

## The Evolution of Law Enforcement Attitudes to Recording Custodial Interviews\*

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“Life is not what one lived, but what one remembers and how one remembers it in order to recount it.”<sup>1</sup>

“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

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<sup>1</sup> 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.

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reconstruction, or construction, built out of the relation of our attitude towards a whole active mass of organized past reactions or experiences....”<sup>2</sup>

### **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?<sup>3</sup> 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

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<sup>2</sup> *People v. Shirley*, 723 P.2d 1354, 1378 (Cal. 1982) (citations omitted) (quoting FREDERIC C. BARTLETT, REMEMBERING: A STUDY IN EXPERIMENTAL AND SOCIAL PSYCHOLOGY 204-05, 213 (Cambridge Univ. Press 1932).

<sup>3</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1966).

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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!<sup>4</sup>

### 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.<sup>5</sup> This was the first time that recording of custodial interviews was required by a state statute.<sup>6</sup>

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

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<sup>4</sup> BOB DYLAN, *THE TIMES THEY ARE A-CHANGIN'* (Columbia 1964).

<sup>5</sup> 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.

<sup>6</sup> 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).

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and prosecutors resist installation of recording facilities in stationhouse rooms, and thus diminish unwarranted claims that *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).<sup>7</sup> Because there are thousands 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 interviews 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.<sup>8</sup> Based on the first hand testimony of experienced detectives and their

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<sup>7</sup> 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.

<sup>8</sup> Thomas P. Sullivan, Ctr. on Wrongful Convictions, Northwestern Univ. Sch. of Law, *Police Experiences with Recording Custodial Interrogations* 1 (2004), <http://www.jenner.com/policestudy>; Sullivan, *Police Experiences with Recording Custodial Interrogations*, 88 JUDICATURE 132 (2004); Sullivan, *The Police Experience: Recording Custodial Interrogations*, 28 CHAMPION 24 (2004); Sullivan, *Recording Custodial Interrogations: The Police Experience*, 52 FED. LAW. 20 (2005); Sullivan,

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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,<sup>9</sup> and legislative bodies and conferences.<sup>10</sup>

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*Recording Custodial Interrogations*, 53 L. & ORD. 46 (2005); Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127 (2005); Sullivan, *Electronic Recording of Custodial Interrogations*, THE CHIEF OF POLICE: NAT'L ASS'N OF CHIEFS OF POLICE Nov.-Dec. 2005, at 17 (2005); Sullivan, *The Time Has Come for Law Enforcement Recordings of Custodial Interviews, Start to Finish*, 37 GOLDEN GATE U. L. REV. 175 (2006); Sullivan, *Federal Law Enforcement Should Record Custodial Interrogations*, 53 FED. LAW. 44 (2006), reprinted in 31 CHAMPION 8 (Apr. 2007); Sullivan, Andrew W. Vail & Howard W. Anderson, *The Case for Recording Police Interrogations*, 34 A.B.A. LITIG. 30 (2008); Sullivan, *Recording Federal Custodial Interviews*, 45 AM. CRIM. L. REV. 1297 (2008); Sullivan & Vail, *The Consequences of Law Enforcement Officials' Failure to Record Custodial Interviews as Required by Law*, 99 J. CRIM. L. & CRIMINOLOGY 215 (2009).

<sup>9</sup> For example, Am. Acad. of Psychiatry and Law, Midwest Chapter Annual Conf., Chicago, IL, (Apr. 2003); Nat'l Lawyers Ass'n Annual Convention and Educ. Conf., Chicago, IL (July 2003); Nat'l Defender Investigator Ass'n Midwest Reg'l Conf., St. Louis, MO (Sept. 2003); Wis. Avery Task Force (Apr. 2004); Ill. Defenders Ass'n Spring Seminar, Urbana, IL (May 2004); State Legis. Leaders Found., Chicago, IL (June 2004); Northwestern Univ. Sch. of Law, Short Course for Prosecuting Att'ys, Chicago, IL (July 2004); Nat'l Ass'n of Criminal Def. Lawyers, San Francisco, CA (July 2004) and Portland, OR (Aug. 2005); Justice Mgmt. Inst., Am. Judicature Soc'y (AJS), Chapel Hill, NC (Dec. 2004); Hennepin County Att'y's Office, Conf., Minneapolis, MN. (Feb. 2005); State Bar of Tex. Individual Rights and Responsibilities Section, Symposium, Austin, TX. (Feb. 2005); Ill. State Appellate Defender Conf., Chicago, IL. (Mar. 2005); Nat'l Inst. of Justice Nat'l Conf., St. Petersburg, FL. (Sept. 12-14, 2005); Idaho Ass'n of Criminal Def. Att'ys Annual Meeting, Sun Valley, ID (Mar. 2006); Cyril H. Wecht Inst. of Forensic Sci. and Law and Duquesne Univ.'s Symposium, Pittsburgh, PA (Apr. 20-22, 2006); Cal. Comm'n on the Fair Admin. of Justice, Los Angeles, CA. (June 2006); Ctr. for Am. and Int'l Law and AJS Program, Plano, TX. (Aug. 17-18, 2006); Int'l Ass'n of Chiefs of Police, Annual Meeting (Oct. 2006); Nat'l State Legislators' Conf., Washington, DC (Dec. 2006); Mich. Ass'n of Chiefs of Police Mid-Winter Meeting (Jan. 2007); Univ. of Richmond Law Sch., Symposium, Richmond, VA. (Apr. 2007); John Jay College of Criminal Justice, Conf., New York, NY (Mar. 2007); Univ. of Tex. El Paso, El Paso, TX (Sept. 2007); Iowa Ass'n of Criminal Def. Lawyers Annual Conf., Des Moines, IA (Nov. 2007); Ctr. for Am. and Int'l Law, Plano, TX (Aug. 2008); Nat'l Inst. of Military Justice Comm., Washington, DC (June 2009).

<sup>10</sup> Maryland (Mar. 2006, Jan. 2007), Missouri (Nov. 2005), Montana (Feb. 2009), Nebraska (Feb. 2007), New York (Oct. 2005 and Apr. 2008), Oregon (Mar. 2009), Pennsylvania (Mar. and Aug. 2008), Tennessee (Dec. 2007), Wisconsin (Apr. 2004), District of Columbia (Nov. 2004).

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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<sup>11</sup> and the District of Columbia.
- Recent rulings of three state supreme courts<sup>12</sup> 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.<sup>13</sup>

### 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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<sup>11</sup> Illinois, Maine, Maryland, Montana, New Mexico, Nebraska, North Carolina, Oregon, Wisconsin.

<sup>12</sup> Iowa, Massachusetts and New Jersey. See *State v. Hajtic*, 724 N.W.2d 449 (Iowa 2006); *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533-34 (Mass. 2004); N.J. Ct. R. 3.17 (2005) (West 2009). As noted, the supreme courts of Alaska and Minnesota ordered statewide custodial recordings years before enactment of the Illinois statute. See *above* text and cases cited accompanying note 6.

<sup>13</sup> 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.

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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.<sup>14</sup>

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.<sup>15</sup> 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.”<sup>16</sup> 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.<sup>17</sup>

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 become accustomed to their own “tried and true” methods: vigorous opposition gives way to cautious consideration, followed by grudging

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<sup>14</sup> 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.

<sup>15</sup> *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533-34 (Mass. 2004).

<sup>16</sup> Mass. Dist. Att’ys Ass’n, Report of the Justice Initiative 14 (Sept. 2006).

<sup>17</sup> See Noah Schaffer, *Tale of the Tape: Recorded Interrogations Level the Playing Field, Despite Initial Fears*, MASS. LAW. WKLY., Apr. 2, 2007, available at [http://www.nacdl.org/sl\\_docs.nsf/freeform/Mandatory:028?OpenDocument](http://www.nacdl.org/sl_docs.nsf/freeform/Mandatory:028?OpenDocument).

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.<sup>18</sup> 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

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<sup>18</sup> See *Electronic Recording of Custodial Interrogations: Everybody Wins*, above note 8, at 1142.



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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.<sup>19</sup>

These instructions are similar to those required by the New Jersey Supreme Court.<sup>20</sup>

### **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

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<sup>19</sup> *The Consequences of Law Enforcement Officials' Failure to Record*, above note 8, app. A at 226.

<sup>20</sup> N.J. CT. R. 3:17(d), (e) (West 2009). See also the statutes enacted in Nebraska, NEB. REV. STAT. § 29-4505 (West 2009); North Carolina, N.C. GEN. STAT. § 15A-211 (West 2009); Oregon, Act of Jan. 24, 2009, ch. 488, 2009 Or. Laws ch. 488 (West 2009); Wisconsin, WIS. STAT. ANN. § 972.115(d)(2) (West 2009).

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without doubt that people occasionally confess to committing crimes they did not commit.<sup>21</sup> 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.<sup>22</sup>

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.<sup>23</sup>

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.<sup>24</sup>

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<sup>21</sup> Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, Law & Hum. Behav. (forthcoming Jan. 2010) (manuscript on file with author); Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. (forthcoming 2009), available at [http://bepress.com/uva/wps/uva\\_publiclaw/art136](http://bepress.com/uva/wps/uva_publiclaw/art136).

<sup>22</sup> See Kassin et al., above note 54 (manuscript at 23) (emphasis omitted).

<sup>23</sup> See *The Substance of False Confessions*, above note 54, at 53-54.

<sup>24</sup> See Jim Trainum, *I Took A False Confession—So Don't Tell Me It Doesn't Happen!*, THE CALIFORNIA MAJORITY REPORT, Sept. 20, 2007, <http://www.camajorityreport.com/index.php?module=articles&func=display&aid=2306>.

**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.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup> 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<sup>28</sup> 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

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<sup>25</sup> For example, undercover agents and “cooperating individuals” routinely use recorded personal and telephone conversations and videotapes to depict suspects’ conduct.

<sup>26</sup> 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.

<sup>27</sup> 18 U.S.C.A. § 1001(a)(2) (West 2009).

<sup>28</sup> 10 U.S.C.A. § 836 (West 2009).

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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<sup>1</sup>**

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

#### **Alabama**

Mobile CS  
Mobile PD  
Prichard PD

Pinal CS  
Prescott PD

Alameda CS  
Arcadia PD  
Auburn PD  
Bishop PD  
Butte CS  
Carlsbad PD  
Contra Costa CS

#### **Alaska**

All departments -  
Supreme  
Court ruling<sup>i</sup>

Scottsdale PD  
Sierra Vista PD  
Somerton PD  
South Tucson PD  
Surprise PD

#### **Arizona**

Casa Grande PD  
Chandler PD  
Coconino CS  
El Mirage PD  
Flagstaff PD  
Gila CS  
Gilbert PD  
Glendale PD  
Marana PD  
Maricopa CS  
Mesa PD  
Oro Valley PD  
Payson PD  
Peoria PD  
Phoenix PD  
Pima CS

Tempe PD  
Tucson PD  
Yavapai CS  
Yuma CS  
Yuma PD

El Cajon PD  
El Dorado CS  
Escondido PD  
Folsom PD  
Grass Valley PD  
Hayward PD  
LaMesa PD  
Livermore PD  
Oceanside PD  
Orange CO Fire  
Authority  
Orange CS  
Placer CS  
Pleasanton PD  
Rocklin PD  
Roseville PD  
Sacramento CS

#### **Arkansas<sup>ii</sup>**

AR State PD  
Eureka Springs PD  
Fayetteville FD  
Fayetteville PD  
14th Judicial District  
Drug Task Force  
Washington CS  
Van Buren PD

#### **California**

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

Sunnyvale DPS  
Union City PD  
Vallejo PD  
Ventura CS  
West Sacramento PD  
Woodland PD  
Yolo CS

### **Colorado**

Arvada PD  
Aurora PD  
Boulder PD  
Brighton PD  
Broomfield PD  
Colorado Springs PD  
Commerce City PD  
Cortez PD  
Denver PD  
El Paso CS  
Ft. Collins PD  
Lakewood PD  
Larimer CS  
Logan CS  
Loveland PD  
Montezuma CS  
Sterling PD  
Thornton PD

### **Connecticut<sup>iii</sup>**

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<sup>iv</sup>

### **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  
Boise City PD  
Boise CS  
Bonneville CS  
Caldwell PD  
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<sup>v</sup>  
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<sup>vi</sup>**

Albion PD  
Allen CS  
Atlanta PD  
Auburn PD  
Carmel PD  
Cicero PD  
Clark CS  
Clarksville PD  
Columbia City PD  
Dyer PD  
Elkhart CS  
Elkhart PD  
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<sup>vii</sup>**

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<sup>viii</sup>

#### **Maryland**

All departments -  
statute<sup>ix</sup>

#### **Massachusetts<sup>x</sup>**

Barnstable PD  
Boston PD  
Bourne PD

Brewster PD  
Cambridge  
Chatham PD  
Dalton PD  
Dennis PD  
Easton PD  
Edgartown PD  
Fall River PD  
MA State PD  
North Central  
Correctional  
Inst.  
Oak Bluffs PD  
Orleans PD  
Pittsfield PD  
Revere Fire Dept.  
Somerset PD  
Tewksbury PD  
Troro PD  
West Tisbury PD  
Yarmouth PD

### **Michigan**

Auburn Hills PD  
Benzie CS  
Big Rapids DPS  
Cass County Drug  
Enforcement Team  
Cass County CS  
Charlevoix CS  
Detroit PD (homicides)  
Emmet CS  
Farmington DPS  
Gerrish Township PD  
Gladwin PD  
Huntington Woods DPS  
Isabella CS  
Kent CS  
Kentwood PD  
Lake CS  
Ludington PD  
Manistee CS  
Mason CS  
Mecosta CS  
MI State PD

Milford PD  
Mt. Pleasant PD  
Niles City PD  
Novi PD  
Oak Park DPS  
Onaway PD  
Paw Paw PD  
Redford Township PD  
Scottville PD  
Troy PD  
Waterford PD  
West Branch PD  
Wyoming PD

### **Minnesota**

All departments -  
Supreme  
Court ruling<sup>xi</sup>

### **Mississippi**

Biloxi PD  
Cleveland PD  
Gulfport PD  
Harrison CS  
Jackson CS

### **Missouri**

All departments -  
statute<sup>xii</sup>

### **Montana**

All departments -  
statute<sup>xiii</sup>

### **Nebraska**

All departments -  
statute<sup>xiv</sup>

### **Nevada**

Boulder City PD  
Carlin PD  
Douglas CS  
Elko CS  
Elko PD  
Henderson PD  
Lander CS

Las Vegas Metro PD  
Nevada DPS  
North Las Vegas PD  
Reno PD  
Sparks PD  
Washoe CS  
Wells PD  
Yerington PD

### **New Hampshire<sup>xv</sup>**

Carroll CS  
Concord PD  
Conway PD  
Enfield PD  
Keene PD  
Laconia PD  
Lebanon PD  
Nashua PD  
NH State PD  
Plymouth PD  
Portsmouth PD  
Swanzey PD

### **New Jersey**

All departments -  
Supreme  
Court Rule<sup>xvi</sup>

### **New Mexico**

All departments -  
statute<sup>xvii</sup>

### **New York**

Binghamton PD  
Broome CS  
Cayuga Heights PD  
Delaware CS  
Deposit PD  
Dryden PD  
Endicott PD  
Greece PD  
Glenville PD  
Irondequoit PD  
NY State PD - Ithaca  
NY State PD - Oneonta  
NY State PD - Sidney



Rotterdam PD  
Schenectady PD  
Tompkins CS  
Vestal PD

### **North Carolina**

All departments -  
homicides - statute<sup>xviii</sup>  
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)<sup>xix</sup>  
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  
Chattanooga PD  
Cleveland PD  
Goodlettsville PD  
Hamilton CS  
Hendersonville PD  
Loudon CS  
Montgomery CS  
Murfreesboro PD  
Nashville PD

### **Texas<sup>xx</sup>**

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

**Utah<sup>xxi</sup>**

Layton PD  
Salt Lake City PD  
Salt Lake CS  
Utah CS

**Vermont**

Burlington PD  
Norwich PD  
Rutland PD

**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  
Kennewick 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<sup>xxii</sup>

**Wyoming**

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

Thomas P. Sullivan  
August 2009

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<sup>1</sup> 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.

<sup>i</sup> *Stephan v. State*, 711 P.2d 1156, 1162 (Alaska 1985).

<sup>ii</sup> 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.

<sup>iii</sup> 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.

<sup>iv</sup> D.C. CODE §§ 5-116.01-03 (West 2009), effective Apr. 13, 2005.

<sup>v</sup> 705 ILL. COMP. STAT. ANN. § 405/5-401.5 and 725 ILL. COMP. STAT. ANN. § 5/103-2.1 (West 2009), effective July 18, 2005.

<sup>vi</sup> 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."

<sup>vii</sup> 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

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practice.” Tom Miller, *Cautions Regarding Custodial Issues*, IOWA POLICE J., vol. 39, no. 1, at 15 (2007).

<sup>vii</sup> ME REV. STAT. ANN. Title 25, § 2803-B(1)(K) (West 2009), effective Jan. 1, 2005.

<sup>ix</sup> The Maryland Code of Criminal Procedure requires that law enforcement units shall make “reasonable efforts” to create a recording of custodial interviews of suspects in connection with cases involving named felonies “whenever possible.” MD. ANN. CODE, CRIM. PROC. § 2-402 (West 2009), effective Oct. 1, 2008.

<sup>x</sup> *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.”

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

<sup>xii</sup> MO REV. Stat. ch. 590, sec. 701.

<sup>xiii</sup> The Montana statute requires recording of custodial interviews of felony suspects. Act of Apr. 15, 2009, ch. 214, 2009 Mont. Laws (West), effective Oct. 1, 2009 (to be codified at MONT. CODE ANN. tit. 46, ch. 4).

<sup>xiv</sup> NEB. REV. STAT. ANN. § 29-4501-4508 (West 2009), effective July 18, 2008.

<sup>xv</sup> 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.

<sup>xvi</sup> N.J. CT. R. 3.17 (2005).

<sup>xvii</sup> N.M. STAT. ANN. § 29-1-16 (West 2009), effective Jan. 1, 2006.

<sup>xviii</sup> N.C. GEN. STAT. Ann. § 15A-211 (West 2009), effective Mar. 1, 2008.

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<sup>xix</sup> The Oregon statute requires recording of custodial interviews of suspects of aggravated homicides and crimes with mandatory minimum sentences. Act of Jan. 24, 2009, ch. 488, 2009 Or. Laws ch. 488 (West 2009), effective July 1, 2010 and July 1, 2011 (to be codified at OR. REV. STAT. § 165.540).

<sup>xx</sup> 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).

<sup>xxi</sup> 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).

<sup>xxii</sup> Wis. Stat. Ann. §§ 968.073, 972.115 (West 2009), effective Dec. 31, 2005.