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A Review Of The Law In Jurisdictions Requiring Electronic Recording Of Custodial Interrogations

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INTRODUCTION

[1] Although not constitutionally required, it has become considerably more commonplace for law enforcement to electronically record a suspect's custodial interrogation. This includes a complete recording, beginning with the advice of rights and continuing through the end of the interrogation. In fact, society now recognizes it as a useful, if not necessary, tool for law enforcement.

[2] Law enforcement officials initially resisted this investigative technique. Today, however, many officials have come to see the substantial benefits associated with the recording of a suspect's custodial interrogation. The usual reasons given in opposition to recording confessions include concerns that the suspect will refuse to talk and confessions will be lost, juries will be offended by the sometimes necessary aggressive techniques used by the police to obtain a confession,

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the equipment will malfunction during an interrogation, and the high costs associated with supplying a room with the necessary equipment.[1]

[3] This change in law enforcement's attitude towards electronic recording of custodial interrogations has occurred for a number of reasons. These include the notoriety associated with false confessions,[2] concerns about adequacy of the *Miranda* warnings, lawsuits filed against police officers, enhanced investigations, reduction of suppression motions, strengthening of the prosecutor's case,[3] increased guilty pleas,[4] and increased confidence by the public in the criminal justice system.[5] Potential jurors expect that law enforcement will record a suspect's confession because the camcorder technology used for such recordings is readily accessible and inexpensive. Jurors may wonder why a police department failed to record something as significant as a defendant's confession, especially when the justice system requires jurors to consider whether a confession was voluntary and reliable.

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[1] Lisa C. Oliver, *Mandatory Recording of Custodial Interrogations Nationwide: Recommending a New Model Code*, 39 SUFFOLK U. L. REV. 263, 280–81 (2005).

[2] It has been estimated that approximately fourteen to twenty-five percent of exonerations based upon DNA testing involved false confessions. *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA* World, 82 N.C. L. REV. 891, 902 (2004); Innocenceproject.org, False Confessions & Mandatory Recording of Interrogations, http://www.innocenceproject.org/fix/False-Confessions.php (last visited Feb. 25, 2010) (stating that over twenty-five percent of convictions reversed through DNA testing have involved false confessions).

[3] *See* Oliver, *supra* note 1, at 283–84.

[4] For example, in a survey of 246 police departments in Texas that have electronic recording polices, over sixty-four percent indicated that recording confessions protects police officers from claims of abuse by suspects, strengthens the prosecutor's case, and increases ability to focus on the investigation since the traditional need to take notes has been significantly reduced. THE JUSTICE PROJECT, ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS IN TEXAS: A REVIEW OF CURRENT STATUTES, PRACTICES, AND POLICIES 2–3, http://www.thejusticeproject.org/wp-content/uploads/texas_recording_write-up.pdf.

[5] MONT. CODE ANN. § 46-4-406 (2009).

[4] Over 500 jurisdictions have now enacted policies and procedures requiring their officers to record confessions in certain circumstances.[6] At present, seventeen states and the District of Columbia have enacted such requirements through the state legislature,[7] court decision,[8] amendment to the state's rules of evidence,[9] or by court rules.[10] Even in the states that have not mandated recording, numerous police departments have voluntarily instituted a policy requiring some type of recording requirement.[11]

[5] This Article will survey those states where law enforcement personnel are required to electronically record a suspect's post-arrest

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[6] *See* Innocenceproject.org, *supra* note 2.

[7] *See*, *e.g.*, D.C. CODE § 5-116.01 (2009); 705 ILL. COMP. STAT. ANN. §§ 405/5-401.5, 5/103-2.1 (West 2009); ME. REV. STAT. ANN. tit. 25, § 2803-B(1)(K) (2009); MD. CODE ANN., CRIM. PROC. § 2-402 (West 2009); MO. ANN. STAT. § 590.700 (West 2009); MONT. CODE. ANN. §§ 46-4-407(2), 46-4-408 (2009); NEB. REV. STAT. § 29-4503 (2009); N.M. STAT. ANN. § 29-1-16 (West 2009); N.C. GEN. STAT. ANN. § 15A-211 (West 2009); 2009 OR. LAWS ch.488 (relating to custodial interrogations; creating new provisions and amending OR. REV. STAT. § 165.540) (adopted June 24, 2009); TEX. CODE CRIM. PROC. ANN. art. 38.22 § 3 (Vernon 2009); WIS. STAT. ANN. §§ 968.073, 972.115 (West 2009).

[8] *See* Stephan v. State, 711 P.2d 1156, 1162 (Alaska 1985); State v. Hajtic, 724 N.W.2d 449, 454 (Iowa 2006); Commonwealth v. DiGiambattista, 813 N.E.2d 516, 533–34 (Mass. 2004); State v. Scales, 518 N.W.2d 587, 591 (Minn. 1994); State v. Barnett, 789 A.2d 629, 632 (N.H. 2001). *Contra* Starks v. State, 594 So. 2d 187, 196 (Ala. Crim. App. 1991); People v. Holt, 937 P.2d 213, 241–43 (Cal. 1997); Coleman v. State, 375 S.E.2d 663, 664 (Ga. Ct. App. 1988); State v. Kekona, 886 P.2d 740, 745–46 (Haw. 1994); Brashars v. Commonwealth, 25 S.W.3d 58, 63 (Ky. 2000); State v. Thibodeaux, 750 So. 2d 916, 923 (La. 1999); Williams v. State, 522 So. 2d 201, 208 (Miss. 1988); State v. Smith, 684 N.E.2d 668, 686 (Ohio 1997); Commonwealth v. Craft, 669 A.2d 394, 397 (Pa. 1995).

[9] IND. R. EVID. 617(effective Jan. 1, 2011).

[10] *See*, *e.g.*, N.J. CT. R. 3.17.

[11] THOMAS P. SULLIVAN, DEPARTMENTS THAT CURRENTLY RECORD A MAJORITY OF CUSTODIAL INTERROGATIONS (2009), http://www.law.northwestern.edu/wrongfulconvictions/issues/Causesandremedies/falseconfessions/ PDDEPTLIST.pdf.

statements. It will also compare, contrast, and consider the more significant provisions commonly associated with this requirement. This includes provisions regarding circumstances in which police must record a statement, exceptions to the recording requirements, what the recording must include, whether recording can be done without the suspect's knowledge, and the consequences for failure to record.

[6] Part I will survey the District of Columbia and those states that require the recording of custodial interrogations by statute. Part II will review states where a judicial decision created the requirement. Parts III and IV review those states that have created a recording requirement through a rule of evidence and by court rule. Finally, parts V and VI will conclude with a review of model legislation, as well as a review of proposed legislation in Michigan.

I. LEGISLATIVE ACTION

A. District of Columbia

[7] The recording statute in the District of Columbia is generally straightforward and encompasses standard requirements found in many other jurisdictions.[12] A unique consequence of the recording requirement is that the United States Attorney's Office, which prosecutes local crimes committed in the District of Columbia, must adhere to the recording requirements when presenting cases in superior court.[13] However, no such requirement exists when that office prosecutes federal crimes in the U.S. District Court for the District of Columbia, because a federal recording requirement does not currently exist.[14]

[8] The Metropolitan Police Department (MPD) is required to record custodial interrogations when interrogating a person suspected of

[12] D.C. CODE § 5-116.01 (2009).

[13] United States Attorney's Office for the District of Columbia: About Us, http://www.justice.gov/usao/dc/ About_Us/index.html (last visited Feb. 25, 2010).

[14] *See generally infra* note 211.

committing a crime of violence[15] and when the interrogation takes place in a MPD interview room.[16] In accordance with most other jurisdictions, the MPD must record the advice of rights and the suspect's response.[17] This is significant because it will have a substantial impact on litigation in which the adequacy of the advice of rights and the voluntariness of a subsequent waiver are in question.

[9] If the suspect consents to questioning but does not want the interview recorded, the statute permits the police to stop recording.[18] A statement obtained in violation of the statute results in a rebuttable presumption that the statement is involuntary.[19] Legislation creating a presumption of involuntariness exists only in the District of Columbia and Illinois.[20] Although the presumption is rebuttable, it creates a potential, yet

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[15] Section 23-1331(4) defines crime of violence as

> aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt or conspiracy to commit any of the foregoing offenses.

D.C. CODE § 23-1331(4).

[16] *Id.* § 5-116.01(a)(1).

[17] *Id.* § 5-116.01(b).

[18] *Id.* § 5-116.01(c)(1).

[19] *Id.* § 5-116.03.

[20] 725 ILL. COMP. STAT. 5/103-2.1(f) (2009).

substantial, barrier for the government, and it appears to be inconsistent with prevailing Supreme Court authority, as well as case law in the District of Columbia. Ordinarily, the government is only required to establish, by a preponderance of the evidence, that the defendant made a statement voluntarily.[21] This statute increases the government's burden of proof to "clear and convincing evidence."[22]

[10] The fact that the police did not record a confession does not mean that it was coerced. The Supreme Court, as well as decisions in the District of Columbia, has held that a statement is voluntary unless "the will of [the defendant] was 'overborne in such a way as to render his confession the product of coercion.'"[23] Moreover, this standard is inconsistent with the rule that, when ascertaining the voluntariness of a statement, the trier of fact must base the conclusion upon the totality of the circumstances, without giving presumptive weight to any single factor, such as a failure to record.[24]

B. Illinois

[11] Illinois requires the recording of custodial interrogations of murder suspects when the questioning occurs in a detention facility, such as a police station or a jail.[25] However, there is no specific requirement to

[21] Lego v. Twomey, 404 U.S. 477, 489 (1972).

[22] D.C. CODE § 5-116.03.

[23] United States v. Thomas, 595 A.2d 980, 981 (D.C. 1991) (quoting Arizona v. Fulminante, 499 U.S. 279, 288 (1991)); *see* Davis v. United States, 724 A.2d 1163, 1168 (D.C. 1998).

[24] The voluntariness of a confession is determined from "the totality of all the surrounding circumstances –[considering] both the characteristics of the accused and the details of the interrogation." Dickerson v. United States, 530 U.S. 428, 434 (2000) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)). By comparison, in Massachusetts a failure to record is a factor to be considered on the issue of voluntariness. Commonwealth v. DiGiamattista, 813 N.E.2d 516, 529 (Mass. 2004).

[25] 725 ILL. COMP. STAT. 5/103-2.1(a)–(b) (West 2009) ("'[C]ustodial interrogation'" means any interrogation during which (i) a reasonable person in the subject's position would consider himself or herself to be in custody and (ii) during which a question is

record the advice of a suspect's rights or the suspect's response.[26] As will be discussed, most of the states require that the recording include the advice of rights. The latter requirement is sound policy because it will be easier for the parties to determine whether there has been compliance with *Miranda*.

[12] Like many other jurisdictions, the Illinois statute provides numerous exceptions to the recording requirement.[27] A non-recorded statement may be admissible if the prosecutor can prove, by a preponderance of the evidence that an exception exists.[28] These exceptions include, but are not limited to, situations where recording was not "feasible,"[29] statements that bear on the credibility of the suspect as a witness,[30] spontaneous statements by the accused not made in response to questioning,[31] a suspect's precondition that he will only make a statement if it were not recorded,[32] and a statement made at a time the interrogator is

asked that is reasonably likely to elicit an incriminating response."). The statutory definition tracks United States Supreme Court authority. *See* Berkemer v. McCarty, 468 U.S. 420, 442 (1984); Rhode Island v. Innis, 446 U.S. 291, 292 (1980). It has been specifically held that the statute is not to be applied retroactively. People v. Amigon, 903 N.E.2d 843, 848 (2009).

[26] *See* 725 ILL. COMP. STAT. 5/103-2.1(e).

[27] *See Id.* 5/103-2.1(e).

[28] *Id.* 5/103-2.1(e)(ix).

[29] *Id.* 5/103-2.1(e)(ii).

[30] *Id.* 5/103-2.1(e)(iii). For example, a defendant could not successfully move to keep his statement out and subsequently be able to testify in a manner inconsistent with the statement given to the police. This is consistent with the Fifth Amendment impeachment jurisprudence where it has been held that the protections provided by *Miranda* cannot be used as a basis to commit perjury. Harris v. New York, 401 U.S. 222, 226 (1971).

[31] 725 ILL. COMP. STAT. 5/103-2.1(e)(v). *See generally* Pennsylvania v. Muniz, 496 U.S. 582 (1990).

[32] *Id.* 5/103-2.1(e)(vi).

unaware that a death has occurred.[33] Even if the state cannot establish the existence of an applicable exception, the statement may still be admissible if it can pass a due process voluntariness analysis.[34]

[13] The penalties for failing to record are stricter in Illinois than in many of the other jurisdictions surveyed. If the court finds by a preponderance of the evidence that the interrogation should have been recorded, the statute mandates that the statement "shall be presumed to be inadmissible as evidence against the accused in any criminal proceeding . . . ."[35] This includes not only the non-recorded statement made by the defendant, but also any statement made after the non-recorded statement, even if the subsequent interrogation complies with the statute.[36] This presumption of inadmissibility may be overcome by a preponderance of evidence "that the statement was voluntarily given and is reliable, based upon a totality of circumstances."[37] If the statement is excluded, the only permissible use of the statement is for impeachment purposes.[38] As noted, this is consistent with the U.S. Supreme Court's decision in *Harris v. New York*.[39]

C. Maine

[14] In 2004, Maine enacted legislation requiring police agencies to create policies and procedures to deal with recording "interviews of

[33] *Id.* 5/103-2.1(e)(viii). In *People v. Armstrong*, the court determined that this exception applies when "(1) a death has occurred; and (2) the interrogators are aware of the death." 919 N.E.2d 57, 70 (Ill. App. Ct. 2009).

[34] *See* 725 ILL. COMP. STAT. 5/103-2.1(f).

[35] *Id.* 5/103-2.1(b).

[36] *Id.* 5/103-2.1(d).

[37] *Id.* 5/103-2.1(f). This comports with the voluntariness requirement required under the Due Process Clause. Dickerson v. United States, 530 U.S. 428, 434 (2000).

[38] 725 ILL. COMP. STAT. 5/103-2.1(d).

[39] 401 U.S. 222, 226 (2009); 725 ILL. COMP. STAT. 5/103-2.1(e)(iii).

suspects in serious crimes."[40] The Maine Chiefs of Police developed a model policy in February 2005.[41] In 2006, the state mandated that all police agencies "[adopt] written policies" to deal with a number of specified law enforcement situations.[42]

[15] Unlike other states, Maine's statute is non-specific concerning issues such as whether electronic recording is required, what must be recorded (e.g. advice of rights) and what consequences, if any, exist for a failure to record.[43] For example, there is no mandatory exclusion requirement or a provision for a cautionary jury instruction.[44] The only

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[40] ME. REV. STAT. ANN. tit. 25, § 2803-B (2009). In *State v. Buzzell*, the Supreme Judicial Court of Maine rejected the defendant's argument that a failure to record violated due process. 617 A.2d 1016, 1018–19 (Me. 1992). It declined to follow *Stephan v. State,* where the Alaska Supreme Court ruled that the due process clause of its state constitution required the recording of custodial interrogation when feasible. 711 P.2d 1156, 1159–60 (Alaska 1985).

[41] The policy states:

> This agency recognizes the importance of recording custodial interrogations related to serious crimes when they are conducted in a place of detention. A recorded custodial interrogation creates compelling evidence. A recording aids law enforcement efforts by confirming the content and the voluntariness of a confession, particularly when a person changes his testimony or claims falsely that his or her constitutional rights were violated. Confessions are important in that they often lead to convictions in cases that would otherwise be difficult to prosecute. Recording custodial interrogations is an important safeguard, and helps to protect the person's right to counsel, the right against self-incrimination and, ultimately, the right to a fair trial. Finally, a recording of a custodial interrogation undeniably assists the trier of fact in ascertaining the truth.

MAINE CHIEFS OF POLICE ASS'N, GENERAL ORDER, No.2-23A (2005), http://www.nacdl.org/sl_docs.nsf/freeform/MERI_attachments/$FILE/ME_Police_Recording.pdf.

[42] ME. REV. STAT. ANN. tit. 25, § 2803-B(3).

[43] *See id.* §§ 2803-B, C.

[44] *See generally* § 2803-B.

consequence is a relatively minor civil penalty incurred by the police agency that failed to record.[45] Also, there are no specified exceptions to the recording requirement that appear in other states, such as statements made during routine booking questions, spontaneous statements, and inoperable equipment.[46] It would seem that each police agency has substantial latitude to develop its own standards. Among the states surveyed, Maine's provisions are among the least stringent regarding requirements and consequences.

D. Missouri

[16] Interestingly, passage of the Missouri statute is largely due to a committee of prosecutors and law enforcement officials who, concerned about the potential sanctions for non-recording as seen in other jurisdictions, decided to be proactive and preempt any legislative or court action by drafting legislation.[47] This committee, while recognizing the importance of recording interrogations, feared that a failure to act could result in either the legislature or a state court creating an exclusionary rule similar to ones found in other jurisdictions.[48] In Missouri, there are no significant penalties for failing to record a custodial interrogation.[49]

[17] Missouri requires that a member of law enforcement electronically record the questioning of a person suspected of committing certain serious offenses (such as murder, rape, and kidnapping), under circumstances

[45] *Id.* § 2803-C.

[46] *See generally id.* § 2803-B.

[47] *See generally* Eric G. Zahnd, *Missouri's Experience With Recorded Interrogation Legislation: Prosecutors Lead Effort to Pass Sensible Law*, 43 PROSECUTOR 36 (2009).

[48] *Id.* at 38 (discussing rules about the potential exclusion of non-recorded statements found in Alaska, Illinois, Minnesota, New Jersey, North Carolina, Texas and Washington, D.C.).

[49] *See* MO. REV. STAT. §§ 590.700(5)–(7) (2009).

traditionally defined as "custodial interrogation."[50] Missouri law also provides for situations in which law enforcement is not required to record an interrogation, including a request by the suspect not to record the interrogation, spontaneous statements, equipment failure, and emergencies.[51] In addition, the statute requires that every police agency create a written policy regarding the recording of such interrogations.[52]

[18] In Missouri, the statute specifically provides that a failure to comply with the provisions does not constitute grounds for suppression.[53] Moreover, a failure to comply may not be used as evidence during a criminal trial.[54] The only penalty provided in the statute allows the governor to withhold funds earmarked for the non-compliant agency, if the agency failed to act in good faith in its non-compliance.[55] In *State v. Blair*, the Missouri Court of Appeals first rejected the defendant's argument that a failure to record is a due process violation. [56] The court referred to the pending Missouri statute, and observed that "this new statute would not provide future defendants" a suppression remedy where there has been a failure to record under circumstances requiring it.[57] Therefore, the committee's action appeared to have had the impact it intended.

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[50] MO. REV. STAT. § 590.700(1) (defining custodial interrogation as "the questioning of a person under arrest, who is no longer at the scene of the crime, by a member of a law enforcement agency along with the answers and other statements of the person questioned.").

[51] *Id.* § 590.700(3).

[52] *Id.* § 590.700(4).

[53] *Id.* § 590.700(6).

[54] *Id.*

[55] *Id.* § 590.700(5).

[56] 298 S.W.3d 38 (Mo. Ct. App. 2009); *see also* 725 ILL. COMP. STAT. 5/103-2.1(e)(viii) (West 2009).

[57] *Blair*, 298 S.W.3d at 51–52.

E. Montana

[19] Montana requires the electronic recording of all custodial interrogations for felony offenses.[58] The recording must include the advice of rights.[59] Moreover, as with most of the state statutes, there exist a number of exceptions.[60] The list is fairly typical and consistent with the exceptions in other states. However, there is a significant escape hatch, which allows for the admission of the statement if the prosecution can establish by a preponderance of the evidence that "the statements have been made voluntarily and are reliable . . . ."[61] Thus, if the interrogation passes muster under the traditional tests of voluntariness and is otherwise reliable, the trial court *shall* admit it even though there is no recording.[62] However, even under these circumstances, the judge is required to give the jury a cautionary instruction regarding the failure of the police to record the interrogation, if requested by the defendant to do so.[63]

F. Nebraska

[20] Nebraska requires the electronic recording of custodial interrogations regarding certain designated felonies, such as sexual assault, kidnapping, and child abuse.[64] Nebraska defines "custodial interrogation" in a manner that specifically tracks the Fourth and Fifth Amendments of the United States Constitution, U.S. Supreme Court decisions, and similar

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[58] MONT. CODE. ANN. §§ 46-4-407 to 46-4-408 (2009). The statute states that "all custodial interrogations must be electronically recorded." *Id.* § 46-4-408. However, "custodial interrogation" is defined as "an interview conducted by a peace officer in a place of detention for the purpose of investigating a felony . . . ." *Id.* § 46-4-407.

[59] *Id.* § 46-4-408.

[60] *Id.* § 46-4-409.

[61] *Id.* § 46-4-409(1).

[62] *Id.*

[63] *Id.* §§ 46-4-408, 46-4-410.

[64] NEB. REV. STAT. § 29-4503(2) (2009).

provisions of the Nebraska Constitution.[65] Other provisions, including the definitions for "electronically record" and "place of detention," as well as the exceptions to the recording requirements, are similar to those found in many of the other jurisdictions.[66] The law requires the recording of the advice of rights and the waiver (if one is obtained), as do many of the other jurisdictions surveyed in this Article.[67]

[21] Nebraska significantly differs from other jurisdictions in that a failure to comply with the requirements of the statute requires the trial court to "instruct the jury that they may draw an adverse inference for the law enforcement officer's failure to comply with such section."[68]

[22] However, even if law enforcement personnel fail to record the statement, the court may permit its use for impeachment purposes if the statement was knowingly, intelligently, and voluntarily given.[69] A jury instruction is not required if the prosecution establishes by a preponderance of the evidence that a "reasonable exception" existed for not recording the statement.[70] Finally, consistent with *Miranda* jurisprudence, there is no "fruit of the poisonous tree" application as it

[65] *Id.* § 29-4502(1).

[66] *Id.* §§ 29-4502(2)–(4) (defining "electronically record" to mean "to record using an audio recording device, a digital recording device, or a video recording device" and defining a "place of detention" as "a police station, sheriff's office, troop headquarters, courthouse, county attorney's office, juvenile or adult correctional or holding facility, community correctional center, or building under the permanent control of law enforcement at which the person is in custody pursuant to the authority of a law enforcement officer." *Id.* §§ 29-4502(2)–(3)).

[67] *Id.* § 29-4501.

[68] *Id.* § 29-4504.

[69] *Id.* § 29-4504(1).

[70] *Id.* § 29-4505(2).

relates to derivative evidence, if the subsequently obtained evidence is otherwise admissible.[71]

G. New Mexico

[23] New Mexico law is broad in application because it only requires the electronic recording of custodial interrogations "when reasonably able to do so" and only when "the person is suspected of committing a felony offense."[72] Thus, law enforcement appears to have some flexibility in determining whether to record. Consistent with the requirements in other jurisdictions, law enforcement agencies are required to record the complete custodial interrogation, beginning with the advice of rights.[73] "Custodial interrogation" includes circumstances in which *Miranda* warnings are necessary.[74] Although recording is mandatory, a police officer's failure to comply can be excusable if "good cause" existed and the officer created a "contemporaneous written or electronic record" specifying the reasons for not recording.[75] Additionally, there are no penalty provisions for failure to record.[76] In fact, the final section of the statute provides that "this section shall not be construed to exclude otherwise admissible evidence in any judicial proceeding."[77]

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[71] *See id.* § 29-4506; *see also* United States v. Patane, 542 U.S. 630, 635–44 (2004); Oregon v. Elstad, 470 U.S. 298, 301–05 (1985); Michigan v. Tucker, 417 U.S. 433, 445 (1974).

[72] N.M. STAT. ANN. § 29-1-16(A), (D) (West 2009).

[73] *Id.* §§ 29-1-16(A)(1), (3).

[74] *See id.* § 29-1-16(H).

[75] *Id.* § 29-1-16(B) (stating examples of good cause including situations when the equipment was unavailable, where the equipment failed and replacement equipment was not available, or when the suspect refused to be recorded).

[76] *See generally id.* § 29-1-16.

[77] *Id.* § 29-1-16(I).

H. North Carolina

[24] In North Carolina, all police departments are required to electronically record custodial interrogations pertaining to homicide investigations.[78] A unique feature of the North Carolina statute is the requirement that the recording device capture *both* the suspect and the interrogator.[79] This statutory requirement would appear to be a reflection of studies that demonstrate that it is important to position the camera on both participants.[80] The result is a more fair and objective evaluation of the voluntariness of the interview. This is important because a failure to capture the interrogator may lend itself to allegations by the defendant that the interrogator intimidated him through off-camera gestures and facial expressions.[81]

[25] The enumerated exceptions are generally consistent with those found in other jurisdictions. They include spontaneous statements, statements made during routine questions asked during the processing of a suspect, statements made in open court, and statements made when the police are not cognizant that the person interviewed is not a murder suspect.[82] Finally, consistent with most other jurisdictions, the police department must keep the recording for one year after the exhaustion of all appeals, including habeas corpus proceedings.[83]

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[78] N.C. GEN. STAT. § 15A-211(d) (2009).

[79] *Id.* § 15A-211(c)(2).

[80] *See* Evelyn Mahoney, *Interrogations, Confessions, and Videotape*, 14 J. Politics & Society, 117, 123 (2003), *available at* http://www.helvidius.org/files/2003/2003_Mahony.pdf (citing G. Daniel Lassiter, et al., *Videotaped Confessions: Is Guilt in the Eye of the Camera?*, 33 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 189–254 (2001)); *see also* William Geller, Nat'l Inst. of Justice Research in Brief, *Videotaping Interrogations and Confessions* (Mar. 1993) (on file with author).

[81] Mahoney, *supra* note 80, at 123; *see* Geller, *supra* note 80.

[82] N.C. GEN. STAT. § 15A-211(g).

[83] *Id.* § 15A-211(h).

[26] A failure by law enforcement to record the entire interrogation does not preclude admissibility of a subsequent recorded portion of the interrogation; rather, this later recorded statement is open to a challenge as to its voluntariness and reliability.[84] In such circumstances, the prosecutor has the burden of establishing by "clear and convincing evidence that the statement was both voluntary and reliable and that law enforcement officers had good cause for failing to electronically record the interrogation in its entirety."[85] Good cause includes the recorded refusal by the suspect to have the statement recorded and unforeseen equipment failure.[86]

[27] If the state fails to record as required by the statute, the court is required to consider this in connection with a motion to suppress.[87] In addition, upon a challenge of the interrogation, the court must consider the failure to record as being involuntary or unreliable.[88] Finally, the court must instruct the jury that the failure of the police to record the interrogation is a factor they may consider regarding whether the statement was voluntary.[89]

I. Oregon

[28] Oregon's statute becomes effective in two stages.[90] As of July 1, 2010, recording is required for all custodial interrogations resulting from

[84] *Id.* § 15A-211(e).

[85] *Id.*

[86] *Id.* §§ 15A-211(e)(1)–(2).

[87] *Id.* § 15A-211(f)(1).

[88] *Id.* § 15A-211(f)(2).

[89] *Id.* § 15A-211(f)(3).

[90] *See* 2009 OR. LAWS ch.488 (relating to custodial interrogations; creating new provisions and amending OR. REV. STAT. § 165.540) (adopted June 24, 2009).

certain offenses, such as aggravated murder.[91] On July 1, 2011, the statute will extend the recording requirement to include all major felonies that carry a mandatory minimum sentence.[92] The statute does seem to require that the recording include the advice of rights.[93]

[29] Oregon's law contains many of the same exceptions found in other states' statutes. Some examples are: statements made during routine booking questions, spontaneous statements, statements provided to federal law enforcement, and equipment failure.[94] In what appears to be a unique exception, the statute does not apply to an "agency that employs five or fewer peace officers."[95] This exception is likely meant to relieve smaller agencies of the costs associated with purchasing the recording equipment and constructing the appropriate facilities.

[30] The Oregon statute prohibits courts from excluding a defendant's statement or dismissing criminal charges in spite of a violation of the recording requirements.[96] However, if the state cannot show by a preponderance of the evidence, the existence of an enumerated exception to the recording requirement, the court upon Defendant's request "shall instruct the jury regarding the legal requirement described in subsection (1) . . . and the superior reliability of electronic recordings . . . ."[97] Conversely, if the state records the statement, "the court may *not* give a cautionary jury instruction."[98]

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[91] *Id.*

[92] *Id.*

[93] *See id.* § 1(6).

[94] *Id.* §§ 1(2)(a)–(i), (7).

[95] *Id.* § 1(2)(g).

[96] *Id.* § 1(3)(b).

[97] *Id.* § 1(3)(a).

[98] *Id.* § 1(3)(c) (emphasis added).

J. Texas

[31] Under Texas law, "no oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless: (1) an electronic recording . . . is made of the statement."[99] As with several other states, such as Nebraska, authorities must record their efforts to advise an individual of his rights and the individual's waiver of those rights.[100] However, as with virtually every other jurisdiction mandating electronic recording of custodial interrogations, there is no requirement to record conversations with the police that occurred prior to a defendant's final statement.[101] The occurrence of a prior, unrecorded conversation may be important information for a judge, if asked to consider a possible Fifth Amendment violation, and a jury, since it is essential to view the final recorded statement in the context of what may have previously occurred. Additionally, signed written statements do not fall within the statute because the statute is limited to "oral or sign language statement[s]."[102]

[32] Interestingly, the statute also provides the following unique exception to the recording requirement:

> Subsection (a) of this section shall not apply to any statement which contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he states the offense was committed.[103]

[99] TEX. CODE CRIM. PROC. ANN. art. 38.22 §§ 3(a)–3(a)(1) (Vernon 2001).

[100] *Id.* § 3(a)(2); *see supra* Part II.F.

[101] *See* TEX. CODE CRIM. PROC. ANN. art. 38.22 § 3.

[102] *Id.* § 3(a); *see* GEORGE E. DIX & ROBERT O. DAWSON, 41 TEX. CRIM. PRAC. & PROC. § 13.161 (2d ed. 2001).

[103] TEX. CODE CRIM. PROC. ANN. art. 38.22 § 3(c).

Thus, if a murder suspect, while subject to police questioning, states that he left the murder weapon at an elementary school playground, the statement is admissible if the weapon was later found as a direct result of the suspect's statement. Furthermore, the statement is admissible even if law enforcement did not electronically record it, as required. In *Robertson v. State*, the defendant claimed that his statement, taken while in police custody, did not comply with Texas law because the police did not advise him of his right to terminate the interview at any time.[104] The suspect told the police about his involvement in the robbery, disclosed that he had used a stolen .38 caliber revolver and revealed where he had hidden the weapon.[105] Pursuant to the suspect's statement, police found the gun.[106] The court held that "[b]ecause the confession contains assertions of facts which were found to be true and which help establish the appellant's guilt, the confession [is] admissible . . . ."[107]

[33] Another unique feature of the statute concerns the use of an electronically recorded statement as part of a proceeding. The statute dictates that if an individual untruthfully testifies regarding the facts and circumstances concerning the recording, he "is presumed to have acted with intent to deceive" and is subject to a perjury prosecution.[108]

[34] Texas law is generally consistent with other states as it relates to those situations in which an electronic recording is not required (e.g.,

[104] 871 S.W.2d 701**,** 713 (Tex. Crim. App. 1993).

[105] *Id.* at 714.

[106] *Id.*

[107] *Id.*; *see also* Sendejo v. State, 953 S.W. 2d 443, 448–49 (Tex. App. 1997) (finding that the defendant's statements made to a police officer while in custody constituted facts later found to be true and were therefore admissible under the statute); Romero v. State, 800 S.W. 2d 539, 545 (Tex. Crim. App. 1990) (finding that the defendant's oral confession made to police while in custody did not contain facts later found to be true and was therefore inadmissible under the statute).

[108] TEX. CODE CRIM. PROC. ANN. art. 38.22 § 4.

voluntary statement).[109] Except as noted above, a failure by law enforcement personnel to adhere to the electronic recording requirements bars the admission of a statement, unless one of the enunciated exceptions applies.[110] Unlike other jurisdictions, which either have no penalty for a failure to comply (Missouri)[111] or require the giving of an adverse jury instruction (Nebraska),[112] Texas law provides that if the requirements are not met, "no oral or sign language statement of an accused made as a result of custodial interrogation *shall* be admissible against the accused . . . ."[113]

K. Wisconsin

[35] Wisconsin law requires the recording of custodial interrogation for all felonies.[114] There is no requirement to inform the suspect that the police are recording his statement.[115] The statutory exceptions are generally consistent with those found in other states (e.g., routine processing questions, spontaneous statements, equipment failure, exigent circumstances, etc.).[116]

[36] If the police failed to make a recording as required by the statute and the state fails to establish good cause for such failure upon request by the defendant, the court is required to instruct the jury that the state's policy is to make an audio or visual recording of a custodial

[109] *Id.* § 5.

[110] *See id.* § 3.

[111] *See supra* notes 49–51 and accompanying text.

[112] *See supra* note 68 and accompanying text.

[113] TEX. CODE CRIM. PROC. ANN. § 3(a) (emphasis added).

[114] WIS. STAT. ANN. §§ 968.073, 972.115 (West 2009).

[115] *Id.* § 968.073(3).

[116] *Id.* §§ 972.115(2)(a)(1)–(6).

interrogation.[117] The court will further instruct the jury that it "may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in the case."[118]

[37] In several federal prosecutions, the defendants sought to challenge the admissibility of their post-arrest statements because law enforcement, including state officers, failed to record their statements as required by state law.[119] The court rejected their arguments in each instance because there is no federal law enforcement counterpart to Wisconsin's mandatory recording provisions.[120]

II. JUDICIAL MANDATE

A. Alaska

[38] In the 1980 case of *Mallot v. State*, the Alaska Supreme Court instructed law enforcement officials that "as part of their duty to preserve evidence,[121] it is incumbent upon them to tape record, where feasible, any questioning and particularly that which occurs in a place of detention."[122] In 1985, the court mandated statewide recording of custodial interrogations.[123] In *Stephan v. State*, two defendants, Harris and Stephan,

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[117] *Id.* § 972.115(2)(a).

[118] *Id.*

[119] *See generally* United States v. Bruce, 550 F.3d 668 (7th Cir. 2008); United States v. Wilderness, 160 F.3d 1173 (7th Cir. 1998); United States v. Delaporte, 42 F.3d 1118 (7th Cir. 1994); United States v. Haeuser, No. 08-CR-56, 2008 WL 4642250 (E.D. Wis. Oct. 17, 2008).

[120] *Bruce*, 550 F.3d at 671–73; *Haeuser*, 2008 WL 4642250, at *10; *see Wilderness*, 160 F.3d at 1175–76; *Delaporte*, 42 F.3d at 1119–20.

[121] Mallot v. State, 608 P.2d 737, 743 n.5 (Alaska 1980) (citing Catlett v. State, 585 P.2d 553, 558 n.5 (Alaska 1978)).

[122] *Id*. (citing UNIF. R. CRIM. P. 243(b)).

[123] Stephan v. State, 711 P.2d 1156, 1162 (Alaska 1985).

were arrested on unrelated charges and interrogated by police officers at the stationhouse.[124] Harris was questioned twice and Stephan once.[125] Both made inculpatory statements.[126] In each case, the police had recording equipment present, that they used during a portion of the interviews.[127] The officers were unable to offer adequate explanations for their failure to record the interrogations in their entirety.[128]

[39] Both defendants moved to suppress their statements prior to trial and, as is usually the case, there were disputes between the police and the defendants as to what occurred in the interrogation rooms.[129] In both cases, the Alaska Court of Appeals found a violation of the *Mallot* rule but rejected the application of an exclusionary rule.[130] In *Stephan*, the court acknowledged that, based upon prior decisions, there was uncertainty regarding what should be the proper remedy when there is a failure to record.[131] Additionally, the Stephan court decided that "an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process under the Alaska Constitution, and that any statement thus obtained is generally inadmissible."[132] The recording must include the advice of rights.[133] This

[124] *Id.* at 1158.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.* One officer testified that it was "normal practice" to first obtain a statement and then record the confession. *Id.* at n.3.

[129] *Id.* at 1158.

[130] *Id.* at 1159.

[131] *See id.* at 1163.

[132] *Id.* at 1158.

[133] *Id.* at 1162.

recording requirement is necessary to help ensure the suspect's right to counsel, to protect against self-incrimination, and to protect the right to a fair trial.[134] This requirement only applies where the interrogation is "conducted in a place of detention, such as a police station . . ., where it is reasonable to assume that recording equipment is available . . . ."[135] The court issued a warning that it may extend the requirement of recording to other venues if it finds that law enforcement is conducting interviews in a manner designed to circumvent the requirement.[136]

[40] The court went on to hold that the exclusionary rule would apply "*only if the failure is unexcused*."[137] It recognized that it cannot provide an exhaustive list of excusable circumstances but does provide several examples, including equipment failure and a suspect's refusal to answer questions once informed the police would be recording the interrogation.[138] As such, the trial court is to consider each circumstance where the police did not record the interrogation.[139] The state will be required to satisfy the court pursuant to a preponderance of evidence standard as to why the failure of the police to record is excusable.[140]

[41] Finally, the court observed that rigid application of the exclusionary rule, when there has been a violation of the recording rule, would be unreasonable.[141] Failure to record a portion of the interrogation does not necessarily bar the use of the suspect's recorded statements "*if*

[134] *Id.* at 1164.

[135] *Id.* at 1165 n.33 (emphasis removed).

[136] *Id*. (emphasis removed).

[137] *Id.* at 1162 (emphasis in original).

[138] *Id.*

[139] *See id.*

[140] *Id.*

[141] *See id.* at 1165

the unrecorded portion of the interrogation is, by all accounts, innocuous."[142] For example, police officers may obtain statements, only portions of which are recorded, before a violation actually occurs. The full unrecorded statement is admissible despite a violation of the rule if there is no evidence "that the statement is inaccurate or was otherwise obtained improperly . . . ."[143]

B. Iowa

[42] Iowa encourages, but does not require, the police to record custodial interrogations.[144] In *Hajtic*, the court considered whether a seventeen-year-old suspect made his confession voluntarily, knowingly, and intelligently.[145] His fourteen-year-old sister translated conversations between the defendant's mother and the police.[146] Iowa's juvenile laws required that a parent consent to the juvenile's waiver of *Miranda* rights.[147]

[43] The court observed that the recording of the defendant's confessions assisted in the voluntariness determination.[148] The court noted that "[t]his case illustrates the value of electronic recording, particularly videotaping, of custodial interrogations."[149] The court added that "the videotape of Hajtic's confession and the *Miranda* warnings that preceded

[142] *Id*. (emphasis in original).

[143] *Id*.

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

[145] *See id.* at 451–52.

[146] *Id.*

[147] IOWA CODE ANN. § 232.11(2) (West 2010).

[148] *See Hajtic*, 724 N.W.2d at 454.

[149] *Id.*

it clearly show that he understood the *Miranda* warnings given to him and the questions asked."[150]

[44] The Alaska Supreme Court's adoption of an exclusionary rule and the Minnesota Supreme Court's mandate of electronic recording pursuant to its supervisory powers significantly influenced the court's decision.[151] In addition, the *Hajtic* court cited the ABA provisions endorsing electronic recording.[152]

C. Massachusetts

[45] Although Massachusetts does not require the police to electronically record custodial interrogations, the state's highest court

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[150] *Id.* at 456.

[151] *See id.* at 454–55 (citing Stephan v. State, 711 P.2d 1156, 1160 (Alaska 1985); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994)).

[152] 724 N.W.2d at 456. The ABA policy provides:

> RESOLVED, That the American bar Association urges all law enforcement agencies to videotape the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or where videotaping is impractical, to audiotape the entirety of such custodial interrogations.
>
> FURTHER RESOLVED, that the American Bar Association urges legislatures and/or courts to enact laws or rules of procedure requiring videotaping of the entirety of custodial interrogations of crime suspects at police precincts, courthouses, or other places where suspects are held for questioning, or, where videotaping is impractical, to require the audiotaping of such custodial interrogations, and to provide appropriate remedies for non-compliance.

Id. (quoting N.Y. COUNTY LAWYERS' ASSOC. AM. BAR ASS'N REPORT TO THE HOUSE DELEGATES 1 (2004), http://www.abanet.org/leadership/2004/recommendations/8a.pdf). The current ABA policy is available at http://www.abanet.org/leadership/2009/midyear/recommendations/108.pdf.

exacts a penalty when the police fail to do so.[153] In *Commonwealth v. DiGiambattista*, the court held that, under the totality of circumstances, the defendant's confession to arson was not voluntary.[154] In particular, the court was concerned about the interrogator's use of trickery, implied offers of leniency, and minimization.[155] The court held that where the police could have recorded the confession and failed to do so, the defendant may request a jury instruction indicating that a failure to record may be considered in determining whether the state has met its burden of establishing voluntariness beyond a reasonable doubt.[156]

[46] Despite its clear preference for recording, the court declined to impose a "rule of exclusion," given the existence of differing circumstances and problems.[157] The court cited several possible situations, including non-custodial interrogations conducted at a police station and non-custodial interrogations that turn into custodial interrogations.[158] In addition, any recording requirement would have to allow for justifiable failures to record, as well as a situation in which the suspect insists that as

[153] Commonwealth v. Diaz, 661 N.E. 2d 1326, 1328 (Mass. 1996).

[154] 813 N.E.2d 516, 528; *see also* SULLIVAN, *supra* note 11, at 6 n.11. *See generally* Commonwealth v. Dagley, 816 N.E.2d 527 (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."

[155] *See DiGiambattista*, 813 N.E.2d at 523.

[156] *Id.* at 518 ("[T]he admission in evidence of any confession or statement of the defendant that is the product of an unrecorded custodial confession, or an unrecorded interrogation conducted at a place of detention, will entitle the defendant, on request, to a jury instruction concerning the need to evaluate the alleged statement or confession with particular caution.").

[157] *See id.* at 534.

[158] *Id.* at 532.

a precondition to an interview, he does not want the police to record his interrogation.[159]

D. Minnesota

[47] In *Minnesota v. Scales*, the state's highest court considered whether a defendant had a due process right to have his complete custodial interrogation recorded under the Minnesota Constitution.[160] As an alternative route, the court evaluated whether it could issue a mandate requiring recordation based upon its supervisory powers.[161] As part of its analysis, the court reiterated its clear preference that recording a suspect's statements to the police would substantially aid lower courts in resolving what took place in the interrogation room.[162] The failure of law enforcement to do so troubled the court.[163]

[48] Despite the court's clear predilection and earlier warnings, the police in *Scales* interrogated the defendant, who was a suspect in a murder, for approximately three hours and did not record it.[164] Thereafter, the interrogation continued, but in a more formal question and answer session.[165] Police recorded the second interrogation.[166] Before trial, the

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[159] *Id.* The last two circumstances consistently appear as justifiable excuses for a failure to record.

[160] 518 N.W.2d 587, 589 (Minn. 1994).

[161] *Id.*

[162] See *id.* at 591.

[163] *See*, *e.g.*, State v. Robinson, 427 N.W.2d 217, 224 n.5 (Minn. 1988). In *State v. Pilcher*, the court "urge[d] . . . law enforcement professionals [to] use those technological means at their disposal to fully preserve those conversations and events preceding the actual interrogation." 472 N.W.2d 327, 333 (Minn. 1991). A failure to do so would cause the court to "look with great disfavor upon any further refusal to heed these admonitions." *Id.*

[164] State v. Scales, 518 N.W.2d 587, 590 (Minn. 1994).

[165] *Id.*

defendant challenged the truthfulness of the officers' testimony, as well as the adequacy of his *Miranda* warnings and his ensuing waiver.[167] The trial court rejected his argument and declined to rule whether the failure to record was a violation of the state's Constitution.[168]

[49] In deciding that recording a suspect's statement is required, the Minnesota Supreme Court looked favorably upon the Alaska Supreme Court's decision in *Stephan v. State*, which held that the failure by the police to record a suspect's custodial interrogation was a due process violation under the state Constitution.[169]

E. New Hampshire

[50] In *State v. Barnett,* the defendant's interrogation was in connection with a sexual assault.[170] However, police only recorded a portion of the interrogation.[171] Initially, the defendant denied molesting the young girls, but after forty-five minutes, he admitted to the assault.[172] Thereafter, the defendant agreed to repeat his admissions for recording purposes.[173] On appeal, he claimed the trial court erred in admitting the recorded

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[166] *Id.* at 590.

[167] *Id.*

[168] *Id.*

[169] The court also cited the Model Code of Pre-Arraignment Procedure §130.4(3) and the Uniform Rule of Criminal Procedure, both of which require the recording of custodial interrogations conducted at detention facilities. *Id.* at 591–92 (stating that the Court "chooses not to determine at this time whether under the Due Process Clause of the Minnesota Constitution a criminal suspect has a right to have his or her custodial interrogation recorded," but requiring that all such questioning to be electronically recorded); *see Stephan*, *supra* notes 123–25 and accompanying text.

[170] 789 A.2d 629, 630 (N.H. 2001).

[171] *Id.* at 631.

[172] *Id.* at 630–31.

[173] *Id.* at 631.

interrogation because it did not include his prior exculpatory statements.[174] He argued that this was a violation of his due process rights under both the New Hampshire and the federal Constitution.[175]

[51] The Supreme Court of New Hampshire disagreed.[176] The court began its analysis by looking at two other states that considered this issue. The only state to require recordation of custodial interrogations as a due process right is Alaska.[177] The court declined to follow Alaska's path and instead looked to the Minnesota line of reasoning, where that court held that a suspect possesses no due process right under the Minnesota Constitution to have his or her custodial interrogation recorded.[178] Consequently, the New Hampshire court invoked its supervisory powers by requiring recordation of all custodial interrogations.[179] The state's failure to do so results in the inadmissibility of the recording of the interrogation.[180]

[52] The *Barnett* court carved out a decision that cuts between these two states. Initially, it held that the advice of rights and waiver need not be recorded.[181] In addition, the police are not required to record all custodial interrogations.[182] Rather, it held that if law enforcement decides to record

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[174] *Id.*

[175] *Id.*

[176] *Id.* at 632.

[177] *Id*. at 631–32; *see* Stephan v. State, 711 P.2d 1156, 1162 (Alaska 1985).

[178] *Barnett*, 789 A.2d at 632; *see* Minnesota v. Scales, 518 N.W.2d 587, 592 (Minn. 1994).

[179] *Barnett*, 789 A.2d at 632–33.

[180] *Id.*

[181] *Id.* at 632.

[182] *Id.*

a suspect's interrogation, it must record the *complete* interrogation.[183] The penalty for failing to do so is the exclusion of the entire recorded statement.[184] However, unlike the rules in Alaska and Minnesota, "where the incomplete recording of an interrogation results in the exclusion of the tape recording itself, evidence gathered during the interrogation may still be admitted in alternate forms, subject to the usual rules of evidence."[185] Thus, presumably, while the state would be prohibited from introducing a partially recorded interrogation, the prosecution could still have the officer testify as to what the defendant said in the interrogation room being a non-hearsay statement.[186]

III. RULE OF EVIDENCE

[53] Indiana's recording rule requires that law enforcement electronically record custodial interrogations for all felonies.[187] However, this requirement came about through an order of the Indiana Supreme Court amending Rule of Evidence 617.[188] Rule 617 requires recordation of all custodial interrogations occurring in a place of detention, unless there is the existence of an enumerated exception.[189] The Rule tracks the

[183] *Id.*

[184] *Id.* at 632–33.

[185] *Id.*

[186] *See* N.H. R. EVID. 801(d)(2) (2009).

[187] IND. R. EVID. 617 (effective Jan. 1, 2011), http://www.in.gov/ilea/files/Evidence_Rule_617.pdf.

[188] RANDALL T. SHEPARD, CHIEF JUSTICE OF IND., ORDER AMENDING RULES OF EVIDENCE, No. 94S00-0909-MS-4 (2009), http://www.in.gov/ilea/files/Evidence_Rule_617.pdf. Pursuant to the request of the Marion County Prosecutor's Office and the Indiana Metropolitan Police Department the rule "shall only apply to statements made on or after January 1, 2011. *Id.*

[189] IND. R. EVID. 617(a) (effective Jan. 1, 2011), http://www.in.gov/ilea/files/Evidence_Rule_617.pdf.

traditional definitions of "electronic recording," "custodial interrogation," and "place of detention."[190]

[54] The failure to record results in suppression of the statement, unless the prosecutor can establish by clear and convincing evidence the existence of an enumerated exception.[191] The exceptions are those typically found in the other jurisdictions and include statements made during booking, a suspect who agrees to answer questions only if there is no recording, malfunctioning equipment where there is no bad faith, and spontaneous utterances.[192] In addition, recording is not required where the officer reasonably believes that the suspect's questioning is in regards to non-felonious conduct.[193] The Rule does allow for non-recording where there exists "substantial exigent circumstances."[194] There are no examples of substantial exigent circumstances provided by the Rule.[195]

IV. COURT RULE

A. Maryland

[55] Maryland's requirements are very limited and are contained in its criminal procedure code.[196] The statute merely provides that where a law enforcement unit maintains rooms capable of electronic recording, they should make "reasonable efforts" to record custodial interrogations in cases involving murder, rape, and certain sexual offenses.[197] It is

[190] *Id.* at 617(b).

[191] *Id.* at 617(a).

[192] *Id.*

[193] *Id.* at 617(a)(5).

[194] *Id*. at 617(a)(7).

[195] *See id.*

[196] *See* MD. CODE ANN., CRIM. PROC. § 2-402 (West 2009).

[197] *Id.*

essentially a policy statement; none of the requirements or consequences found in many of the other statutes exists. For example, there are no penalties or consequences if the police fail to record a murder suspect's custodial interrogation.[198]

B. New Jersey

[56] In 2005, New Jersey adopted a court rule that requires the recording of all custodial interrogations in a place of detention.[199] The court rule is generally consistent with the statutory requirements promulgated in other states. For example, it is limited to enumerated felonies such as murder, kidnapping, and criminal sexual contact.[200] In addition, the exceptions are similar to those found in other jurisdictions.[201] They include routine questioning, spontaneous utterances, a suspect's requirement that he will only answer questions absent a recording, and interrogations conducted out-of-state.[202] The state has the burden of establishing by a "preponderance of the evidence" the existence of an exception.[203] These enumerated exceptions include circumstances where the suspect is being interviewed for an offense that does not require recordation and situations where the police are unaware the individual being interviewed has committed an offense that requires recordation. [204]

[57] Procedurally, the state has the burden of establishing an exception by a "preponderance of the evidence" if it intends to use an unrecorded

[198] *See id.*

[199] N.J. CT. R. 3.17.

[200] *Id.* at 3.17(a).

[201] *Id.* at 3.17(b); *see*, *e.g.*, *supra* note 192 and accompanying text.

[202] N.J. CT. R. at 3.17(b)(i)–(vii).

[203] *Id.* at 3.17(b).

[204] *Id.* at 3.17(b)(vi)–(vii).

statement.[205] The state also must file a "notice of intent" specifying when and where the unrecorded statement occurred and which applicable exception(s) it is relying upon.[206] Additionally, if requested by the defendant, the state must provide the names and addresses of the witnesses it intends to call to establish one of the specified exceptions.[207]

[58] The penalty for the failure to follow the rule is not necessarily suppression of the statement.[208] Rather, it is only a factor for the court to take into consideration in determining the admissibility of the statement, an issue for the jury as to whether the defendant made the statement, and what weight, if any, to give to the statement.[209] If a statement should have been recorded, the defendant may request a cautionary instruction, which the court is obligated to give.[210]

V. MODEL LEGISLATION

A. National Conference of Commissioners on Uniform State Laws

[59] The Electronic Recordation of Custodial Interrogations Act ("Act") requires the electronic recording of the entire custodial interrogation, including the advice of rights.[211] The Act requires the recording of any "statement" made in response to police interrogation.[212]

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[205] *Id.* at 3.17(a)–(b).

[206] *Id.* at 3.17(c).

[207] *Id.*

[208] *See id.* at 3.17(d).

[209] *Id.*

[210] *Id.* at 3.17(e).

[211] NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, ELECTRONIC RECORDATION CUSTODIAL INTERROGATION ACT § 3(a) (2009) (Interim Draft), http://www.law.upenn.edu/bll/archives/ulc/erci/2009nov_interim.pdf.

[212] *See id.* § 2(1).

The Act defines "statement" broadly, including both oral and written statements.[213] There is no requirement that the suspect know that the police are recording her statement.[214] Many of the specified exceptions are similar to those found in the jurisdictions previously summarized (e.g. exigent circumstances, spontaneous statements, routine booking questions, a refusal by the suspect to allow police to record the statement, and equipment malfunction).[215]

[60] If interrogation occurs for an offense not covered by the Act, no recording is required.[216] However, if during the questioning there is reason to believe the responses by the suspect relate to a covered offense, the officer should try to record the covered statements.[217] If the state intends to rely on a covered exception, it must demonstrate by a "preponderance of the evidence" why the police failed to record the statement.[218] In addition, if the police failed to make a recording in circumstances where they should have, the law enforcement officer may prepare a report explaining his or her reasons.[219] The state must provide the defendant with notice if it intends to rely upon a recognized exception for not recording the statement.[220]

[61] There are various remedies for a failure to record when the state has failed to satisfy its burden regarding an applicable exception.[221] The

[213] *Id.* § 2(6).

[214] *Id.* § 3(c).

[215] *Id.* §§ 4–9.

[216] *Id.* § 8(1).

[217] *Id.*

[218] *Id.* § 10.

[219] *Id.* § 11(a).

[220] *Id.* § 12(a).

[221] *Id*. § 13.

list of remedies includes a jury instruction, if requested by the defendant.[222] The Act also allows the admission of expert testimony "about factors that may affect the voluntariness . . . of a statement made during a custodial interrogation . . . ."[223] The defendant must first establish by a preponderance of the evidence that there are factors, not readily apparent, which might influence the voluntariness and reliability of the statement.[224] Several examples include age, mental acuity, and interrogation technique.[225] No other jurisdiction surveyed included a similar provision.

B. Innocence Project

[62] The model legislation proposed by the Innocence Project requires law enforcement to record all custodial interrogations when they occur in places of detention.[226] This recordation requirement encompasses both oral and written statements.[227] It also requires the focus of the camera to be on both the suspect and the interrogator.[228] A failure to record results in a presumption of inadmissibility that the state can overcome if the court finds, for example, that the defendant made the statement voluntarily, and it is reliable.[229] Similar to other jurisdictions, a recording is not required if

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[222] *Id.* ("Those instructions must, at a minimum, explain to the jury that the police did not electronically record the entire interrogation process, though the law required them to do so, and that the jury is therefore, deprived of the most reliable and complete evidence of what was said and done by each of the participants.").

[223] *Id.* § 13(c).

[224] *Id.*

[225] *Id.*

[226] INNOCENCE PROJECT, AN ACT DIRECTING THE ELECTRONIC RECORDING OF CUSTODIAL INTERROGATION §§ 2–3 (2008), http://www.innocenceproject.org/docs/09_model_legislation/Electronic_Recording_Custodial_ Interrogations_2009.pdf.

[227] *Id.* § 2(D).

[228] *Id.* § 3(C).

[229] *Id.* §§ 4, 5(B).

the person refuses to be recorded.[230] However, the refusal must occur after consulting with counsel.[231]

[63] In addition, although many jurisdictions carve out exceptions for statements made to a grand jury or in court, the Act requires the court to find by "clear and convincing evidence" that statements in these venues were made voluntarily.[232] Another unusual feature is a "monitoring requirement."[233] Under that requirement, the appropriate state committee must monitor compliance with the recording requirements through documents submitted by the court and prosecutor.[234] The court and prosecutor must submit these forms for cases where recorded conversations were introduced into evidence, unrecorded interrogations were introduced into evidence, or a guilty plea followed an interrogation.[235] Finally, the state committee must keep the recordings until the conclusion of all appeals, including habeas corpus proceedings.[236]

VI. PROPOSED LEGISLATION

A. Michigan

[64] In 1998, the Michigan Court of Appeals in *People v. Fike* rejected the argument that failure by the police to record a post-arrest statement constituted a violation of the State's Due Process Clause.[237] The court revisited the issue in 2004, and again rejected the defendant's argument

[230] *See id.* § 5.

[231] *Id.* § 5(D)(2).

[232] *Id.* § 6.

[233] *Id.* § 7.

[234] *Id.* § 7(A).

[235] *Id.*

[236] *Id.* § 8(B).

[237] 577 N.W.2d 903, 906–07 (Mich. Ct. App. 1998).

that law enforcement should be required to record custodial interrogations.[238]

[65] In 2007, Michigan House introduced a bill that would require law enforcement to electronically record custodial interrogations in major felony cases.[239] The bill punishes violations by excluding any evidence obtained absent a showing of "good cause" for not recording the interrogation.[240] The bill is still pending.[241]

[66] In 2006, the Michigan State Bar created a "Custodial Interrogation Recording Task Force."[242] Its purpose is as follows:

> [t]he State Bar of Michigan has appointed a Custodial Interrogation Recording Task Force. The group consisting of State Bar members in the criminal defense, prosecution, judicial and law enforcement communities is charged with developing and promoting legislative, court rule, and funding changes that advance the use of audio and video electronic recording of custodial interrogations. The need for the task force arises from concerns about the wrongful convictions of innocent people, and the amount of time spent at trial and on appeal litigating who said and did what during an interrogation.[243]

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[238] People v. Geno, 683 N.W.2d 687, 690 (Mich. Ct. App. 2004).

[239] H.B. 4909, 2007-2008 Sess. § 7(1) (Mich. 2007), *available at* http://www.legislature.mi.gov/documents/2007-2008/billintroduced/House/pdf/2007-HIB-4909.pdf.

[240] *Id.* § 7(4).

[241] H.B. 4909, 2007-2008 Sess. § 7(1) (Mich. 2007).

[242] State Bar of Michigan, *New Custodial Interrogation Recording Task Force Formed*, May 16, 2006, http://www.michbar.org/news/releases/archives06/interrogation_taskforce.cfm.

[243] *Id.*

[67] The current draft of the proposed bill is generally consistent with the requirements of several other jurisdictions. It requires the recording of custodial interrogations in "major felony" cases, which include crimes punishable by life imprisonment and crimes for which the statutory maximum exceeds twenty years.[244] Law enforcement is required to record the complete interrogation, including *Miranda* warnings.[245] There is no requirement that the individual have knowledge of or consent to the recording.[246]

[68] A failure to record does not preclude the admissibility of a statement if the court finds there was "good cause."[247] If the court does not find good cause for the failure to record, the statement might nevertheless be admissible; however, the court must instruct the jury that law enforcement failed to record the statement as required by the statute.[248]

CONCLUSION

[69] The electronic recording of a suspect's custodial interrogation has greatly benefited the criminal justice system on both sides of the aisle. The results have brought increased integrity to events taking place in police interrogation rooms. The system benefits where a record of the process for obtaining a suspect's statement, including the advice of rights, is preserved.

[70] From my experience, prosecutors and law enforcement are generally supportive of mandatory recording. When recording of an interrogation occurs, law enforcement is better able to question a suspect

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[244] H.B. 5763, 2009-2010 Sess. § 7(D) (Mich. 2010), *available at* http://www.legislature.mi.gov/documents/2009-2010/billintroduced/House/pdf/2010-HIB-5763.pdf.

[245] *Id.* § 8(1).

[246] *Id.*

[247] *Id.* § 9(1).

[248] *Id.* § 9(2).

and develop investigative leads because it greatly reduces the need to take copious notes. A recording requirement also enhances the quality of a prosecutor's case. Recording custodial statements necessarily results in more convictions through both guilty pleas and trials. A jury's ability to see and hear the defendant is very powerful incriminatory evidence. Better community relations and a reduction in lawsuits against police officers are indirect but significant benefits.

[71] From the defense perspective, mandatory recording better protects the rights of suspects, especially if the recording requirement includes the advice of rights. It eliminates the swearing contests – typically won by the prosecution – that frequently accompany motions to suppress. It also reduces the number of false confessions and deters police misconduct.

[72] From a judicial perspective, a recording requirement allows a court to evaluate more carefully whether the police adequately advised a suspect of his or her rights, as well assess the voluntariness of the statement. It also reduces the workload of trial and appellate courts in resolving confession-related issues. As one judge in the Eastern District of Michigan observed in connection with a motion to suppress a confession:

> [a]fforded the Court the benefit of watching or listening to a videotaped or audiotaped statement is invaluable; indeed, a tape-recorded interrogation allows the court to more accurately assess whether a statement was given knowingly, voluntarily, and intelligently.[249]

[73] As a former federal prosecutor, I tried, unsuccessfully, to create relevant guidelines for the federal law enforcement agencies in the Eastern District of Michigan. The district gave several reasons for rejecting those guidelines, including concerns that imposing such a requirement would reduce the number of confessions, be overly expensive, and otherwise would inhibit law enforcement. Those reasons have not been borne out in jurisdictions that require recording.

[249] United States v. Lewis, 355 F. Supp. 870, 873 (E.D. Mich. 2005).

[74] Although the states have enacted various penalties for failing to record an interrogation, suppression of the statement, absent a showing of good cause, is the most effective remedy. By contrast, a presumption of involuntariness is not consistent with prevailing authority and erects too high a barrier for the admissibility of a non-recorded statement. Unfortunately, Congress has not enacted a recording requirement for federal law enforcement. Without further federal or state action, this beneficial tool for law enforcement cannot be realized.

Jurisdiction	Statute	Court Discretion	Rule of Evidence	Court Rule	Included Offenses	Potential Penalties for Failure to Record
AK		X			Not indicated	Statement inadmissible if unexcused
DC	X				Crimes of Violence[250]	Rebuttable presumption that the statement was involuntary
IL	X				Murder	Statements presumed to be inadmissible
IA		X			Not specified	None specified
IN			X		All felonies	Statements are inadmissible absent clear and convincing evidence of a listed exception
ME	X				Serious crimes[251]	No consequences as it concerns admissibility of the statement
MD				X	Murder, rape, and certain other sexual crimes	None specified
MA		X			Not specified	No rule of exclusion but the defendant may request a jury instruction
MA		X			Not specified	No rule of exclusion but the defendant may request a jury instruct

[250] The District of Columbia defines a "crime of violence" as "aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt or conspiracy to commit any of the foregoing offenses." D.C. CODE ANN. § 23-1331(4) (2009).

[251] Maine does not define "serious crimes." *See* ME. REV. STAT. ANN. tit. 25, § 2803-B(1)(K) (2009).

Jurisdiction	Statute	Court Discretion	Rule of Evidence	Court Rule	Included Offenses	Potential Penalties for Failure to Record
MN		X			Not specified	Statement inadmissible if the violation is "substantial"[252]
MO	X				Murder and other serious specified crimes[253]	No rule of exclusion. The Governor may withhold funds if the agency is not in compliance
MT	X				Felonies	No rule of exclusion but the defendant may request a Jury instruction
NE	X				Murder and other specified felonies	No rule of exclusion but the defenda jury instruction
NH		X			Not specified	No requirement to record custodial interrogations, however, if do so, must record the entire interrogation otherwise it is inadmissible.
NJ				X	Murder and other specified felonies	No rule of exclusion but the defenda jury instruction

[252] The Minnesota Supreme Court specifically avoided specifying when a failure to record would be "substantial." "This determination is to be made by the trial court after considering all relevant circumstances bearing on substantiality, including those set forth in . . . the Model Penal Code of Pre-Arraignment Procedure." State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994). Quoting from the Model Penal Code, several of these factors include the unlawfulness of the conduct, whether it was willful, the influence of the violation on the defendant's decision to make a statement, deterrence and whether there are alternate remedies other than exclusion of the statement. *Id*. at n.5.

[253] Missouri requires the recording of "[a]ll custodial interrogations of persons suspected of committing or attempting to commit murder in the first degree, murder in the second degree, assault in the first degree, assault of a law enforcement officer in the first degree, domestic assault in the first degree, elder abuse in the first degree, robbery in the first degree, arson in the first degree, forcible rape, forcible sodomy, kidnapping, statutory rape in the first degree, statutory sodomy in the first degree, child abuse, or child kidnapping shall be recorded when feasible." MO. REV. STAT. § 590.701.2(2) (2009).

Jurisdiction	Statute	Court Discretion	Rule of Evidence	Court Rule	Included Offenses	Potential Penalties for Failure to Record
NM	X				Felonies	No rule of exclusion
NC	X				Murder	Failure to comply may result in the inadmissibility of the statement. The defendant may request a jury instruction which the court must give
OR	X				Initially, aggravated murder and then other offenses carrying mandatory minimum sentences	The court cannot dismiss charges or otherwise exclude the admissibility of the statement. The defendant may request a jury instruction, which the court is required to give
TX	X				All crimes	The statement is inadmissible if obtained as a result of custodial interrogation
WI	X				All felonies	No rule of exclusion but the defendant may request a Jury instruction