings, especially videotape, have proven a great boon to law enforcement and the defense of innocent suspects. We have also made personal appearances to explain our findings to police, prosecutors, defense lawyers and judges,9 and legislative bodies and conferences.10

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Slowly but inexorably, word has spread in the law enforcement community and among members of state legislatures about the positive results obtained from electronic recordings of custodial interrogations. The evolution of changed attitudes among law enforcement personnel, legislators and courts have been interesting to observe, and impressive. At this writing:

- Recording statutes have been enacted in nine states and the District of Columbia.
- Recent rulings of three state supreme courts have resulted in statewide recordings.
- Thus, 14 states now require that electronic recordings be made of custodial interviews of felony suspects in various categories of felony investigations.
- In addition we have identified over 580 police and sheriff departments in the other 36 states that have voluntarily adopted the practice of using electronic devices to record custodial interrogations.
- A committee of the National Conference of Commissioners on Uniform State Laws (ULC) has drafted a model state statute on electronic recording of custodial interviews. If approved by the Conference, the statute will be presented to all state legislatures with recommendations for enactment.

Appendix 1 contains a list of the statutes, court rulings and the departments that voluntarily record all or a majority of their custodial interviews.

3. The evolution of law enforcement attitudes

As discussed above, when we first ventured into this area, a majority of police and prosecutors opposed the requirement that complete custodial interviews must be electronically recorded. The reasons varied; most were grounded upon fears that having a recording activated at the outset would impair the ability of detectives to establish “rapport” with suspects before they began pointed questioning about the

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11 Illinois, Maine, Maryland, Montana, New Mexico, Nebraska, North Carolina, Oregon, Wisconsin.
13 We continue to place calls to a growing list of departments we have been told record on a voluntary basis, and to urge legislatures to adopt recording statutes.
Recording Custodial Interviews

crimes; that suspects would refuse to speak if recorded; that various kinds of equipment malfunctions might occur during questioning; and cost. In short, mandatory recordings would require large expenditures and somehow create risks that guilty criminals would go free.14

Since we began our efforts in 2003, we have observed a dramatic evolution of attitudes among police, sheriffs and prosecutors. From initial resistance to the notion of recording complete custodial interviews of criminal suspects, there is now a widespread acknowledgement by law enforcement personnel that electronic recordings, Miranda to the end, is a wise practice, although – as discussed below in part 4e – in some quarters opposition persists to legislation that provides sanctions for unexcused failures to record.

An apt example is contained in the affidavits filed by experienced Massachusetts detectives when the Supreme Judicial Court of Massachusetts was asked to adopt a statewide rule requiring recording. The affidavits contained dire predictions of restraints that would be put on detectives, and resulting doom for law enforcement, if beginning-to-end custodial recordings were mandated. The need for initial “rapport building” sessions was described as crucial to obtaining cooperation from guilty suspects. Mechanical problems and unacceptably high costs were predicted, as well as lost opportunities to question suspects who declined to speak if recorded. In its ruling, the Court declined to require recordings, but jury instructions (described below) were mandated when officers testified to unrecorded interviews.15 This led state law enforcement organizations to direct statewide recordings of “all custodial interrogations of suspects and interrogations of suspects conducted in places of detention.”16 To their credit, several District Attorneys and the General Counsel for the Massachusetts Chiefs of Police Association conceded that their fears were unjustified, and that recordings have worked to the benefit of police and prosecutors.17

We all tend to resent suggestions for change, especially when presented by those who are “outsiders.” A pattern often emerges when new ideas of how to “do business” are presented to those who have been become accustomed to their own “tried and true” methods: vigorous opposition gives way to cautious consideration, followed by grudging

14 Similar doom and gloom predictions were voiced by law enforcement when the United States Supreme Court ruled in the Miranda case that arrested suspects could not be questioned about crimes until after they were told of their rights to remain silent and to legal representation. As it has turned out, most “street crimes” suspects are indigent, and voluntarily waive these rights.
agreement to give it a try, and, if warranted by experience, by eventual acceptance and endorsement. It reflects credit on the many law enforcement officers and prosecutors throughout the country who, following initial opposition, now acknowledge the benefits of custodial recordings.

4. The experiences of those involved in state criminal justice systems with electronic recordings of custodial interrogations.

Please see the full article in the upcoming issue of the *Journal of Psychiatry and Law* for a rich discussion of these experiences. This article cannot be fully appreciated without reading the section addressing these experiences.

5. Public perception of law enforcement

There can be no doubt that making full recordings of what goes on behind the doors of stationhouse interview rooms is a boon to public perception of law enforcement. The degree of cynicism about law enforcement seems to be on the rise, which is in some sense ironic, because so often the cause is the misconduct of officers outside the stationhouse which happens to be captured on video or audio tape. But when detectives and prosecutors conduct themselves properly – which in my opinion is almost always the case – and recordings prove that they acted properly, there is a resulting increase in public confidence in our police and our system of criminal justice.

6. Sanctions for non-recorded custodial interviews

As explained above, my views on this matter have evolved: My first model recording statute adopted the approach taken by the Illinois General Assembly, containing a rebuttable presumption that testimony about interviews that should have been recorded but were not, and none of the statutory exceptions applied, is presumed inadmissible, unless the judge deems the evidence reliable and otherwise admissible under the rules of evidence.\(^\text{18}\) Since that model was originally published in 2005, we have obtained a greater understanding of the attraction that recordings have to law enforcement officers once they have adopted the practice. But we have also learned of problems potentially faced by detectives when conducting custodial interviews, and observed first hand the vigor of law enforcement resistance to a presumption of inadmissibility, with the threat of losing confessions and admissions of suspects they believe guilty.

In order to accommodate the legitimate concerns of law enforcement personnel, we have altered our position as to consequences of failures to record when required by statute or court decision. The revised model code, published in a recent edition of the *Journal of Criminal Law and Criminology*, provides that testimony about unrecorded

\(^{18}\) See *Electronic Recording of Custodial Interrogations: Everybody Wins*, above note 8, at 1142.
sessions is admissible, but unexcused failures to record are dealt with through the following jury instructions:

The law of this state required that the interview of the defendant by law enforcement officers which took place on [insert date] at [insert place] was to be electronically recorded, from beginning to end. The purpose of this requirement is to ensure that you jurors will have before you a complete, unaltered, and precise record of the circumstances under which the interview was conducted, and what was said and done by each of the persons present.

In this case, the interviewing law enforcement agents failed to comply with that law. They did not make an electronic recording of the interview of the defendant. No justification for their failure to do so has been presented to the court. Instead of an electronic recording, you have been presented with testimony as to what took place, based upon the recollections of law enforcement personnel [and the defendant].

Accordingly, I must give you the following special instructions about your consideration of the evidence concerning that interview.

Because the interview was not electronically recorded as required by our law, you have not been provided the most reliable evidence as to what was said and done by the participants. You cannot hear the exact words used by the participants, or the tone or inflection of their voices.

Accordingly, as you go about determining what occurred during the interview, you should give special attention to whether you are satisfied that what was said and done has been accurately reported by the participants, including testimony as to statements attributed by law enforcement witnesses to the defendant.19

These instructions are similar to those required by the New Jersey Supreme Court.20

7. Unrecorded false confessions

Recent in-depth research into adjudicated cases has disclosed that many of the persons who have been exonerated through DNA have confessed, thus establishing

19 The Consequences of Law Enforcement Officials’ Failure to Record, above note 8, app. A at 226.
without doubt that people occasionally confess to committing crimes they did not commit.\textsuperscript{21} The authors of one of the studies have stated:

Without equivocation, our first and most essential recommendation is to lift the veil of secrecy from the interrogation process in favor of the principle of transparency. Specifically, all custodial interviews and interrogations of felony suspects should be videotaped in their entirety and with an equal focus on suspects and interrogator.\textsuperscript{22}

The author of another study had this to say:

Absent a recording of the interrogation, courts were faced with a swearing contest between the defendant alleging coercion and law enforcement denying coercion…. A complete interrogation record enables meaningful reliability review and could help to prevent the problem of confession contamination through disclosure of key facts.\textsuperscript{23}

An inevitable result of not recording custodial interviews is that detectives, unintentionally or deliberately, will fail to give an accurate, fair description of what occurred. There is also a risk that detectives may inadvertently induce confessions that are untrue. One veteran detective has candidly admitted that he obtained a confession from an innocent suspect, and explained how it occurred: After the suspect/confessor’s innocence was proven by an ironclad alibi, the detective reviewed the videotape of the interrogation, and saw how he and his fellow detectives had “unintentionally fed [the suspect] details” of the crime that the suspect “was able to parrot back” to the detectives.\textsuperscript{24}


\textsuperscript{22} See Kassin et al., above note 54 (manuscript at 23) (emphasis omitted).

\textsuperscript{23} See The Substance of False Confessions, above note 54, at 53-54.

8. Costs incurred and saved attributable to electronic recordings.

There are costs incurred and costs saved when custodial interviews are recorded. Analysis shows that savings far outstrip the expenditures, although many of the savings result from money, time and effort not expended, which do not appear “on the books.”

Here are the major costs:

- Purchasing, installing and maintaining audio and/or video equipment.
- Preparing/constructing interview rooms, perhaps with soundproof walls.
- Training officers in the use of equipment and techniques of conducting recorded interviews.
- Officers and prosecutors reading transcripts and/or viewing tape recordings.
- Preparing typewritten transcriptions of recordings.
- Preparing recordings for use/display in courtrooms.
- Storing cassettes, compact discs and related digital equipment.

Here are the major savings:

- Police preparing for, attending and testifying regarding unrecorded interviews at pretrial motions to suppress, trials, and post-conviction hearings.
- Prosecutors preparing police to testify regarding unrecorded interviews, and examining them at pretrial motions to suppress, trials and post-conviction hearings.
- Prosecutors preparing to cross examine, and cross examining, defense witnesses regarding unrecorded interviews.
- Avoiding the risk of judges and jurors accepting defense versions of what was said and/or done during unrecorded interviews, leading to suppression of unrecorded confessions and admissions, and/or acquittals.
- Avoiding state court appellate proceedings, and federal habeas corpus proceedings, related to the foregoing.
- Avoiding risk of civil suits for damages for alleged improper conduct of detectives during interviews, including cost of preparing a defense and trials, and risk of verdicts for money damages.
• Saving premiums for law enforcement liability insurance.

9. Federal investigative agencies, still in the stone age

It is sad but true that federal agencies resist using in their interviews of suspects the very same recording devices they employ on a daily basis for other investigative purposes.\textsuperscript{25} While agents from these fine organizations, both civil and criminal, routinely use the most modern electronic equipment in many aspects of their work they continue to use primitive methods of “recording” what was said and done during custodial interviews, clinging stubbornly to outmoded “scribble and type” practices.\textsuperscript{26} Almost all federal agents, both civil and criminal investigative agents, make handwritten notes of their interviews, and later prepare typewritten summaries. These summaries are, of course, incapable of accurately and completely capturing precisely what was said and done during the interviews; they are a far cry from what would be shown by electronic recordings of the events they purport to portray.

Federal agencies’ adherence to outdated methods of chronicling interviews is of particular significance because, under federal law, it is a crime to make a material misstatement of fact when being interviewed by a federal agent.\textsuperscript{27} The context and accuracy of interviews with federal agents thus becomes of critical importance – precisely what was asked and answered? The only records usually made are the agents’ typed reports. Persons interviewed are thus at a serious risk that the reports may inaccurately summarize what they were asked and answered, which is no small matter because of the deference often given to federal agents by courts and juries.

As observed above, now President Barack Obama, as a Senator in the Illinois General Assembly, was a leading proponent of the bill to require electronic recordings of custodial interviews of homicide suspects, and Illinois became the first state to enact a mandatory recording statute. As President, he has power by issuance of an Executive Order\textsuperscript{28} to require federal investigative agencies to make electronic recordings of all custodial interviews.

When federal agencies come to adopt electronic recording – which they inevitably are destined to do – whether voluntarily, or as a result of a statutory mandate or Executive

\textsuperscript{25} For example, undercover agents and “cooperating individuals” routinely use recorded personal and telephone conversations and videotapes to depict suspects’ conduct.

\textsuperscript{26} The bases for their opposition, summarized by three Department of Justice investigatory agencies, have been found baseless by experienced detectives throughout the country. See Recording Federal Custodial Interviews, above note 8, at 1315-35.

\textsuperscript{27} 18 U.S.C.A. § 1001(a)(2) (West 2009).

\textsuperscript{28} 10 U.S.C.A. § 836 (West 2009).
Order – it will be a major step forward for the accuracy and integrity of federal law enforcement.

**Conclusion**

Let us hope that this evolutionary process will continue, so that within a few years all police and sheriff departments in the United States, including federal investigative agencies, will routinely record their custodial interviews of arrested suspects.

**APPENDIX 1**

**DEPARTMENTS THAT CURRENTLY RECORD A MAJORITY OF CUSTODIAL INTERROGATIONS**

*PD stands for Police Department, DPS for Department of Public Safety, and CS for County Sheriff.*

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Sacramento PD
San Bernardino CS
San Diego PD
San Francisco PD
San Joaquin CS
San Jose PD
San Leandro PD
San Luis PD
Santa Clara CS
Santa Clara PD
Santa Cruz PD
Stockton PD

Connecticut
Bloomfield PD
Cheshire PD
CT State PD Internal Affairs Unit

Delaware
DE State PD
New Castle City PD
New Castle County PD

District of Columbia
All departments - statute iv

Florida
Broward CS
Cape Coral PD
Collier CS
Coral Springs PD
Daytona Beach PD
Ft. Lauderdale PD
Ft. Myers PD
Hallandale Beach PD
Hialeah PD
Hollywood PD
Key West PD
Kissimmee PD
Lee CS
Manatee CS
Margate PD
Miami PD
Monroe CS
Mount Dora PD
Orange CS
Osceola CS
Palatka PD
Pembroke Pines PD
Pinellas CS
Port Orange PD
Sanibel PD
St. Petersburg PD

Georgia
Atlanta PD
Centerville PD

Cobb County PD
DeKalb County PD
Fulton County PD
Gwinnett County PD
Houston CS
Macon PD
Perry PD
Savannah-Chatham PD
Warner Robins PD

Hawaii
Honolulu PD

Idaho
Ada CS
Blaine CS
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Canyon CS
Cassia CS
Coeur d' Alene PD
Garden City PD
Gooding CS
Gooding PD
Hailey PD
ID Dept Fish & Games
ID Falls PD
ID State PD
Jerome CS
Jerome PD
Ketchum PD
Lincoln CS
Meridian PD
Nampa PD
Pocatello PD
Post Falls PD
Twin Falls PD

Illinois
All departments - homicides - statute v
Other felonies -
Bloomington PD
Cahokia PD
Carlinville PD
Caseyville PD
Dixon PD
DuPage CS
East St. Louis PD
Fairview Heights PD
Galena PD
IL Gaming Board
Kankakee CS
Kankakee PD
Lincoln PD
Macon CS
Naperville PD
O'Fallon PD
Rockton PD
Springfield PD
St. Clair CS
Swansea PD
Troy PD
Winnebago CS

**Indiana**
Albion PD
Allen CS
Atlanta PD
Auburn PD
Carmel PD
Cicero PD
Clark CS
Clarksville PD
Columbia City PD
Dyer PD
Elkhart CS
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Elwood PD
Fishers PD
Floyd CS
Fort Wayne PD
Greensburg PD
Hamilton CS
Hancock CS
Hartford PD
IN State PD
Jeffersonville PD
Johnson CS
Kendallville PD
LaGrange CS
Lowell PD
Montpelier PD
Nappanee PD
Noble CS
Noblesville PD
Pendleton PD
Schererville PD
Sheridan PD
Shipshewana PD
Steuben CS
Tipton PD
Wells CS
Westfield PD

**Iowa**
Altoona PD
Ames PD
Ankeny PD
Arnolds Park PD
Benton CS
Bettendorf PD
Cedar Rapids PD
Clarion PD
Colfax PD
Council Bluffs PD
Davenport PD
Des Moines PD
Fayette CS
Fayette County PD
Iowa City PD
Iowa DPS
Johnson CS
Kossuth CS
Linn CS
Marion PD
Marshalltown PD
Mason City PD
Merrill PD
Muscatine PD
Nevada PD
Parkersburg PD
Polk CS
Pottawattamie CS
Sioux City PD
Storm Lake PD
Vinton PD
Washington CS
Waterloo PD
Waverly PD
West Burlington PD
Woodbury CS

**Kansas**
Junction City PD
Kansas Univ. DPS
Liberal PD
Ottawa PD
Sedgwick CS
Sedgwick PD
Shawnee CS
Topeka PD
Wichita PD

**Kentucky**
Elizabethtown PD
Hardin CS
Jeffersontown PD
Louisville Metro PD
Louisville PD
Oldham CS
St. Matthews PD

**Louisiana**
Lafayette City PD
Lake Charles PD
Oak Grove PD
Plaquemines Parish CS
St. Tammany Parish CS

**Maine**
All departments - statute

**Maryland**
All departments - statute

**Massachusetts**
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<td><strong>Missouri</strong></td>
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<tr>
<td>All departments - statute</td>
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<tr>
<td><strong>Montana</strong></td>
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<td>All departments - statute</td>
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<td>xiii</td>
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<tr>
<td><strong>Nebraska</strong></td>
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<td>All departments - statute</td>
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<td>xiv</td>
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<td><strong>Nevada</strong></td>
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<tr>
<td>Boulder City PD</td>
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<td>Carlin PD</td>
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<td>Douglas CS</td>
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<td>Elko CS</td>
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<td>Elko PD</td>
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<td>Henderson PD</td>
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<td>Landers PD</td>
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<td>Las Vegas Metro PD</td>
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<td>Nevada DPS</td>
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<td>North Las Vegas PD</td>
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<td>Reno PD</td>
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<td>Sparks PD</td>
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<td>Washoe CS</td>
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<td>Wells PD</td>
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<td>Yerington PD</td>
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<td><strong>New Hampshire</strong></td>
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<td>Carroll CS</td>
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<td>Concord PD</td>
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<td>Conway PD</td>
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<td>Enfield PD</td>
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<td>Keene PD</td>
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<td>Laconia PD</td>
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<td>NH State PD</td>
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<td>Swanzey PD</td>
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<td><strong>New Jersey</strong></td>
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<td>All departments - Supreme Court</td>
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<td>xvi</td>
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<td><strong>New Mexico</strong></td>
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<td>All departments - statute</td>
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<td>xvii</td>
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<td><strong>New York</strong></td>
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<tr>
<td>Broome CS</td>
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<td>Cayuga Heights PD</td>
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<td>Delaware CS</td>
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<td>Deposit PD</td>
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<td>Dryden PD</td>
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<td>Endicott PD</td>
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<td>Glenville PD</td>
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<td>Irondequoit PD</td>
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<td>NY State PD - Ithaca</td>
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<td>NY State PD - Oneonta</td>
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<td>NY State PD - Sidney</td>
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Rotterdam PD
Schenectady PD
Tompkins CS
Vestal PD

**North Carolina**
All departments - homicides - statute\textsuperscript{vili}
Other felonies -
Burlington PD
Concord PD
Wilmington PD

**North Dakota**
Bismarck PD
Burleigh CS
Fargo PD
Grand Forks CS
Grand Forks PD
Valley City PD

**Ohio**
Akron PD
Brown CS
Cincinnati PD
Columbus PD
Dawson CS
Dublin PD
Franklin PD
Garfield Heights PD
Grandview Heights PD
Grove City PD
Hartford PD
Hudson PD
Millersburg PD
OH Board of Pharmacy
OH State Univ. PD
Ontario PD
Reynoldsburg PD
Springboro PD
Upper Arlington PD
Wapakoneta PD
Warren CS
Westerville PD
Westlake PD
Worthington PD

**Oklahoma**
Moore PD
Norman PD
Oklahoma CS
Tecumseh PD

**Oregon**
All departments - statute (effective Jan. 1, 2010)\textsuperscript{xix}
Bend PD
Clackamas CS
Coburg PD
Corvallis PD
Douglas CS
Eugene PD
Lincoln City PD
Medford PD
Ontario PD
OR State PD, Springfield
Portland PD
Roseburg PD
Salem PD
Toledo PD
Warrenton PD
Yamhill CS

**Pennsylvania**
Bethlehem PD
Tredyffrin Township PD
Whitehall PD

**Rhode Island**
RI Dept of Public Safety (capital offenses)
Woonsocket PD

**South Carolina**
Aiken CS
Aiken DPS
N. Augusta DPS
Savannah River
Site Law Enf.

**South Dakota**
Aberdeen PD
Brookings PD
Brown CS
Clay CS
Lincoln CS
Minnehaha CS
Mitchell PD
Rapid City PD
Sioux Falls PD
SD State Div. of Criminal Investigations
SD State Univ. PD
Vermillion PD

**Tennessee**
Blount CS
Bradley CS
Brentwood PD
Chatanooga PD
Cleveland PD
Goodlettsville PD
Hamilton CS
Hendersonville PD
Loudon CS
Montgomery CS
Murfreesboro PD
Nashville PD

**Texas**\textsuperscript{xx}
Abilene PD
Andrews PD
Arlington PD
Austin PD
Burleson PD
Cedar Hill PD
Cedar Park PD
Cleburne PD
Collin CS
Corpus Christi PD
Dallas PD
Duncanville PD
Florence PD
Frisco PD
Georgetown PD
Granger PD
Harris CS
Houston PD
Hutto PD
Irving PD
Johnson CS
Kileen PD
Knox CSO
Leander PD
Midland PD
Parker CS
Plano PD
Randall CS
Richardson PD
Round Rock PD
San Antonio PD
San Jacinto CS
Southlake DPS
Sugar Land PD
Taylor PD
Travis CS
Webster PD
Williamson CS

Virginia
    Alexandria PD
    Chesterfield County PD
    Clarke CS
    Fairfax PD
    Loudoun CS
    Norfolk PD
    Richmond PD
    Stafford CS
    Virginia Beach PD

Washington
    Adams CS
    Arlington PD
    Bellevue PD
    Bothell PD
    Buckley PD
    Columbia CS
    Ellesburg PD
    Federal Way PD
    Kent City PD
    King CS
    Kirkland PD
    Kittitas CS
    Klickitat CS
    Lewis CS
    Marysville PD
    Mercer Island PD
    Mount Vernon PD
    Pierce CS
    Prosser PD
    Snohomish CS
    Thurston CS
    Univ. WA PD
    Walla Walla PD
    WA State Patrol
    Yakima CS

West Virginia
    Charles Town PD
    Monongalia CS
    Morgantown CS
    Morgantown PD
    Wheeling PD

Wisconsin

All departments - statute

Wyoming
    Cheyenne PD
    Cody PD
    Gillette City PD
    Laramie CS
    Laramie PD
    Lovell PD
    Polk CS

Thomas P. Sullivan
August 2009
In August 2007, the National Conference of Commissioners on Uniform State Laws approved formation of a drafting committee to formulate a uniform state statute on electronic recording of custodial interrogations.


In *Clark v. State*, 374 Ark. 292, 302 (2008), the Arkansas Supreme Court rejected the defendant’s argument that she had a constitutional right to have the police make a complete recording of her custodial interview. However, the Court stated, “we believe that the criminal justice system will be better served if our supervisory authority is brought to bear on this issue. We therefore refer the practicability of adopting such a rule to the Committee on Criminal Practice for study and consideration.” *Clark*, 374 Ark. at 304.

In 2008, the Connecticut General Assembly instructed the Advisory Commission on Wrongful Convictions to implement a “pilot program to electronically record the interrogations of arrested persons” and report findings and recommendations by July 1, 2009. Act of June 5, 2008, Pub. Act No. 08-143, sec. 2-4, 2008 Conn. Legis. Serv. (West), effective June 5, 2008. The Commission reported that of the ninety-nine custodial interviews recorded under the pilot program, eighty-four interviews were covert, fifty-five resulted in confessions, and three resulted in statements of criminal involvement. Conn. Advisory Comm’n on Wrongful Convictions, Report, at 4 (Feb. 2009). A substantial majority of detectives reported positive opinions of the recording program, and a remainder expressed neutral opinions. Report at app. B. The detectives reported that the use of recording equipment did not interfere with questioning or outcomes. Report at app. B.

D.C. CODE §§ 5-116.01-03 (West 2009), effective Apr. 13, 2005.

In March 2009, the Indiana Supreme Court Committee on Rules of Practice and Procedure distributed an announcement which states: “The Indiana Supreme Court is interested in receiving comments from the bench, bar and public concerning (1) whether it should adopt a rule requiring that custodial interrogations in criminal investigations be electronically recorded in some circumstances, and (2) if so, the appropriate content of such a rule. To that end, the Court asked the Committee on Rules of Practice and Procedure to develop and publish such a rule.”

Following the ruling of the Iowa Supreme Court in *State v. Hajtic*, 724 N.W.2d 449 (Iowa 2006), the Attorney General wrote in the State Police Association’s publication: “Although the court stated that it is ‘encouraging’ the practice of electronic recording, the attorney general’s office believes that the *Hajtic* decision should be interpreted as essentially requiring this...


x *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533-34 (Mass. 2004). Following this ruling, the state Attorney General and District Attorneys Ass’n wrote in a Sept. 2006 Justice Initiative Report: “Law enforcement officers shall, whenever it is practical and with the suspect’s knowledge, electronically record all custodial interrogations of suspects and interrogations of suspects conducted in places of detention.” The Chiefs of Police Ass’n, District Attorneys Ass’n and State Police distributed a “Sample Policy and Procedure” (No. 2.17) to law enforcement agencies throughout the state, which states, “It is the policy of the department, whenever it is practical, to electronically record all custodial interrogations of suspects or interrogations of suspects in places of detention.”

xi *State v. Scales*, 518 N.W.2d 587, 591 (Minn. 1994).


xv In *State v. Barnett*, 789 A.2d 629, 632-33 (N.H. 2001), the New Hampshire Supreme Court held that if an electronically recorded statement is offered into evidence, the recording is admissible only if the entire post-*Miranda* interrogation interview was recorded. The ruling does not require that custodial interviews be recorded either in whole or in part. If a partially recorded statement is excluded from evidence because the entire interview was not recorded, testimonial evidence is nevertheless admissible as to what occurred before, during and after the custodial interview, including the portion that was recorded.


The Texas Code of Criminal Procedure provides that a defendant’s unrecorded oral statement is inadmissible unless the statement “contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused.” TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 2009) (effective Sept. 1, 1989, amended 2001); see Moore v. State, 999 S.W.2d 385, 400 (Tex. App. 1999). The statute does not require recording of custodial interviews preceding recorded statements, nor exclusion of suspects’ unrecorded written statements. See Rae v. State, No. 01-98-00283-CR, 2001 WL 125977, at 3 (Tex. App. 2001); Franks v. State, 712 S.W.2d 858, 860 (Tex. App. 1986).

The Utah Attorney General has adopted a Best Practices Statement, endorsed by all state law enforcement agencies, recommending that custodial interrogations in a fixed place of detention of persons suspected of committing a statutory violent felony, should be electronically recorded from the Miranda warnings to the end in their entirety. Various exceptions to the requirement are included. Office of the Utah Attorney General, Best Practices Statement for Law Enforcement: Recommendations for Recording of Custodial Interviews (Oct. 2008).