D R A F T

FOR APPROVAL

UNIFORM ELECTRONIC RECORDATION OF CUSTODIAL INTERROGATIONS ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-NINETEENTH YEAR
CHICAGO, ILLINOIS
JULY 9 - JULY 16, 2010

UNIFORM ELECTRONIC RECORDATION OF CUSTODIAL INTERROGATIONS ACT

WITH PREFATORY NOTE AND COMMENTS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

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PREFATORY NOTE

Electronic recording of the entire process of custodial interrogation is likely to be a major boon to law enforcement, improving its ability to prove its cases while lowering overall costs of investigation and litigation. Such recording will also, however, improve systemic accuracy, fairness to the accused and the state alike, protection of constitutional rights, and public confidence in the justice system. Recent attention to the benefits of electronic recording has, however, been prompted significantly by concerns raised by law enforcement and numerous other system participants and observers about the risks of convicting the innocent. *See* RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 296-305 (2008) (summarizing the benefits of recording).

In just the past decade, numerous cases of wrongful convictions have garnered the attention of the media, prosecutors, defense counsel, legislators, and law reformers. Error was proven in most of these cases by DNA evidence. But such evidence is not available in most cases. Other research has suggested, however, that similar, and perhaps greater, rates of wrongful conviction likely prevail in the run-of-the-mill cases where DNA evidence is never available. Social science studies of wrongful convictions have further revealed that one important contributing factor to a large percentage of the mistakes made—indeed perhaps one of *the* top contributing factors—is the admissibility at trial of a false confession. False confessions may often occur no matter how well-meaning the interrogating officer or how strong his or her belief in the suspect's guilt. Subtle flaws in interrogation techniques can elicit confessions by the innocent. Yet confessions are taken as such powerful evidence of guilt that prosecutors, jurors, and judges often fail to identify the false ones. The resulting wrongful conviction means not only that an innocent person may languish in prison or jail but also that the guilty offender goes free, perhaps to offend again. *See id.* at 291-96 (summarizing the history of the movement for electronic recording).

The need for improving police training in interrogation techniques that will reduce the risk of error and for improving prosecutor, jury, and judicial effectiveness in spotting mistakes based upon false confessions is thus great. Moreover, constitutional principles require exclusion of involuntary confessions and those taken without properly administering *Miranda* warnings, yet defense and police witnesses often tell very different tales about the degree of coercion involved in the interrogation process. This conflicting testimony sometimes results in judges or jurors believing the wrong tale, other times allowing for frivolous suppression motions wasting the court's time and impugning careful, professional, and honest police officers. *See id.* at 296-305.

Many academics have recommended, and several states have statutorily-mandated, electronic recording of the entire custodial interrogation process, from the start of questioning to the end of the suspect's confessing, as a way to solve these and related problems. For example, Illinois, the District of Columbia, Maine, Maryland, Nebraska, New Mexico, North Carolina, and Wisconsin have adopted mandatory recording laws for a variety of felony investigations. *See*

Thomas P. Sullivan and Andrew W. Vail, *The Consequences of Law Enforcement Officials' Failure to Record Custodial Interviews as Required by Law,* 99 NW. U. L. REV. 215, 216-7 (2009). Alaska, Massachusetts, and Minnesota have recording requirements imposed by judicial decision. *See id.* at 216-17. The New Jersey Supreme Court has likewise required recording, doing so via court rule, *see id.* at 217, as has the Indiana Supreme Court just recently. *See Order Amending [Indiana] Rules of Evidence, [Rule 617],* No. 94S00-0909-MS-4 (filed September 15, 2009) (requiring, subject to seven narrow exceptions, audio and video recording of custodial interrogations in all felony prosecutions). A significant number of state reviewing courts have declared that recording would have powerful benefits for the justice system but have declined to impose that obligation absent legislative action. *See id.* at 216-17 n.8.

The military has also begun embracing the recording ideal. For example, the United States Naval Criminal Investigative Service (USNCIS) Manual now contains General Order 00-0012, which requires video or audio recording of suspect interrogations of crimes of violence where the interrogation takes place in a Naval Criminal Investigative Service facility. *See* U.S. Naval Criminal Investigative Service, General Order 00-0012, *Policy Change Regarding Recording of Interrogations.* Similarly, in October 2009, the Commission on Military Justice, known as the Cox Commission, released a report concluding that principles of justice, equity, and fairness require "military law enforcement agencies to videotape the entirety of custodial interrogations of crime suspects at law enforcement offices, detention centers, or other places where suspects are held for questioning, or, where videotaping is not practicable, to audiotape the entirety of such custodial interrogations." *See* Thomas P. Sullivan, *Departments that Currently Record a Majority of Custodial Interrogations* 8 n.25 (December 2009) [hereinafter Sullivan, *Departments that Record*]. The Air Force Judge Advocate General also declared that it would start recording all subject interviews as of October 2009, though there are limited exceptions, but the optional recording of witness and victim interviews. *See id.* at n. 25.; Judge Advocate General On-line News Service, August 26, 2009. Furthermore, the National Defense Authorization Act for Fiscal Year 2010, in Section 1080, requires that "each strategic intelligence interrogation" (one conducted in a "theater-level detention facility") of persons in the custody of, or under the control of, the Department of Defense (DOD) shall be "videotaped or otherwise electronically recorded." The Section requires the Judge Advocate General to develop implementing guidelines. *See* Sullivan, *Departments that Record, supra,* at n.26.

A significant number of police departments have also voluntarily adopted the recording solution. *See* Sullivan and Vail, *supra.* at 228-34 (listing all such departments, a list encompassing departments in forty states who have voluntarily adopted recording; when the states having mandated recording are added, all fifty states plus the District of Columbia have at least one police department engaged in recording in at least some cases).Yet the vast majority of police departments still do not record. Moreover, there are wide variations among the state provisions and the voluntarily-adopted programs. Furthermore, some approaches promise to be more effective in protecting the innocent, convicting the guilty, minimizing coercion, and avoiding frivolous suppression motions than others. Additionally, the further spread of the recording process throughout states and localities has been slow when its promised benefits are great. A uniform statute may help to speed informed resolution of the recording issue. Thus the need for this Uniform Act for the Electronic Recording of Custodial Interrogations (UAERCI).

The Justifications for Electronic Recording

Three broad types of justifications have been offered for electronic recording of interrogations: promoting truth-finding, promoting efficiency, and protecting constitutional values. *See generally* LEO, *supra*, at 296-305 (elaborating on the justifications noted here).The list below summarizes the major ways in which electronic recording furthers these goals.

A. Promoting Truth-Finding

Truth-finding is promoted in seven ways:

1. *Reducing Lying*: Neither defendants nor police are likely to lie about what happened when a tape recording can expose the truth.

2. *Compensating for Bad Witness Memories*: Witness memories are notoriously unreliable. Video and audio recording, especially when both sorts of recording are combined, potentially offer a complete, verbatim, contemporaneous record of events, significantly compensating for otherwise weak witness memories.

3. *Deterring Risky Interrogation Methods*: "Risky" interrogation techniques are those reasonably likely to elicit false confessions. Police are less likely to use such techniques when they are open for public scrutiny. Clearly, harsh techniques that police understand will elicit public and professional disapproval, even if only rarely used today, are ones that are most likely to disappear initially. But more subtle techniques creating undue dangers of false confessions of which the police may indeed be unaware will, over time, fade away if exposed to the light of judicial, scientific, and police administrator criticism—criticism that electronic recording of events facilitates. Electronic recording thus most helps precisely the vast bulk of interrogators, who are hardworking, highly professional officers, to improve the quality of their interrogations and the accuracy of any resulting statements still further.

4. *Police Culture*: Taping enables supervisors to review, monitor, and give feedback on detectives' interrogation techniques. Over time, resulting efforts to educate the police in the use of proper techniques, combined with ready accountability for errors, can help to create a culture valuing truth over conviction. Police tunnel vision about alternative suspects and insistence on collecting whatever evidence they can to convict their initial suspect (the "confirmation bias") have been shown to be major contributors to wrongful convictions. Tunnel vision and confirmation bias are not the result of police bad faith. To the contrary, these cognitive patterns are common to all humans but can be amplified by stress, time pressure, and institutional cultures that encourage zealous pursuit of even the loftiest of goals – factors often present in law enforcement organizations. Moreover, these cognitive processes work largely at a subconscious level, thus requiring procedural safeguards and internal organizational cultures that act as counterweights. A more balanced police culture of getting it right rather than just getting it done would be an enormously good thing.

5. *Filtering Weak Cases*: By permitting police and prosecutors to review tapes in a search for tainted confessions, prosecutions undertaken with an undue risk of convicting the

innocent can be nipped in the bud—before too much damage is done—because the tapes can reveal the presence of risky interrogation techniques that may ensnare the innocent.

6. *Factfinder Assessments:* Judges and juries will find it easier more accurately to assess credibility and determine whether a particular confession is involuntary or untrue if these factfinders are aided by recording, which reveals subtleties of tone of voice, body language, and technique that testimony alone cannot capture.

7. *Improving Detective Focus*: A detective who has no need to take notes is better able to focus his attention, including his choice of questions, on the interviewee if machines do the job of recording. Such focus might also improve the skill with which detectives can seek to discover truth by improving interrogation-technique quality.

There are also essential economic efficiency benefits to recording.

B. Promoting Efficiency

Efficiency is promoted in these four ways:

1. *Reduced Number of Suppression Motions*: Because the facts will be little disputed, the chance of frivolous suppression motions being filed declines, and those that do occur can be more speedily dispatched, perhaps not requiring many, or even any, police witnesses at suppression hearings.

2. *Improved Police Investigations*: The ability of police teams to review recordings can draw greater attention to fine details that might escape notice and enable more fully-informed feedback from other officers. Police can thus more effectively evaluate the truthfulness of the suspect's statement and move on to consider alternative perpetrators, where appropriate.

3. *Improved Prosecutor Review and Case Processing*: For guilty defendants, an electronic record enhances prosecutor bargaining power, more readily resulting in plea agreements. Prosecutors can more thoroughly prepare their cases, both because of the information on the tape and because of more available preparation time resulting from the decline in frivolous pretrial motions.

4. *Hung Juries Are Less Likely*: For guilty defendants who insist on trials, a tape makes the likelihood of a relatively speedy conviction by a jury higher, while reducing the chances that they will hang. The contrary outcome—repeated jury trials in the hope of finally getting a conviction—is extraordinarily expensive. But, as I now explain, videotaping not only saves money while protecting the innocent but also enhances respect for constitutional rights.

C. Protecting Constitutional Values

Constitutional values are protected in six primary ways:

1. *Suppression Motion Accuracy*: Valid claims of *Miranda*, Sixth Amendment right to

counsel, and Due Process voluntariness violations will be more readily proven, creating a disincentive for future violations, when such violations, should they occur, are recorded.

2. *Brady Obligations*: *Brady v. Maryland*, 373 U.S. 83 (1963), requires prosecutors to produce to the defense before trial all material exculpatory evidence. Some commentators argue that *Brady* does more than this: it implies an affirmative duty to *preserve* such evidence. Electronic recordings further this preservation obligation.

3. *Police Training*: Recordings make it easier for superiors to train police in how to comply with constitutional mandates.

4. *Restraining Unwarranted State Power*: Recordings make it easier for the press, the judiciary, prosecutors, independent watchdog groups, and police administrators to identify and correct the exercise of power by law enforcement.

5. *Race*: Racial and other bias can play subtle but powerful roles in altering who the police question and how they do so. Electronic recordings make it easier to identify such biases and to help officers avoid them in the future, difficult tasks without recordings precisely because such biases are often unconscious, thus operating outside police awareness.

6. *Legitimacy*: Recordings can help to improve public confidence in the fairness and professionalism of policing. By ending the secrecy surrounding interrogations, unwarranted suspicions can be put to rest, warranted ones acted upon. Enhanced legitimacy is a good in itself in a democracy, but it has also been proven to reduce crime and enhance citizen cooperation in solving it.

Key Concepts of the Proposed UAERCI

The UAERCI is organized into twenty-three sections. Section one merely contains the Act's title. Section two contains definitions. Section three mandates the electronic recording of the entire custodial interrogation process by law enforcement, leaving it to individual states to decide where and for what types of wrongs this mandate applies, as well as the means by which recording must be done. Concerning the "where," states must choose among no locational limitation, limiting the mandate to places of detention, or covering both places of detention and all other locations but varying the means by which recording must be done (audio and video at places of detention, only audio at other locations). Concerning the means – the how – states may choose to mandate only audio, audio and video, or, as just noted, audio and video at a place of detention, only audio elsewhere. As for the type of legal violation to which the electronic recording mandate applies, jurisdictions must choose among felonies, crimes, delinquent acts, or some combination. Moreover, each state must identify by section numbers to which specific violations within each chosen category the mandate applies.

The UAERCI thus permits states to vary the scope of the mandate based upon local variations in cost, perceived degree of need for different categories of criminal or delinquent wrongdoing, or other pressing local considerations. Nevertheless, combined audio and video recording remains the ideal, and the advantages of recording exist wherever custodial

interrogation occurs and for whatever criminal or delinquent wrong is involved. Therefore, states choosing less than the maximum scope permitted by the options offered in Section 3 remain free over time to expand that scope as transitional and other costs decline.

These mandates are further limited by Section two's definition of "custodial interrogation" as "questioning or other conduct by a law enforcement officer which is reasonably likely to elicit an incriminating response from an individual and occur[ring] when reasonable individuals in the same circumstances would consider themselves in custody." This definition largely matches that in *Miranda v. Arizona*, as that decision's meaning was understood by the United States Supreme Court at the time of this Act's drafting. However, the definition is still a statutory one, not expressly linked in its text to *Miranda,* because it is possible that *Miranda* will in the future be abandoned, or its meaning substantially altered, by future Court interpretation. Nevertheless, the close tracking to current understandings of the *Miranda* rule narrows the Act's scope while triggering the electronic mandate under circumstances that have been familiar to law enforcement for over four decades. Additionally, for clarity, Section three also expressly declares that it does not require the recording of spontaneous statements made outside the course of a custodial interrogation or in response to questions routinely asked during the processing of the arrest of an individual, though those situations do not constitute custodial interrogations under *current* post-*Miranda* case law.

Section four does not, however, require informing the individual being interrogated that the interrogation is being recorded. Section four exempts electronic recording of custodial interrogations from state statutory requirements, if any, that an individual consent to the recording of the individual's conversations.

Sections five through ten outline a variety of exceptions from the recording mandate. Section five creates an exception for exigent circumstances. Section six creates an exception where the individual interrogated refuses to participate if the interrogation is electronically recorded, though Section six does, if feasible, require the electronic recording of the interrogatee's refusal to speak if his statements are electronically recorded. Section seven excepts custodial interrogations conducted in other jurisdictions in compliance with their law. Section eight excepts custodial interrogations conducted when the interrogator reasonably believes that the offense involved is not one that the statute mandates must be recorded. Section nine excepts custodial interrogations from electronic recording where the law enforcement officer or his superior reasonably believes that electronic recording would reveal a confidential informant's identity or jeopardize the safety of the officer, the person interrogated, or another individual. Section ten creates an exception for equipment malfunctions occurring despite the existence of reasonable maintenance efforts and where timely repair or replacement is not feasible. Although a few of these "exceptions" outline circumstances that would likely not fit the definitions of "custody" or "interrogation," thus not requiring electronic recording in the first place, those exceptions are nevertheless included to resolve any ambiguity and to offer quick-and-easy guidance to specific situations that will aid law enforcement in readily complying with the Act.

Section eleven places the burden of persuasion as to the application of an exception on the prosecution by a preponderance of the evidence.. Section twelve requires the state to notify the defense of an intention to rely on an exception if the state intends to do so in its case-in-chief.

Section 13 outlines remedies for violation of the Act's requirement that the entire custodial interrogation process be electronically recorded – remedies that come into play, of course, only if no exceptions apply. Section 13(a) declares that the court shall consider failure to comply with the Act in ruling on a motion to suppress a confession as involuntary. This subsection does not mandate suppression for violation of the Act but merely mandates consideration of the relevance and weight of the failure to record by the trial judge in deciding whether to suppress on grounds of the involuntariness of the statement. Bracketed language extends this same approach to confessions that are "not reliable," even though they may be voluntary. If the judge admits the Act-violative confession, Section 13(b) mandates that the trial judge give a cautionary instruction to the jury.

Section 14 mandates that electronic recordings of custodial interrogations be identified, accessible, and preserved. Preservation must be done in the manner prescribed by local statutes or rules governing the preservation of evidence in criminal cases generally.

Section 15 requires each law enforcement agency (alternatively, in brackets, the "state agency charged with monitoring law enforcement's compliance with this act" or the "appropriate state authority") to adopt and enforce rules to implement this Act. Subsection (b) specifies a small number of matters that these rules must address, including (1) the manner in which an electronic recording of a custodial interrogations must be made; (2) the collection and review of electronic recording data, or the absence thereof, by superiors within the law enforcement agency; (3) the assignment of supervisory responsibilities and a chain of command to promote internal accountability; (4) a process for explaining noncompliance with procedures and imposing administrative sanctions for failures to comply that are not justified; (5) a supervisory system expressly imposing on specific individuals a duty to ensure adequate staffing, education, training, and material resources to implement this [act]; and (6) a process for monitoring the chain of custody of electronic recordings of custodial interrogations. Bracketed subsection (c) further requires that the rules adopted for video recording under subsection (a) must contain standards for the angle, focus, and field of vision of a recording device that reasonably promote accurate recording of a custodial interrogation at a place of detention and reliable assessment of its accuracy and completeness. This subsection is bracketed because it is required only in jurisdictions that require both audio and video recording at a place of detention.

Section 16 concerns limitation of actions. Subsection (a) declares that a law enforcement agency in the state that has adopted and enforced rules reasonably designed to ensure compliance with this Act's terms is not subject to civil liability arising from a violation of the Act. Subsection 15(a) is thus linked to the rule-writing and implementation provisions of Section 14. Subsection 15(b) declares that the only sanction that may be imposed on a law enforcement officer for failing to comply with Section 3(c)'s report-writing requirement shall be administrative sanctions. Subsection 15 (c) declares that the Act does not create a cause of action against an individual law enforcement officer.

Section 17 makes electronic recordings of custodial interrogations presumptively self-authenticating in any pretrial or post-trial proceeding if accompanied by a certificate of authenticity by an appropriate law enforcement officer sworn under oath. However, authenticity

may otherwise be challenged in whatever way the law of a particular state provides.

Sections 18 through 233 address technical matters. Section 18 declares that the Act does not create a right to electronic recording of a custodial interrogation, nor does the Act require preparation of a transcript of such an interrogation. Section 19 provides for consideration of the need to promote uniformity of the law in applying and construing the Act. Section 20 addresses the Act's relationship to the Electronic Signatures in Global and National Commerce Act. Section 21 addresses severability. Section 22 provides for repeal of whatever statutory provisions are listed by an individual jurisdiction as inconsistent with the terms of the Act. Section 23 provides for a statement of the Act's effective date.

UNIFORM ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS ACT

GENERAL PROVISIONS

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Electronic Recording of Custodial Interrogations Act.

Comment

This Act's title captures its subject matter concisely: the electronic recording of custodial interrogations.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Custodial interrogation" means questioning or other conduct by a law enforcement officer which is reasonably likely to elicit an incriminating response from an individual and occurs when reasonable individuals in the same circumstances would consider themselves in custody.

(2) "Electronic recording" means an audio recording or an audio and video recording that accurately records a custodial interrogation.

(3) "Law enforcement agency" means a governmental entity or person authorized by a governmental entity or by state law to enforce criminal laws or investigate suspected criminal activity. The term includes a nongovernmental entity that has been delegated the authority to enforce criminal laws or investigate suspected criminal activity.

(4) "Law enforcement officer" means:

(A) an individual:

(i) employed by a law enforcement agency; and

(ii) whose responsibilities include enforcing criminal laws or

investigating criminal activity; or

(B) an individual acting at the request or direction of an individual described in subparagraph (A).

(5) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(6) "Place of detention" means a fixed location under the control of a law enforcement agency where individuals are questioned about an alleged crime or [insert the state's term for juvenile delinquency]. The term includes a jail, police or sheriff's station, holding cell, and correctional or detention facility.

(7) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(8) "Statement" means a communication whether it is oral, written, or electronic, nonverbal, or in sign language.

Comment

A. The definition of "custodial interrogation" is meant to track the United States Supreme Court's understanding of the term's meaning in *Miranda v. Arizona*, 384 U.S. 436 (1966), as the term is understood by the Court in *Miranda*'s progeny as of the drafting of this Act. Law enforcement has proven itself capable over more than four decades of working effectively with the *Miranda* test. Thus, whenever law enforcement would be required to give the warnings established by *Miranda*, they would also be required to conform with this Act. When such warnings are not required by *Miranda*, however, this Act has no application. However, the definition in the Act is still a statutory one, making no express reference to *Miranda*, to forestall difficulties that might arise under the Act should the Court in the future abandon the *Miranda* rule or substantially further alter its meaning.

B. The term "electronic recording" is broadly defined to include any audio or audio and visual record of a custodial interrogation, provided that the chosen means record accurately. Therefore, whenever an electronic recording of custodial interrogation is required by Section 3 of

this Act, that recording must necessarily be one that represents the events that it purports to and must do so as those events actually unfolded and without misleading omissions. The record must also remain unaltered or it ceases to comply with the mandates of this Act.

C. "Law enforcement agency" is broadly defined to include any agency whose responsibilities include investigating suspected criminal activity or enforcing the criminal law. Thus investigators in prosecutors' offices; state, county, and local police; and corrections officers are among the most salient examples of entities subject to the electronic recording requirements of this Act. This definition, like that of "statement," is also a common-sense one unlikely to raise difficult interpretive questions.

D. The term "law enforcement officer" means an individual employed by a law enforcement agency and whose responsibilities include investigating criminal activity or enforcing the criminal law. Anyone acting at such an individual's request or direction is also a law enforcement officer.

E. The term "person" is a standard definition that needs little explanation.

F. The term "place of detention" is meant to include all *fixed* locations where persons are questioned in connection with criminal charges or juvenile delinquency proceedings. The definition specifies as examples the most common such locations: a jail, police or sheriff's station, holding cell, and correctional or detention facility. The definition emphasizes that the location must be "fixed" and thus would not, for example, include interrogations conducted in roving vehicles, such as a police car. Nor would the definition include places, such as the suspect's residence, that are not mobile but are nevertheless not "fixed" as locations where interrogation frequently occurs. The definition therefore seeks to limit itself to a relatively small number of locations in any jurisdiction where law enforcement must equip that location with technology sufficient to electronically record the entire custodial interrogation of a suspect, from start to finish, by audio and visual means, in the manner specified by this Act.

This definition, of course, creates the danger that law enforcement will routinely choose to interrogate in locations other than "place[s] of detention" should a state mandate recording only at such places, one option that Section 3 permits a state to choose. That danger is addressed in bracketed section 3(e) of this Act, which requires law enforcement officers conducting custodial interrogations outside a place of detention to prepare reports as soon as practicable explaining why they have chosen so to interrogate and summarizing the entire unrecorded custodial interrogation process. Such reports permit review by superiors while creating an administrative hurdle that may alone discourage efforts to circumvent the Act's goals. Furthermore, Section 15 requires adoption of rules that permit review by superiors of instances of a failure to record, while Section 16 protects a state agency from civil liability if it adopts and enforces reasonable rules to implement the Act. Sections15 and 16 together thereby help in deterring intentional efforts to evade the Act's requirements, as well as discouraging careless inattention to the Act's mandates.

G. The term "state" is a standard definition and needs no explanation.

H. "Statement" is defined in common-sense terms to include all verbal and non-verbal "communications," written, oral or otherwise. The definition thus includes any human action intended to convey a message. The definition also extends to sign language to be clear that accommodations must be made for the deaf. Ordinarily, the time taken to obtain a translator to interrogate a deaf person should be no greater than the time needed to travel to a place of detention, so it is likely to be the rare case where there is a need to interrogate a suspect outside a place of detention.

SECTION 3. ELECTRONIC RECORDING REQUIREMENT.

(a) Except as otherwise provided by Sections 5 through 10, a custodial interrogation [at a place of detention], including the giving of any required warning, advice of the rights of the individual being questioned, and the waiver of any rights by the individual, must be electronically recorded in its entirety [by both audio and video means] if the interrogation relates to a [felony] [crime] [delinquent act] [offense] described in [insert applicable section numbers of the state's criminal and juvenile codes]. [A custodial interrogation at a place of detention must be recorded by both audio and video means.]

(b) If a law enforcement officer conducts a custodial interrogation to which subsection (a) applies without electronic recording, the officer shall prepare a written report explaining the reason for not complying with this section and summarizing the custodial interrogation process and the individual's statements.

(c) A law enforcement officer shall prepare the report required by subsection (b) as soon as practicable after completing the interrogation.

[(d) As soon as practicable, a law enforcement officer conducting a custodial interrogation outside a place of detention shall prepare a written report explaining the decision to interrogate outside a place of detention and summarizing the custodial interrogation process and the individual's statements made outside a place of detention.]

(e) This section does not apply to a spontaneous statement made outside the course of a

custodial interrogation or a statement made in response to questions asked routinely during the processing of the arrest of an individual.

Legislative Note: *In subsection (a), a state that wants to require recording of all custodial interrogations, regardless of where they occur, should omit the bracketed phrase "at a place of detention." A state that wants to limit the recording requirement to a place of detention should instead keep that bracketed phrase. Each state must also decide whether it wants to require video recording in addition to audio recording. If a state intends to also require video recording, it should include the bracketed language "by both audio and video means." If a state elects to require recording of all custodial interrogations, regardless of location, but wishes to require video recording only of those occurring at a place of detention, the state should not adopt that bracketed language ("by both audio and video means") but should instead adopt the bracketed sentence at the end of subsection (a). In a state that elects this last option, and only in such a state, subsection (d) becomes relevant. It is for this reason that subsection (d) is also bracketed.*

Comment

A. The Electronic Recording Mandate

Subsection (a) requires electronic recording of the entire custodial interrogation process provided certain triggering circumstances are met. Jurisdictions are offered a choice between two types of triggering circumstance: (1) the type of wrong done; and (2) the location of the custodial interrogation. Specifically, the person interrogated must be suspected of a crime specifically identified by statutory section and fitting a certain category of legal wrong. The section offers four bracketed options as to the category of wrong: "felony," "crime," "delinquent act," or "offense." Jurisdictions can also choose a combination of these options. A jurisdiction's choice of felonies would limit the mandate to serious norm violations. Choosing "crime" would instead extend the statute's mandates to all crimes, increasing costs, at least in time-investment, though each jurisdiction should be free to decide whether this increased cost is outweighed by the benefits of broader scope. The term "delinquent acts" extends the electronic recording mandate to acts by juveniles that would constitute crimes were they committed by adults or that otherwise fit a particular jurisdiction's concept of delinquency or its synonyms. The term "offenses" extends scope still further to include violations of norms that are often deemed significant yet are not always labeled a "crime" in each jurisdiction or may be considered a mere violation. For example, there are jurisdictions where driving under the influence of alcohol would fit the term "offenses" but not the term "crime." This additional extension in scope would, of course, potentially further expand costs, the brackets again leaving it to each individual jurisdiction to decide whether the benefits nevertheless outweigh that cost.

1. Should Audio, Video, or Both be Required?

Jurisdictions vary on this question, but the combination of both is the most effective choice for achieving the goals outlined above. Absent video, demeanor cannot be observed, nor can the subtleties of body language and position that can affect voluntariness and truthfulness. Absent audio, the important effects of tone of voice, volume, and pace are lost. Absent the

combination, the overall goal of accurately preserving and reconstructing the entire interrogation process is sacrificed. What is lost can harm the state's efforts to discourage frivolous suppression motions and to present its most powerful case for conviction. Similarly, these lost subtleties hamper each defendant's efforts to prove his innocence or his subjection to unconstitutional interrogation methods. Moreover, social science research suggests that even subtle variations in how interrogation evidence is preserved and presented can have large effects on how it is perceived by factfinders. Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gisli H. Gudjonsson, Richard A. Leo, Allison D. Redlich, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM BEHAV. 3, 23-27 (2010) (summarizing the research on the impact of confessions evidence on juries and judges and noting in particular that even camera angle can affect the ability of judges and jurors accurately to judge the truthfulness and voluntariness of a confession).

Still, the perfect should not be the enemy of the good. It is plausible that smaller and even medium size agencies will not be able to afford audiovisual equipment outside places of detention, particularly if recording is to be concealed from the suspect, or may have insufficient serious crime to warrant the investment. The worry that equipment and methods that allow concealment of recording are more expensive than are more open recording methods is, however, easily addressed: choose *not* to conceal. Indeed, some social science suggests, concealment will not usually reduce a suspect's willingness to talk, so why bother doing so? *See* RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 303 (2008) (summarizing research, noting that most suspects in states requiring consent to videotaping simply consent and promptly forget they are being recorded, and declaring that "a number of studies – including one by the International Association of Chiefs of Police (1998) – have concluded that electronic recording does not cause suspects to refuse to talk, fall silent, or stop making admissions."). Moreover, the costs of the necessary equipment are declining, including the costs of storage, because digital formats rather than videotapes can be used. Furthermore, if the full audio-visual recording requirement is limited to interrogations in police stations and similar venues (a matter addressed below), the quantity of equipment required, and thus its aggregate cost, declines. *See also* Thomas P. Sullivan, *Police Experience with Recording Custodial Interrogations: A Special Report Presented by the Northwestern University School of Law Center on Wrongful Convictions* 23-24 (2004) (summarizing additional relative costs and benefits and noting the declining nature of recording costs generally over time and with increased experience recording).

The Innocence Project estimates that, at current retail prices, the out-of-pocket costs for recording equipment in a single room would roughly be $550. *See* Innocence Project, *The Recording of Interrogations: A Range of Cost Alternatives* 1 (2008). The Special Committee on the Recordation of Custodial Interrogations, in its report to the New Jersey Supreme Court, estimated that "for under a thousand dollars a video system can be installed recording onto VHS tape." *Cook Report*, www.judiciary.state.nj.us/notices/reports/cookreport.pdf. Denver, Colorado, installed a 25-room system that stores interrogations on a hard drive capable of burning them onto a CD for $175,000 ($7000 per room), spending an additional $11,000 for a mainframe computer to store all interrogation recordings. *See* Innocence Project, *supra*, at 1-2. Illinois embraced an integrated state-of-the-art system that records investigator notes too and can allow each investigator to retrieve interrogation recordings from any computer, thus enabling detective case-collaboration, for $40,000, outfitting four rooms. *Id.* at 2. A less sophisticated

one-room system requiring CD burning costs $8000. *See Word Systems*, http://www.systems.com.

Additionally, how much expense is "too much" is subject to debate. Opposition to any recording requirement has often been based on claims of undue expense. The response of the technology's defenders has been to argue that likely cost savings far outweigh initial and continuing out-of-pocket costs, and experience seems to be proving this true (departments of varied sizes adopting recording requirements generally praise them across-the-board, rather than bemoaning their existence). Perhaps legislation should work to overcome cost short-sightedness by localities. Mandating *both* video and audio recording, under this view, would help localities see the low-cost forest through the high-cost trees.

Several options may be chosen: (1) both audio and video are presumptively mandated whenever recording is feasible but audio is an acceptable second best choice where video is not reasonably available *in the particular case* (thus rejecting the idea that it can be rendered unavailable in every case because of cost); (2) both means of recording are required for large police departments but not smaller or medium ones (raising definitional problems about how to define each of the categories); (3) either audio or video is acceptable; or (4) audio is acceptable but only for categories of cases for which the audio-visual combination may be unduly expensive, specifically, for custodial interrogations occurring outside places of detention. The third option also raises the question of consistency. Should police have to use the same recording method in each case, or do they have the discretion to choose? If so, is that delegating unwarranted discretion to the police, thus giving free reign to subconscious racial bias or permitting visually-aggressive interrogations to be *audio* taped, allowing gentler voices to distort the true intensity of the interrogation?

Washington, DC's statute seems to embrace option 1, declaring that custodial interrogations must not only be recorded in their entirety but "to the greatest extent feasible," apparently meaning "to capture the most information feasible." The General Order of the Chief of Police goes still further, largely eliminating the feasibility requirement and flatly declaring that all custodial interrogations "shall be ***video AND audio recorded***," for emphasis reciting this requirement in bold and italicized letters. Illinois, Maine, Massachusetts, New Mexico, North Carolina, and Wisconsin, and apparently New Jersey (the text of that state's rules is less than crystal clear), on the other hand, adopt option three. None of the states seem yet to have been willing to try option two.

Given that local financial, human, and other resources may vary, and given the expectation that jurisdictions that have not previously mandated recorded will want time to experiment and learn from experience in implementing a recording mandate, this Act offers three major bracketed options. First, a jurisdiction may choose to require only audio recording. Second, a jurisdiction may choose instead also to require video recording. Even if this option is chosen, the costs involved will depend upon what wrongs the jurisdiction has chosen to cover and whether it is limiting electronic recording to places of detention (costs are low if electronic recording is limited to a small number of crimes at places of detention, higher if there are fewer or no such limitations). Third, a jurisdiction choosing to avoid any locational limits on the recording mandate has the option of choosing audio and video as both required but only at places

of detention, while audio alone is acceptable outside such locations.

These variations in the means for recording recognize both real and perceived differences in local cost-benefit analyses. But there is no serious doubt that the benefits of electronic recording are maximized when that recording is done by both audio and visual means.

2. Temporal Triggers: When Should Recording Be Required?

Police departments embracing recording might someday decide that it is worth the cost of installing portable audio-visual equipment in every police car and mandating recording of every interrogation whenever practicable. For now, however, cost, practical, and political concerns may in some jurisdictions limit the full-blown technology's availability to those situations where the dangers of not recording are at their highest. Furthermore, police often conduct interviews of numerous witnesses before focusing on, or questioning, a suspect. Moreover, many such interviews are informal or open to observation by persons other than the police, reducing the chances of abuse. Mandating recording all such interviews would be an enormous burden. One relatively easy time to start the recording clock running is when police engage in "custodial interrogation," as that term is defined in *Miranda* and its progeny, thus a definition with which police have long been familiar. Maine, for example, takes this approach, defining "custodial interrogation" as occurring when "(1) a reasonable person would consider that person to be in custody under the circumstances, and (2) the person is asked a question by a law enforcement officer that is likely to elicit an incriminating response." This definition is slightly narrower than *Miranda*'s (for example, *Miranda* recognizes that police words or actions other than asking questions can be likely to elicit an incriminating response) but tracks it closely. New Mexico, North Carolina, Illinois, and the District of Columbia follow a similar approach.

3. Locational Triggers

Limiting the recording requirement solely to custodial interrogations at police facilities is the cheapest, most operationally workable approach and the one least likely to engender opposition. The District of Columbia—limiting the mandate to properly-equipped police interview rooms—takes this approach, with Alaska ("police station") and Iowa ("station house confession") following similar approaches.

Illinois reaches somewhat more broadly, including any building or police station where police, sheriffs, or other law enforcement agencies may be holding persons in connection with criminal or juvenile delinquency charges—a definition arguably sufficient to include jails, but not necessarily prisons. Massachusetts takes a still broader approach, requiring electronic recording of custodial interrogations at any "police station, state police barracks, prison, jail, house of correction, or . . . department of youth services secure facility where persons may be held in detention in relation to a criminal charge. . . ." North Carolina limits the mandate in a similar, though not identical, fashion.

New Mexico's statute is ambiguous but may be read quite broadly, for it at first declares that "when reasonably able to do so, every state or local law enforcement officer shall electronically record each custodial interrogation in its entirety," next going on to recount more

specific requirements if the interrogation occurs in a "police station." The in-police-station requirement is that electronic recording be done "by a method that includes audio or visual or both, if available. . . ." It is unclear, however, how electronic recording can be done *without* either audio, or visual, so how the in-police-station requirement differs from that outside the police station is hard to fathom. Nevertheless, the statute's intent does seem to be that electronic recording be done *wherever the interrogation takes place*, so long as "reasonably" feasible. Wisconsin seems to go still further, placing no locational limitation on the mandate, though it applies only to felonies.

Extending the mandate beyond police stations to other law enforcement or correctional facilities where persons are held in custody, as do Illinois and Massachusetts, for example, raises costs modestly, but many investigations involve "jailhouse informants," who may finger other inmates, and it may be hard to justify giving lesser protections to those already incarcerated or, even worse, to those who are simply in jail awaiting trial but unable to make bond. The latter situation in particular makes a person's rights turn on income, surely not a desirable state of affairs. Extending protection in this fashion also ameliorates the danger that police will sometimes (it would admittedly be logistically difficult for police to do this routinely) switch interrogation locations as a way of avoiding the recording requirement. As discussed in the comment to Section 2, the Act also contains safeguards in other sections that are designed to deter intentional evasion of the Act's mandates or negligent inattention to them.

That danger still exists, of course, for any interrogation in a person's home or workplace, or those of his friends and family, if recording need be done only in a "place of detention." New Mexico's apparent omission of that or a similar requirement at first blush avoids the problem. But recording, the New Mexico rule continues, is unnecessary where police are not "reasonably" able to do so—an exception that can be read so broadly as to swallow the apparent breadth of the rule. It might (or might not), for example, be reasonable not to purchase *portable* video equipment or not to tape because the time for interrogation is short or because taping in a particular location might be embarrassing.

Despite such concerns, Massachusetts has gone even further, not creating even any arguable locational limits.

Because of these differences in real and perceived local costs in transitioning to a regime of standard electronic recording of custodial interrogations, subsection (a) offers states three options: (1) mandating recording wherever custodial interrogation occurs; (2) doing so only in places of detention; (3) mandating it everywhere custodial interrogation occurs, but permitting only audio recording outside places of detention, while mandating audio and video recording in such places.

4. Subject Matter Limitations

To what crimes should the mandate apply? Most (though there are exceptions) jurisdictions with statutes have responded, "not to all," likely again because of time, money, and other cost considerations. One option is to limit the mandate to felonies, especially given the huge relative number of misdemeanors. Other options are to limit coverage still further, to

"serious crimes," "serious felonies," or only homicides. Drafting issues abound here. A statute using vague terms like "serious felonies," even if defined, offers police little guidance. The solution is either for the statute itself to list what precise crimes it covers or to mandate that the police, the Attorney General, or some other governmental entity prepare such a list. Alternatively, the statute might retain a broad, general term, such as extending the statute's coverage to "all serious violent felonies," while leaving the precise specification of the felonies included in that term to regulations, interpretations, or general orders by the police, Attorney General, or other governmental authority. Because crime names and definitions vary among the states, it is hard for a uniform statute to give much specificity, however, unless the statute offers an illustrative list or addresses the matter in commentary. Any distinction among crime categories also creates some confusion at the margins, for police may be uncertain early in an investigation whether a crime is, for example, a "felony" or a "misdemeanor," "serious" or not.

The District of Columbia limits the rule to any "crime of violence," a term defined by statute to consist of a list of specified crimes, including arson, aggravated assault, burglary, carjacking, child sexual abuse, kidnapping, extortion accompanied by threats of violence, malicious disfigurement, mayhem, murder, robbery, voluntary manslaughter, sexual abuse, acts of terrorism, and any attempt or conspiracy to commit those offenses if the offense is punishable by imprisonment for more than one year. By regulation, the Metropolitan DC Police Department (MPD) extends the requirement to additional offenses, including assaulting a police officer, assault with intent to kill, any traffic offense resulting in a fatality, unauthorized use of a vehicle, or suspected gang recruitment, participation, or retention activities accomplished by the actual or threatened use of force, coercion, or intimidation.

Illinois avoids any general subject matter language, simply listing in its recording statute the section numbers of those specific offenses defined elsewhere in the criminal code that are covered by the recording mandate. Maine uses the term "serious crimes," with a police General Order listing those specific crimes, all of which involve violence or its threat or sexual assault or its threat. Massachusetts places no limits whatsoever on the categories of crimes covered, though the recording must be done only "whenever practicable," similar to the DC MPD's "to the greatest extent feasible" language. New Jersey covers specifically listed crimes, listed by name, a list quite similar to that in DC. New Mexico reaches any "felony." Wisconsin's statute also reaches any "felony," but offers a remedy only if the case is tried to a jury. North Carolina limits the recording requirement's scope to "homicide investigations."

This Act, to reduce ambiguity and to limit cost by limiting the recording mandate's scope, extends that mandate only to "felonies" (or, in bracketed language, to crimes, offenses, or delinquent acts, or some combination of these options, as each jurisdiction may choose) that are specifically listed in the Act by the legislature. This approach also limits the mandate to crimes that the people's representatives consider serious enough to warrant the cost of recording rather than leaving that judgment to police discretion. On the other hand, this Act sets a floor but not a ceiling on recording, requiring police to record *at least* where the specified crimes are involved but leaving the police free to choose to record in other cases.

B. Explanatory Reports Where Ordinarily Mandated Recording Does Not Occur

Subsection 3(b) requires a law enforcement officer conducting a custodial interrogation to which subsection 3(b) applies without electronic recording to prepare a written report explaining the reasons for not complying with the electronic recording mandate. The report must also summarize the unrecorded custodial interrogation process and the individual's statements. Preparation of such a report permits review by superiors to ensure that officers depart from recording mandates only when permitted by the Act. A report that is created and preserved electronically would satisfy the requirement of a "written" report.

C. Prompt Report Preparation Where Recording Does Not Occur

Subsection 3(c) requires that the report mandated in subsection 3(b) be prepared promptly. Prompt preparation ensures that the report is made when the events are fresh in the officer's mind and promotes timely review and evaluation by the officer's superiors.

D. Report Preparation Where Recording Occurs Outside a Place of Detention

Bracketed subsection 3(d) requires a law enforcement officer conducting a custodial interrogation outside a place of detention to prepare a written report as soon as practicable explaining the decision to interrogate in such a location. That report must summarize the custodial interrogation process and the individual's statements. This subsection is required only in jurisdictions that require electronic recording solely in places of detention or that require it by video and audio means in such places but permit audio means alone in other places. Again, the report permits prompt review and action by superiors. As with subsection 3(b), a report that is created and preserved electronically would satisfy the requirement of a "written" report.

E. Spontaneous Statements and Routine Questioning

Subsection 3(e) declares that the electronic recording mandate, created in subsection 3(a), does not apply to spontaneous statements or to questions asked routinely during the processing of the arrest of an individual. Although current *Miranda* jurisprudence would not consider these circumstances to involve "custodial interrogation," subsection 3(e), for reasons of clarity and because the future course of the development of the *Miranda* doctrine cannot be anticipated, expressly exempts these situations from any recording mandate.

SECTION 4. NOTICE AND CONSENT NOT REQUIRED. Notwithstanding [cite statutes], a law enforcement officer conducting a custodial interrogation is not required to obtain the individual's consent to the recording nor to inform the individual being interrogated that an electronic recording is being made of the interrogation.

Legislative Note: *The bracketed language refers to any state statute requiring that an individual be informed of, or consent to, the recording of the individual's conversations. The "notwithstanding" clause makes clear that the electronic recording of a custodial interrogation*

is exempt from all the requirements of any such notice and consent statutes.

Comment

Subsection 4 declares that law enforcement officers need not warn suspects being custodially interrogated that their interrogation is being recorded. The available empirical data strongly suggests that such warnings will not reduce the likelihood that a suspect will talk, will waive *Miranda*, or will agree to be recorded. Thus Professor Richard Leo, perhaps the leading psychological expert in the country who specializes in the interrogation process, notes that "a number of studies—including one by the International Association of Chiefs of Police (1998)—have concluded that electronic recording does not cause suspects to refuse to talk, fall silent, or stop making admissions." LEO, *supra*, at 303. This is so, says Leo, both because most states where recording does occur do not require prior notice to suspects and because "even in those states where permission is required, most suspects consent and quickly forget about the recording (which need not be visible) . . . ." *Id.* Indeed, concludes Leo, "The irony of the criticisms that electronic recording has a chilling effect on suspects is that exactly the opposite appears to be true." *Id.*; *see also* Thomas Sullivan, *Police Experience with Recording Custodial Interrogations* 22 (2004) (report published by Northwestern University School of Law Center on Wrongful Convictions) ("[T]he majority of agencies that videotape found that they were able to get more incriminating information from suspects on tape than they were in traditional interrogations."); *cf.* David Buckley & Brian Jayne, *Electronic Recording of Interrogations* (2005) (report published by John E. Reid and Associates) (observing that in a survey of Alaska and Minnesota police conducting interrogations, 48 percent believed electronic recording benefits the prosecution more than the defense, 45 percent believed recording benefits both sides equally, and only 7 percent believed that recording gave the defense the comparative advantage). Nevertheless, some law enforcement agencies are unconvinced. This provision addresses their concerns, unambiguously leaving it up to the interrogators to decide whether they want to reveal the fact of the recording to the suspect or not.

Some states prohibit recording conversations where only one party (for example, the police) has agreed to the recording. These statutes may fairly be interpreted as extending to custodial interrogations within the meaning of this Act. Accordingly, absent a special provision to the contrary, police in such jurisdictions would be required both to reveal the fact of recording to the suspect and to get his consent to being recorded. Section 4 addresses this problem by specifically exempting custodial interrogations done within the scope of this Act from any otherwise applicable statutory requirements that all parties to a recorded conversation consent to the recording. Other jurisdictions have followed analogous approaches.

DC, for example, does not require that suspects be informed that they are being taped. Illinois specifically amended its Eavesdropping Act to permit taping without notifying the suspect of its occurrence. The Massachusetts Municipal Police Institute Model Policy, on the other hand, requires informing the suspect that he is being recorded, as seems to be required by the Massachusetts wiretap statute. Although the research suggests that either approach is consistent with obtaining reliable confessions, it is likely that law enforcement will prefer the freedom to choose surreptitious taping whenever possible.

SECTION 5. EXCEPTION FOR EXIGENT CIRCUMSTANCES. A custodial interrogation to which Section 3 otherwise applies need not be electronically recorded if recording is not feasible because of exigent circumstances. The law enforcement officer conducting the interrogation shall electronically record an explanation of the exigent circumstances before conducting the interrogation, if feasible, or as soon as practicable thereafter.

Comment

A. Exceptions Overview

Some of the statutes, like DC's, contain no exceptions but include catchall language that can serve as an exception, such as DC's requirement that recording occur "to the greatest extent feasible," suggesting that in some circumstances recording is *not* feasible. Illinois' statute contains a long list of "exemptions," many of which seem to be included for emphasis or clarity because they are unlikely to involve "custodial interrogation" (at least as defined in *Miranda*) in the first place. These exemptions focus on listening to, intercepting, or recording conversations or other communications, including some that may involve undercover agents or police officers. New Jersey's court rule lists exceptions, including (1) whenever recording "is not feasible"; (2) the statement is made spontaneously outside the course of the interrogation; (3) the statement is made during routine arrest and processing ("booking"); (4) the suspect has, before making the statement, indicated refusal to do so if it were taped (although the agreement to participate if there is no recording of the interrogation must itself be recorded); (5) the statement is made during a custodial interrogation out-of-state; (6) the statement relates to a crime for which recording would be required but for which the defendant was not then a suspect and is made during interrogation for a crime that does not require recordation; (7) the interrogation occurs at a time during which the interrogators had no knowledge that a crime for which recording would be required had occurred.

This seems like a sensible list of exceptions. For ease of reference by law enforcement, this Act separates variants on these exceptions into separate sections numbered 5 through 10.

One modest cautionary note is required, however, before reviewing these specific exceptions as they are articulated in this Act. Specifically, at least one well-respected academic, Christopher Slobogin, has argued that an exception for the circumstance in which a suspect refuses to talk if taped would be unconstitutional. *See* Christopher Slobogin, *Toward Taping,* 1 OHIO ST. J. CRIM. L. 309 (2003) (relying on due process, privilege against self-incrimination, and confrontation concepts to support his argument). Without recounting that argument or its variants in any depth here, it is sufficient to note that it seems highly unlikely that any court will accept Slobogin's argument. Accordingly, the text assumes that such arguments will not prevail. Should that prediction prove wrong as to any individual state, that state's version of this Act will

need to be modified accordingly to require recording even when a suspect objects.

B. Exception for Exigent Circumstances

New Jersey's simple broad exception to the electronic recording mandate when it is "not feasible" is likely to engender interpretive disputes over what it means to say that recording was "not feasible." This feasibility exception thus has the potential to swallow the rule.

Nevertheless, it is hard to foresee every eventuality in which an exception may wisely be needed, and a catchall exception may allay fears of undue rigidity. But, to avoid circumventing the statute, the catchall *must* be narrowly construed. It should, for example, be noted that a similar statement in another context—the legislative history to the Federal Rules of Evidence—urging narrow interpretation of the catchall exception to the hearsay rule has apparently *not* achieved the desired effect. *See, e.g.*, Myrna Raeder, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Discretion?*, 76 MINN. L. REV. 507 (1992) (noting that from the enactment of the Federal Rules of Evidence in 1975 through mid-1991 there were 400 reported residual exception opinions, with a prosecution success rate at admitting residual hearsay of *eighty-one percent*, despite the Senate Judiciary Committee's Report cautioning that the exception should be used only "in exceptional circumstances" and should not establish a "broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions."). This observation might counsel placing limiting language in the rule itself. The term "exigent circumstances" was thought to be less likely to be as capaciously interpreted as might "infeasibility" and thus unlikely to swallow the basic rule, while still permitting exceptions from recording for pressing circumstances specific to an individual case and perhaps not foreseen by the Act's drafters. Thus the exception serves an important purpose while including limiting language to avoid the rule-swallowing breadth of leaving limitations to legislative history that the residual hearsay exception befell.

Moreover, the term "exigent circumstances" has been well-defined by extensive case law in other areas of criminal procedure, including particularly under the Fourth Amendment, providing a ready source for analogies and a term familiar to courts and law enforcement. That familiarity should diminish the scope of interpretive disputes and provide an effective means for resolving them. Accordingly, Section 5 of this Act excepts from the electronic recording requirement situations of non-recording stemming from exigent circumstances.

SECTION 6. EXCEPTION FOR INDIVIDUAL'S REFUSAL TO BE ELECTRONICALLY RECORDED.

(a) A custodial interrogation to which Section 3 otherwise applies need not be electronically recorded if the individual to be interrogated indicates that the individual will not participate in the interrogation if it is electronically recorded. If feasible, the agreement to

participate without recording must be electronically recorded.

(b) If, during a custodial interrogation to which Section 3 otherwise would apply, the individual being interrogated indicates that the individual will not participate in further interrogation unless electronic recording ceases, the remainder of the custodial interrogation need not be electronically recorded. If feasible, the individual's agreement to participate without further recording must be electronically recorded.

(c) A law enforcement officer may not encourage, with intent to avoid the requirement of electronic recording, an individual to request that a recording not be made.

Comment

The exception recited in Subsection 6(a) is based on the sound idea that doing some interrogation is better than none if a suspect will not cooperate in recording. Although the suspect has no "right" to be recorded or to avoid recording, as a practical matter the only way to obtain an otherwise voluntary and reliable confession where the suspect refuses to speak if recorded is to comply with his wishes. Because it his wishes that lead to non-recording, not prompting by law enforcement, it also seems entirely fair to dispense with recording under those circumstances. At the same time, the requirement that his refusal to be recorded must itself be recorded where feasible," avoids factual disputes over whether he did indeed so refuse.

Subsection 6(b) mirrors subsection 6(a) but extends its approach to where electronic recording has begun but during the course of it the suspect declares that he will not speak further unless recording ceases. Subsection 6(a) thus applies when no electronic recording occurs at all, while subsection 6(b) applies when recording is begun but not completed.

Subsection 6(c), again in an effort to prevent the exception from swallowing the rule, prohibits a law enforcement officer, acting with the intent to avoid the requirement of electronic recording, from encouraging a suspect to request that an electronic recording not be made.

SECTION 7. EXCEPTION FOR INTERROGATION CONDUCTED BY OTHER JURISDICTIONS. If a custodial interrogation occurs in another state in compliance with that state's law or is conducted by a federal law enforcement agency in compliance with federal law, the interrogation need not be electronically recorded unless the interrogation is conducted with intent to avoid the requirement of electronic recording in Section 3.

Comment

The exception in Section seven simply recognizes that police cannot ensure electronic recording of statements occurring outside their control, or at least outside their guarantee of access to recording equipment, in this case, when the interrogation occurs in another state or is conducted by federal law enforcement officers. On the other hand, this exception applies only if the other jurisdiction's custodial interrogations were not done "with intent to avoid the requirement of electronic recording." This requirement seeks to avert variants of the now-discredited "silver platter doctrine," "under which evidence illegally obtained by state actors and subsequently excluded from trial was 'served up' to federal prosecutors for use in companion charges by a second sovereign alleging the same conduct as that unsuccessfully charged by the first sovereign." *See* David Lane, *Twice Bitten: Denial Of The Right To Counsel In Successive Prosecutions By Separate Sovereigns*, 45 HOUSTON L. REV. 1769, 1887 (2009).

SECTION 8. EXCEPTION BASED ON BELIEF THAT RECORDING IS NOT REQUIRED.

(a) A custodial interrogation to which Section 3 otherwise applies need not be electronically recorded if the interrogation occurs when no law enforcement officer conducting the interrogation has knowledge of facts and circumstances that would lead a reasonable officer to believe that the individual being interrogated may have committed a [felony] [crime] [offense] for which Section 3 requires that a custodial interrogation be recorded.

(b) If, during a custodial interrogation, the individual reveals facts and circumstances giving a law enforcement officer conducting the interrogation reason to believe that a [felony] [crime] [offense] has been committed for which Section 3 requires that a custodial interrogation be electronically recorded, continued custodial interrogation concerning that [felony] [crime] [offense] must be electronically recorded, if feasible.

Comment

Section 8 of this Act addresses some drafting problems by not expecting the police to record in instances where it is so early in the investigation that they do not know that an offense for which recording is required is involved. The only difference between subsections (a) and (b) is that the former addresses the initial decision not to record, while the latter requires an officer who initially reasonably believed that no offense was involved that triggers this Act's electronic

recording requirement discovers during the course of custodial interrogation that in fact a triggering offense is involved. Once the officer discovers that, contrary to his reasonable initial beliefs a triggering offense is involved, the officer must electronically record the remainder of the custodial interrogation, if feasible.

SECTION 9. EXCEPTION FOR SAFETY OF INDIVIDUAL OR PROTECTION OF IDENTITY. A custodial interrogation to which Section 3 otherwise applies need not be electronically recorded if a law enforcement officer conducting the interrogation or the officer's superior reasonably believes that electronic recording would disclose the identity of a confidential informant or jeopardize the safety of an officer, the individual being interrogated, or another individual. If feasible and consistent with the safety of a confidential informant, an explanation of the basis for the belief that electronic recording would disclose the informant's identity must be electronically recorded at the time of the interrogation. If contemporaneous recording of the basis for the belief is not feasible, the recording must be made as soon as practicable after the interrogation is completed.

Comment

The exceptions created by Section 8 recognize that the safety of various criminal justice system actors must be paramount where genuinely endangered by the ultimate public nature of the recording requirement. Thus if information contained in a recording creates a substantial risk that the safety of a witness or a confidential informant will be endangered, recording should not be mandated. Rather, in such circumstances, law enforcement should have the discretion to decide whether, in the particular case, the risk of physical harm to an individual is so great as to require not electronically recording part or all of a custodial interrogation. This discretion may not be granted, however, based upon mere speculation as to danger. Rather, the law enforcement officer conducting the interrogation or his superior must have adequate information establishing reasonable grounds for believing, and the officer must actually believe, that electronic recording endangers another's safety. Such circumstances are likely to be rare, and the expectation is that this exception will be used sparingly.

In the case of confidential informants, revealing their identity may endanger not only their physical safety but also their further usefulness to law enforcement. Yet, because the informants' identity is secret, it is too easy to claim reliance on protecting such an informant as the basis for nonrecording. Accordingly, where feasible and consistent with the confidential informant's safety, an explanation for the belief that electronic recording of the custodial

interrogation would reveal the confidential informant's identity must itself be made electronically contemporaneously with the custodial interrogation. If contemporaneous recording of the explanation is not feasible, the explanation must be electronically recorded as soon as practicable after the interrogation is completed.

SECTION 10. EXCEPTION FOR EQUIPMENT MALFUNCTION.

[(a)] All or part of a custodial interrogation to which Section 3 otherwise applies need not be electronically recorded to the extent that recording is not feasible because the available electronic recording equipment fails, despite reasonable maintenance of the equipment, and timely repair or replacement is not feasible.

[(b) If both audio and video recording of a custodial interrogation are otherwise required by Section 3, recording may be by audio alone if a technical problem in video recording equipment prevents video recording, despite reasonable maintenance efforts of the equipment, and timely repair or replacement is not feasible.]

[[(b)][(c)] If both audio and video recording of a custodial interrogation are otherwise required by Section 3, recording may be by video alone if a technical problem in the audio recording equipment prevents audio recording, despite reasonable maintenance of the equipment, and timely repair or replacement is not feasible.]

Legislative Note: *Section (b) and (c) need be considered only in jurisdictions that choose to mandate both audio and video recording in Section 3.*

Comment

Subsection 10(a) excludes from the electronic recording mandate all or any part of a custodial interrogation that is not feasible because the available recording equipment has failed, despite reasonable maintenance, where timely repair or replacement is not feasible. Because the subsection applies only where equipment failure occurred despite reasonable maintenance efforts, law enforcement has every incentive to do all it reasonably can to keep its electronic recording equipment in good shape.

Subsections 10(b) and (c) apply only in jurisdictions that have chosen to mandate both audio and video recording, at least in certain locations. Subsection (b) allows for mere audio

recording even in places of detention, instead of audio and video recording, where technical breakdown in video recording capabilities has occurred. Similarly, under subsection (c), mere video recording is acceptable where audio capabilities break down. However, in both subsections, the breakdown must once again have occurred despite adequate maintenance efforts, thus providing an incentive for devising sensible maintenance protocols.

Section 10[(b)][(c)] is bracketed because some members of the drafting committee believed that a failure of audio recording is so egregious as to render the purely visual recording virtually useless. The Committee concluded that the full body should decide whether the failure of audio recording due to maintenance issues should ever be an acceptable exception.

SECTION 11. BURDEN OF PERSUASION. If the prosecution relies on an exception in Sections 5 through 10 to justify a failure to make an electronic recording of a custodial interrogation, the prosecution must prove by a preponderance of the evidence that the exception applies.

Comment

There can, of course, be disputes over whether *the facts* existed to establish a type of exception, including credibility disputes. New Jersey addresses this problem by requiring notice, including of the witnesses the state plans to call, and a hearing at which the state must prove the applicability of an exception by a preponderance of the evidence.

Sections 11 of this Act adopts a similar approach. The section places on the prosecution the burden of proving the applicability of an exception by a preponderance of the evidence. Although some proposed statutes suggest a clear and convincing evidence standard, that imposes an undue burden on the prosecution. The preponderance standard is also consistent with that embraced in much of the law of constitutional criminal procedure. Yet the burden is not so low that the state can readily use the exceptions to nullify the electronic recording rule.

SECTION 12. NOTICE OF INTENT TO INTRODUCE UNRECORDED STATEMENT. If the prosecution intends to introduce in its case in chief a statement made during a custodial interrogation to which Section 3(a) applies which was not electronically recorded, the prosecution, not later than the time specified by [insert citation to statute or rule of procedure], shall serve the defendant with written notice of that intent and of any exception on which the prosecution intends to rely.

Comment

Whenever the prosecution plans to offer into evidence a statement subject to this Act but relying on an exception, Section 12 requires the prosecution to notify the defendant of its intention so to rely. This notice provision is modeled on New Jersey Supreme Court Rule 3:17(c), governing electronic recordation of custodial interrogations. Sections 11 and 12 of this Act jointly contemplate a hearing, after notice, if the prosecution relies upon an exception. The notice and hearing requirements have two major advantages. First, they prevent the numerous exceptions from swallowing the general rule of electronic recording of custodial interrogations at places of detention. Law enforcement officers will know that they must justify their reliance on any exception not only to their superiors but to a court. Moreover, they must be able to state with specificity what exceptions they rely upon. Furthermore, they will understand that they will have to testify at a hearing to support their reliance on an exception – a hearing at which the state will face a burden of persuading the court by a preponderance of the evidence that the facts exist justifying the officer's decision not to record. Similarly, the provision is likely to motivate supervisors to ensure that their officers think carefully about whether to rely on an exception and are able to justify it in a way that will be convincing to a trial judge.

Second, these provisions ensure minimally fair process. This Act generally leaves discovery matters to the law of the individual states. But the default position underlying the Act is that it is in society's best overall interest that electronic recording occur. Although there are sound reasons for creating exceptions to that mandate, given that default position, the state should have to justify its deviation from such mandates. The defendant is the person with the greatest motivation to test the government's capacity convincingly to make its case for such deviation. The defendant needs the minimal tools necessary to fulfilling this function. But, equally importantly, the electronic recording requirement is designed in part to protect the defendant's freedom from coercion and from mistaken conviction. The recording requirement thus helps to protect against convicting an innocent person while aiding in protecting that person's fundamental constitutional rights. Without at least notice of the nature of the state's claim that an exception applies, and without provision of a hearing at which the state must meet the burden of proof by an appropriate level, a defendant will have little ability to protect his rights and to reduce the chances of his facing wrongful conviction.

SECTION 13. REMEDIES.

(a) Unless the court finds that an exception in Sections 5 through 10 applies, the court shall consider the failure to make an electronic recording of all or part of a custodial interrogation to which Section 3 applies [as a factor] in determining whether a statement made during the interrogation is admissible, including whether it was voluntarily made [or is reliable].

(b) If the court admits into evidence a statement made during a custodial interrogation

that was not electronically recorded in compliance with Section 3, the court, upon request of the defendant, shall give cautionary instructions to the jury.

Comment

A. Pretrial Motions

1. General Scope and Nature of This Remedy and of Its Justification

This Act does *not* mandate exclusion of evidence as a remedy. But it does recognize in subsection (a) that the failure to comply with the terms of this Act may be considered relevant in resolving a motion to suppress a confession, including (but not limited to) doing so on the grounds of its involuntariness or unreliability. In doing so, this Act navigates among the inflexible rule of per se exclusion in some states, the presumed inadmissibility in other states, the overly-complex balancing approaches recommended by some law reformers, and the complete abandonment of even the possibility of an exclusionary remedy in one state.

The most likely grounds for suppression are that the accused gave his statement involuntarily, that it was unreliable, or that it violated *Miranda*. The Act emphasizes the first two grounds as most relevant and important, where the need for recording is at its highest, but it uses the word "including" to acknowledge that nonrecording may further be relevant to pretrial suppression on other grounds, including other federal constitutional ones, but also various state grounds, particularly in states that have exercised their authority (either on statutory or state constitutional grounds) to specify additional grounds for suppression of statements generally. Where this occurs, however, unjustified nonrecording would still need to be "considered" in the pretrial motion but would not necessarily result in exclusion of the evidence. Even the possibility of non-recording's being a consideration in suppression motions, of course, generally arises only when *Miranda* warnings would also be required (the existence of a "custodial interrogation" being a necessary trigger for the Act's provisions), the offense is one covered by this Act (in most states, this is likely initially to be a relatively small subset of all crimes), *and* one of the Act's extensive set of exceptions does not apply. That is likely to be the unusual case, albeit an important situation in which the exclusionary possibility should be contemplated.

Indeed, at least seven states and the District of Columbia have adopted, by statute, court rule, or judicial decision, some version of the exclusionary rule. These states are in widely disparate areas of the country: Alaska (the Northwest); Minnesota, Indiana, and Illinois (the Midwest); New Hampshire, New Jersey, and DC (the Northeast); North Carolina (the South), and arguably Montana – there is some statutory ambiguity for this state (the West).

Moreover, although a per se rule of inadmissibility might have the greatest deterrent effect and be easily administrable, such a rule's inflexibility is also why it is the version of the exclusionary rule most likely to face resistance. Such resistance stems from the sense by some lawmakers that exclusion is a harsh remedy to be deployed only where truly needed. Alaska, Indiana, and Minnesota (in Minnesota, for "substantial violations only) have adopted just such a simple, rigid rule, showing that its adoption is nevertheless not beyond political reach in at least

some states that apparently rejected the characterization of exclusion as "unduly harsh."

Nevertheless, exclusion is generally understood as a remedy turning on a cost-benefit analysis. Among the primary social benefits of an exclusionary remedy for violation of this Act's electronic recording mandate are deterring future violations, protecting accuracy in fact-finding, protecting against false confessions occurring in the first place, and adding a statutory layer of protection to other relevant constitutional rights, such as the due process right to be free from coercive interrogations and the Fifth Amendment right to be free from compelled custodial interrogations, including the *Miranda* prophylactic protection of that right. But where violation of the Act has only minimally implicated these social interests, the cost of suppression may not be worth the benefits. Therefore, the Act merely requires the trial court to consider the relevance and weight of violation of the electronic recording mandate in pretrial suppression motion decisions. Merely stating that the unjustified lack of recording should be "considered" simply leaves its weight undefined, perhaps suggesting that a trial judge should be free to give the lack of recording *decisive* weight. Some jurisdictions may trust the trial court to make precisely just such decisions as among those commonly made in pretrial motions. For jurisdictions seeking to make it clear, however, that nonrecording should never alone be sufficient to justify exclusion, bracketed language declares that the trial judge may consider exclusion as only "a factor" in the suppression balancing analysis. On the other hand, rendering violation of the Act irrelevant to pre-trial suppression motions would not adequately serve the Act's goals in cases where the interests the Act serves are substantially implicated, a point explained more fully below.

Statutory mandates for decision-makers to consider factors without requiring that they thereby decide a particular way are common. In the area of constitutional law, one well-known such statute was unsuccessfully challenged as violating free speech rights in *NEA v. Finley*, 524 U.S. 569 (1998). There, Congress amended the statute governing National Endowment of the Arts (NEA) procedures for awarding grants to encourage proposed artistic endeavors. The amended statute directed the NEA chairperson, in establishing procedures for determining the artistic merit of grant applications, to "take into consideration general standards of decency and respect for the diverse beliefs of the American public." Several grant-applicants denied funding sued the NEA, claiming that the statute as applied had violated their First Amendment right to free speech by directing funding-denial for projects espousing a particular viewpoint.

The United States Supreme Court, however, rejected this reading of the statute. First, explained the Court, mandating that an agency "consider" a matter in its deliberations decidedly does not categorically require funding denial. Second, the legislative history expressly revealed that Congress rejected any categorical consequences of such consideration, noting, for example, that an independent Commission advising Congress on the matter declared in its report that new grant-selection criteria "should be incorporated as part of the selection process … rather than isolated and treated as exogenous considerations." The Court therefore viewed the statutory provision in *Finley* as "aimed at reforming procedures rather than precluding speech," thereby undermining "respondents' argument that the provision inevitably will be utilized as a tool for invidious viewpoint discrimination."

Relatedly, the Court rejected the claim that if the mandate to "consider" a factor does not require a particular result on the statute's face, it will render the statute so impermissibly vague

and subjective as to allow the agency to be thoroughly unconstrained, again permitting invidious discrimination to occur below the radar. A mandate to "consider" a factor is no more vague, however, concluded the Court, than the ultimate question to which this consideration contributes to an answer: whether the grant application is for a project that is likely to exemplify "artistic excellence." Only a case-by-case consideration of a wide array of information can lead to a decision on such a question in an individual case.

Here, as in *Finley*, this Act imposes a procedural, not substantive, requirement that breach of the Act's recording mandate be considered in deciding suppression motions on other grounds. The word "consider," again as in *Finley*, thus does not imply or require a result in a particular case. To the extent that these comments are considered "legislative history," they too support such an interpretation. Furthermore, the word "consider" is no more vague than, for example, the word "involuntariness," one ultimate ground for suppression to which consideration of these Act's mandates applies, and a test that has long survived judicial scrutiny. Granted, *Finley* involved an agency rather than a court. This is a distinction without a difference, for legislative mandates for courts to "consider" certain factors in making case-specific judgments are likewise common, and, in any event, nothing in the *Finley* Court's reading of text or the rest of its rationale sensibly limits it to the agency context.

It also might be argued that a statute may not "mandate" that anything be considered in making a constitutional decision because constitutions trump statutes. This argument fails for several reasons. First, the constitutional question whether a confession is "voluntary" is to be made based upon the "totality of the circumstances." Among the recording mandate's purposes is to give the courts a fuller picture of the circumstances relevant to a confession's voluntariness (by recording the events fully and as they actually unfolded) and a stronger appreciation of the significance for the voluntariness determination of the absence of that fuller picture. That absence occurs where recording that should have taken place did not. Violation of the Act's recording mandate thus logically entails its consideration in the "totality of the circumstances" test of voluntariness. For similar reasons, violation of the Act's recording mandate should be relevant in determining "reliability." Violation of the Act's mandates should, of course, always be relevant to any pretrial motion in the sense that the court is deprived of the best evidence of just what the facts were, including subtleties of tone, voice, and expression. Moreover, the mere fact of such unjustified nonrecording may be relevant in resolving credibility disputes. The Act does spell out this logic and its consequences by mandating that courts consider the Act's violation in the voluntariness and other relevant inquiries. But doing so does not require any outcome concerning whether the confession in the particular case was indeed constitutional or not. That decision remains the judge's. There is thus no conflict between statute and constitution, and other jurisdictions, to be discussed shortly, have seen no such conflict.

Furthermore, even were a court to disagree, this Act can and should be understood as creating a statutory ground for suppression of a confession on grounds of involuntariness (if bracketed language is adopted, also on grounds of unreliability, explained in more detail shortly), albeit, given such a ruling, a ground that is co-terminus with the constitutional due process involuntariness doctrine, with the sole exception that violation of the Act's recording mandates must be considered in the voluntariness determination, even if such consideration is not otherwise constitutionally required. Indeed, to avoid any confusion on this ground, the Act spells

out involuntariness (and, for jurisdictions adopting bracketed language, unreliability) as a specifically-identified ground for suppression.

2. *A Comparison to Other Jurisdictions in Greater Detail*

Remember that Alaska and Minnesota have adopted a simple, rigid rule of per se exclusion for violation of their recording mandates. Washington, DC creates a softer rule of presumed inadmissibility that can be rebutted by clear and convincing prosecution evidence that the statement was nevertheless voluntary. Illinois also creates a rule of presumed inadmissibility that can be rebutted but differs from the DC rule in two ways: (1) the prosecution must prove not only that the statement was voluntarily given *but also* that it is reliable, given the totality of the circumstances; and (2) the prosecution's burden of proving these matters is only a preponderance of the evidence. Montana seems to follow a variant of the Illinois rule. Thus the Montana statute declares that a judge "shall admit statements or evidence of statements that do not conform to … [the recording mandate] if, at hearing, the state proves by a preponderance of the evidence that … the statements have been voluntarily made and are reliable" or that certain exceptions apply.

The Illinois and Montana rules in particular permit trial use of statements inexcusably obtained in violation of the recording mandate if the reliability concerns arising from the recording's absence are allayed by other evidence, thus accepting the idea that a remedy for violation of recording requirements must aim at fact finding accuracy, not only at deterrence. Because the prosecution has the opportunity to prove that its non-compliance has created no harm, exclusion will be applied less frequently under this approach than under a per se rule of inadmissibility and will kick in primarily where there is substantial reason to worry that we are in danger of convicting the wrong man.

Other states have created still softer versions of the exclusionary rule. New Jersey, for example, provides that an unexcused failure to record is a *factor* for the court to consider in deciding whether to admit a confession. Where, as in New Jersey, non-recording is but one factor in a case-specific weighing process, there is ample room for a statement obtained in violation of recording mandates nevertheless to be admitted. Yet the uncertainty—the remaining *possibility* of exclusion in a particular case—still provides an incentive for police compliance.

On the other hand, if the confession *is* admitted, New Jersey then requires that a cautionary jury instruction be given. Exclusion and jury instructions can thus be seen, as they are in New Jersey, as complementary rather than alternative remedies. North Carolina follows a similar approach, making an unexcused failure to record admissible to prove that a statement was involuntary *or* unreliable but, if the confession is nevertheless admitted, requiring a jury instruction warning that the jury may consider evidence of non-compliance in deciding whether a statement was voluntary and reliable. Montana likewise provides for a cautionary instruction if a motion to suppress a non-compliant, unrecorded statement is denied.

Indeed, of the states that have enacted recording statutes with remedies, apparently only Wisconsin (arguably) and Nebraska (definitely) explicitly limit the remedy *solely* to a cautionary jury instruction or, in a bench trial in Wisconsin, permits the judge to consider the weight of the

recording requirement violation in judging the worth of the confession. Maine, Maryland, and New Mexico are simply silent about remedies, which may or may not preclude the courts from crafting their own.

Although not yet adopted by any state, there is still another approach to the exclusionary rule: that proposed by the Constitution Project, which itself adopted a variant of an early proposal by the American Law Institute. The Constitution Project brings together, in a search for common ground, groups with opposing views on issues central to maintaining liberty in a constitutional republic. The Project's Death Penalty Initiative recommended electronic recording of the entire custodial interrogation process in capital cases and also recommended a unique exclusionary remedy for violations of that mandate. *See* THE CONSTITUTION PROJECT, MANDATORY JUSTICE: THE DEATH PENALTY REVISITED 50 (2006). Both the Constitution Project and ALI versions of an exclusionary remedy, however, relied on a detailed, complex balancing process to guide judges, a process unnecessarily complex and therefore not adopted here. Instead, this Act, while sharing balancing of interests with the Constitution Project and ALI approaches to exclusion, trusts judges to be capable of making this sort of judgment, one with which they are well familiar in other areas, without the need for greater specificity or undue limitation on their factfinding and balancing discretion.

3. *This Act's Approach Redux: Unreliability as a Ground for Pretrial Motions*

The approach of this Act is to fuse aspects of the Illinois and New Jersey approaches. Illinois requires that the prosecutor prove by a preponderance of the evidence *both* that an unrecorded statement was voluntary *and* that it was reliable – an approach seemingly adopted by Montana as well. Absent such proof, exclusion of the confession is mandated. North Carolina similarly recognizes both involuntariness and unreliability as grounds for suppressing a confession. This Act, unlike that in Illinois, never mandates the exclusionary remedy but makes violation of the Act one factor in the admissibility decision. In this respect, this Act's approach mirrors New Jersey's, which also makes the failure to record but one factor in the admissibility decision. But, unlike New Jersey, but like Illinois, Montana, and North Carolina**,** this Act expressly recognizes two potential grounds for excluding a confession based at least partly on the failure to record: that failure's relevance to proving the confession's *involuntariness* and its relevance to proving the confession's *unreliability.*

The latter ground for suppression is not one routinely recognized in constitutional law or in most state statutory law as a ground for suppression of confessions, though, as noted above, several states have recently done so in the precise context of nonrecording. Accordingly, in many states this Act might create a new basis for potential exclusion of a confession—and it is worth emphasizing again that this is only *potential* exclusion via a multi-factor weighing process and only if none of the exceptions to the Act are met. Because of the novelty of this approach in many, though by no means all, states, further comment on the role of reliability in suppression motions is warranted. Relative novelty is also why the language of reliability in this section is bracketed.

The most common constitutional grounds for suppression of confessions are violations of the *Miranda* rule and the involuntariness of the confession under the due process clauses of the

United States Constitution. A confession is "involuntary" only if coercive police activity has overborne the suspect's will.

A complex of values underlies this involuntariness rule. The rule's most obvious concern seems to be with the suspect's autonomy, that is, with preventing his decision to confess from being the result of his voluntary choice. Yet the rule aims in part to deter the state from being the cause of such involuntariness, so the rule applies only when the state has placed undue pressure upon a suspect to confess. Thus, in *Colorado v. Connelly*, 497 U.S. 157 (1986), Connelly on his own approached a police officer, confessed that he had murdered someone, and asked to talk about it. The trial court suppressed Connelly's confession, however, on involuntariness grounds after hearing expert testimony concluding that Connelly suffered from a psychosis at the time of his confession that compromised his ability to make free and rational choices. The Colorado Supreme Court affirmed, but the United States Supreme Court reversed, holding that there was no coercive police activity that rendered his confession one not freely made. Mental illness, not the state, was at fault. Accordingly, no due process violation had occurred. In reaching this conclusion, the Court famously said, "'The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.'" *Id.* at 167 (quoting Lisenba v. California, 314 U.S. 219, 233-36 (1941)).

Read in isolation, this quote might suggest that the majority was thoroughly unconcerned with "reliability," that is, with whether there is good reason to trust that the confession was truthful, the defendant therefore guilty. But that impression would be misleading, for in other cases the Court, lower courts, and commentators have recognized that one important function of the voluntariness test is to reduce the chances of convicting the innocent. The Court's point was that the danger of wrongful convictions is not *alone* sufficient to violate due process. The exclusionary rule's purpose in this area is to deter police overreaching. Where there is no such overreaching to deter, the due process clauses are irrelevant, despite the risk to the accuracy of the adjudication of guilt. Yet the Court recognized that a fundamental purpose of a criminal trial is to admit "'*truthful* and probative evidence before state juries. . . .'" *Id.* at 166 (quoting Lego v. Twomey, 4044 U.S. 4477, 488-89 (1972)). The Court additionally recognized that, even where coercive police activity is lacking, "this sort of inquiry . . . [may] be resolved by state laws governing the admission of evidence. . . . A statement rendered by one in the condition of respondent might be proved to be quite *unreliable*, but this is a matter to be governed by the evidentiary laws of the forum." *Id.* at 167 (emphasis added).

Justice Brennan, joined by Justice Marshall, squarely addressed the reliability question. Brennan's main point of disagreement with the majority was that he thought that free will and reliability, not overreaching by police officers, should be the sole constitutional due process inquiries. *See id.* at 174, 181 (Brennan, J., dissenting). Explained Brennan:

> Since the Court redefines voluntary confessions to include confessions by mentally ill individuals, the reliability of these confessions becomes a central concern. A concern for reliability is inherent in our criminal justice system, which relies upon accusatorial rather than inquisitorial practices. While an inquisitorial system prefers obtaining confessions from criminal defendants, an

> accusatorial system must place its faith in determinations of "guilt by evidence independently and freely secured."

Id. at 181 (quoting in part *Rogers v. Richmond*, 365 U.S. 534, 541 (1961)). Furthermore, said Brennan, "We have learned the lessons of history, ancient and modern, namely, that "a system of law enforcement which comes to depend on the 'confession' will, in the long run, be less *reliable* and more subject to abuses" than a system dependent upon skillful independent investigation. *Id.* at 181 (quoting *Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964))(emphasis added). Indeed, Brennan was particularly concerned about false or unreliable confessions because of their "decisive impact on the adversarial process." *Id.* at 182. He explained, "Triers of fact accord confessions such heavy weight in their determinations that 'the introduction of a confession makes other aspects of a trial superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained.'" *Id.* at 182. Thus, he concluded, "[b]ecause the admission of a confession so strongly tips the balance against the defendant in the adversarial process, we must be especially careful about a confession's reliability." *Id.* at 182.

In other areas of due process, the Court has reaffirmed that police overreaching is indeed a requirement for a due process violation. But the Court has also made its continuing concern with the reliability of factfinding under the due process clauses evident. A particularly apt example is the Court's due process analysis of eyewitness identifications, such as lineups or photospreads. *See* ANDREW E. TASLITZ, MARGARET L. PARIS, & LENESE HERBERT, CONSTITUTIONAL CRIMINAL PROCEDURE 910-912 (4th ed. 2010). The Court will not suppress an identification resulting from a suggestive identification procedure unless that suggestion was unnecessarily created by the police. *See id.* at 910-11. But if the police have overreached in this area, the sole remaining question for the Court in deciding the admissibility of the out-of-court identification procedure is reliability. *See id.* at 912. Indeed, says the Court, reliability is the "linchpin" of the analysis. The Court will go even further and under certain conditions suppress an in-court identification if it is the fruit of an unreliable out-of-court one. The reason for this is that the reliability of the in-court identification then itself becomes suspect.

Custodial interrogations by definition involve state action. Similarly, motions to suppress confessions resulting from such interrogations necessarily involve claims of police overreaching. Therefore, the logic of the Court's due process jurisprudence should permit an inquiry into reliability, including as part of the decision whether to suppress a confession on grounds of involuntariness. But the involuntariness test still contains the danger of admitting unreliable confessions—ones that may convict the innocent—that are nevertheless not the result of an "overborne will." Moreover, the Court's due process jurisprudence is rarely muscular, generally setting a very low floor of reliability. Accordingly, it is wise to craft other mechanisms for making suppression on the grounds of unreliability *alone* a basis for suppression. One such mechanism is the inherent supervisory power of the courts. *See, e.g., Commonwealth v. DiGiambattista*, 442 Mass. 423, 440-49 (2004) (holding, via its supervisory power, that a sanction must be imposed on the state whenever it fails electronically to record the entire custodial interrogation process, though creating the sanction of a jury instruction rather than suppression, while rejecting claims that this approach violated the separation of powers.) Explained the *DiGiambattista* court,

> The issue is not what we "require" of law enforcement, but how and on what conditions evidence will be admitted in our courts. We retain as part of our superintendence power the authority to regulate the presentation of evidence in court proceedings. The question before us is whether and how we should exercise that power with respect to the introduction of evidence concerning interrogations.

Id. at 444-45. The Massachusetts court's primary reason for taking this action was this: where there are "grounds for [doubting the] reliability of certain types of evidence that the jury might misconstrue as particularly reliable," curative action is required. *Id.* at 446.

Another basis for more muscular protections can be state due process clauses. This approach indeed was followed by Alaska's highest court in *Stephan v. Harris*, 711 P.2d 1156, 1159-63 (1985). There, the Court created an exclusionary remedy under its state constitution's due process clause for the failure electronically to record custodial interrogations in their entirety. Said the Court, "[s]uch recording is a requirement of state due process when the interrogation occurs in a place of detention and recording is feasible." *Id.* at 1159. "We reach this conclusion," the Court explained, "because we are convinced that recording, in such circumstances, is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self incrimination and, ultimately, his right to a fair trial." *Id.* at 1159-60. Due process, the court added, is not a "static" concept but "must change to keep pace with new technological developments." *Id.* at 1161. The technological feasibility of electronic recording of the entire custodial interrogation process was just such a development. Finally, the court concluded:

> In the absence of an adequate record, the accused may suffer an infringement upon his right to remain silent and to have counsel present during the interrogation. Also, his right to a fair trial may be violated, if an illegally obtained, and *possibly false*, confession is subsequently admitted. An electronic recording, thus, protects the defendant's constitutional rights, by providing an objective means for him to corroborate his testimony concerning the circumstances of the confession.

Id. at 1161 (emphasis added).

Commentators have also argued that Federal Rule of Evidence ("FRE") 403 and its state law equivalents already authorize suppression of evidence, including interrogations, that is unreliable. The argument is straightforward. Rule 403 gives the trial judge discretion to exclude even relevant evidence if its probative value is substantially outweighed by a variety of countervailing concerns, including the dangers of unfair prejudice and misleading the jury. Given the psychological data showing the powerful tendency of even false confessions to induce juries to convict, argue these commentators, a confession obtained under circumstances having strong indicia of unreliability will mislead the jury. Accordingly, the trial court has the discretion to exclude such evidence. *See* RICHARD LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 288 (2008).

These same commentators also point out that some courts have embraced a reliability rule on a variety of grounds but under the rubric of "trustworthiness." Law professor and cognitive psychologist Richard Leo made the point thus:

> Several state courts and the federal district courts have chosen to adopt a … rule of corroboration, most often termed the "trustworthiness standard"….In marked contrast to the corpus delecti rule [requiring merely proof independent of the confession that some crime indeed occurred], the trustworthiness standard requires corroboration of the confession itself …. Under the trustworthiness standard, before the state may introduce a confession it "must introduce substantial independent evidence which would tend to establish the trustworthiness of the [confession]…. In effect, the trial court judge acts as a gatekeeper and must determine, as a matter of law, that a confession is trustworthy before it can be admitted. In making the trustworthiness determination, the judge is to consider "the totality of the circumstances"…. Only after a confession is deemed trustworthy by a preponderance of the evidence may it be admitted into evidence.

See id. at 284.

Leo outlines a variety of factors courts should consider, based upon the empirical evidence, in making this trustworthiness or reliability determination, while also offering his own variant on the reliability test. What matters here are not the details of any particular approach but rather the recognition that the unreliability of a confession – one bearing hallmarks raising a risk of the confession's falsity, or lacking any evidence suggesting the alleviation of such a risk, should be an independent ground for suppression from involuntariness. Several states, and a growing number of proposals, would indeed more broadly embrace the reliability standard as one governing a wide array of evidence raising the risk of wrongful convictions, including, for example, "snitch" testimony and that of questionable experts. *See* ALEXANDRA NATAPOFF, CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 191, 194-95 (2009). In the interrogation context, Leo and others have recognized, furthermore, that electronic recording is essential to sound fact-finding concerning a confession's reliability. This Act thus recognizes that violation of the Act's recording mandates should be one factor in a motion to suppress a confession as unreliable but rejects the draconian solution of per se exclusion under such circumstances.

State constitutional due process clauses as interpreted by their courts and those courts' interpretations of the scope of their inherent supervisory power over the admission of evidence will vary widely. Reliance on state equivalents to FRE 403 as grounds for exclusion based upon unreliability is uncertain, given the dearth of court decisions on the point. Some courts articulate fuzzy grounds for their approach to reliability questions, and some approaches are too inflexible and harsh. Legislative action, by contrast, brings a democratic imprimatur and the significant investigative resources of the legislature to bear on designing appropriate remedies. A Uniform

Act's attention to remedies thus promises sounder and more uniform approaches to the remedies question. At the same time, this Act's approach does not even arguably intrude in any significant way upon judicial prerogatives because the Act merely makes violation of its provisions *one factor* for courts to consider in making the admissibility decision.

Finally, some commentators have argued that even the prospect of exclusion is unnecessary to deter police resistance to recording requirements because the virtues of the procedure will quickly become evident to police once they start recording. Whether this is so is a subject of some controversy, but even if it is true, deterring police overreaching is *not* the sole goal of the recording requirement. One of its primary goals is to prevent conviction of the innocent and thus to promote conviction of the guilty. Admitting an unreliable confession creates precisely the risk of wrongful conviction that the Act seeks to prevent. The case law summarized above and ample psychological research demonstrate the grave risk of unreliability of unrecorded confessions and the equally grave risk that jurors are not well-equipped to spot such unreliability. *See* Richard Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. L. REV. 979, 1120-22 (1997); Mark A. Godsey, *Reliability Lost, False Confessions Discovered,* 10 CHAPMAN L. REV. 623 (2007).

The only fully effective remedy for an innocent person who has given an unreliable confession is to exclude it as evidence entirely. But the failure to record does not alone, of course, establish such unreliability but rather turns on a case-specific judgment by the trial court. Accordingly, the Act leaves that judgment to the trial court while making plain that it is a judgment that the court must make and that the failure to record is a relevant factor in making this judgment. Like Illinois, therefore, this Act adopts exclusion of unreliable confessions as an option, albeit applying a much softer version of the exclusionary rule than did Illinois.

B. Jury Instructions and Their Relative Efficacy

1. The Virtues of Instructions Where Videotaping Inexcusably Fails to Occur

Thomas Sullivan, one of the leading national advocates for electronic recording of custodial interrogations, and his co-author, Andrew Vail, have strongly endorsed cautionary jury instructions as a remedy for violation of recording mandates. *See* Thomas P. Sullivan and Andrew W. Vail, *The Consequences of Law Enforcement Officials' Failure to Record Custodial Interviews as Required by Law,* 99 J. CRIM. L. & CRIMINOLOGY 215 (2009). Sullivan and Vail argue that fear of such instructions will provide a significant deterrent to law enforcement violations of the provisions of mandatory recording acts. They further argue that jury instructions will help to improve the reliability of jury fact finding when the jury is faced with mere oral testimony rather than having a verbatim recording of the entire custodial interrogation process. New Jersey has followed just such an approach, declaring in its recording rule that, "in the absence of electronic recordation required … [under this Rule], the court shall, upon request of the defendant, provide the jury with a cautionary instruction." *See* New Jersey Supreme Court Rule 3:17. Pursuant to that mandate, the New Jersey judiciary has prepared fairly lengthy model jury charges as a remedy for violation of the statute. Instructions are already an available remedy in several other jurisdictions, including Montana, Nebraska, Wisconsin, and Massachusetts, highlighting the urgency of getting the instructions right.

Sullivan and Vail's proposed instruction would caution jurors that the officers in the case before them inexcusably failed to comply with a recording requirement—one designed to give jurors a complete record of what occurred; that the jurors consequently have been denied "the most reliable evidence as to what was said and done by the participants" so that the jurors "cannot hear the exact words used by the participants or the tone or inflection of their voices." *Id*. at 7. The proposed instruction would conclude as follows: "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." *Id.*

Here is a variant, prepared by this Act's Drafting Committee, of their complete instruction, which might serve as the basis for a model instruction:

> State law required that the interview of the defendant by law enforcement officers which took place on [insert date] at [insert place] 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, what was said, and what was done by each person present.
>
> In this case, the law enforcement officers did not comply with that law. They did not make an electronic recording of the interview of the defendant. [They made an electronic recording that did not include the entire process of interviewing the defendant, from start to finish.] The prosecution has not presented to the court a legally sufficient justification for not complying with that law. Instead of an electronic recording, you have been presented with testimony about what took place during the custodial interrogation, based upon the recollections of the law enforcement officers [and the defendant]. [Instead of a complete record of the entire process of interviewing the defendant, they have left you with only a partial record of the events.]
>
> Therefore, 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 about what was said and what was done by the participants. You cannot hear the exact words used by the participants, or the tone or inflection of their voices. [Because the interview process was not electronically recorded in its entirety as required by law, you have not been provided with the most reliable and complete evidence of what was said and done by the participants].
>
> Accordingly, as you go about determining what occurred during the interview, you should give special attention to whether you are satisfied that testimony of the participants accurately [and completely]

> reported what was said and what was done, including testimony about statements attributed by law enforcement witnesses to the defendant. It is for you, the jury, to decide whether the statement was made and to determine what weight, if any, to give to the statement.

These proposed model instructions combine elements of Sullivan's proposed federal instructions and of his later-proposed and similar state-level instructions, with modifications made to adjust the instructions to a uniform act recommended for adoption at the state level.

Sullivan and Vail at least implicitly argue that many jurisdictions might give cursory cautionary instructions without a fairly detailed model. Specifically, many courts might give standard instructions about treating a confession with caution without specifying the reasons why jurors should do so in a way that will enable the jurors truly to understand the dangers to reliability created by the failure to record. There is also an argument to be made that more detailed instructions explaining precisely why caution is needed may more effectively improve the jury's ability fairly to assess the evidence given the powerful impact that confessions have on juries *See* Richard A. Leo and Steven Z. Drizin, *The Three Errors: Pathways to Wrongful Conviction, in* POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 21, 27 (G. Daniel Lassiter and Christian A. Meissner ed.s 2010) ("People find detailed, vivid, and plausible confessions to be persuasive evidence of guilt, even when they turn out to be false."). Given such an impact, there may be a risk that brief jury instructions will be ignored or have little effect, particularly given the often weak or perverse effects of jury instructions in many contexts (see the more detailed discussion of this last point below). That reason is likely why Sullivan and Vail counsel providing a fairly lengthy standard instruction in the recording statute itself. Sullivan has been more explicit on this point in drafting a model federal statute that includes standard jury instructions on the ill consequences of the unexcused failure to record. Thomas P. Sullivan, *Recording Federal Custodial Interviews*, 45 AM. CRIM. L. REV. 1297 (2008). On the other hand, the length of this sample instruction is unusual in comparison to many sorts of common instructions, and some observers may fear that a lengthy instruction will lead jurors to give *undue* weight to the failure to record by over-emphasizing it or, alternatively, that a lengthy instruction may backfire, either confusing jurors or further impressing in their mind the fact that a confession was made rather than that it was inexcusably unrecorded (if there were a recognized excuse, no jury instruction would be given).

The Act, in subsection 13(b), leaves trial judges ample discretion in crafting instructions meeting the needs of each individual case. Consequently, the Act mandates only that remedial instructions be given, leaving the details and length of those instructions to the trial court. Nevertheless, the sample instructions provided here may help to inform trial judges' decisions on this question.

2. *The Limitations of Sole Reliance on Instructions as a Remedy*

Nevertheless, it is important to explain why such instructions will not suffice as a sole remedy. Notably, there is no empirical data on whether the availability of jury instructions will be an adequate deterrent to violations of recording mandates. Opinions differ on the point,

raising cause for concern were such instructions to be the sole available judicial remedy. Furthermore, jury instructions will also be unavailable in bench trials.

More importantly, however, there is ample reason to question whether jury instructions alone will adequately improve jurors' accuracy in assessing the weight to give confessions obtained in violation of recording requirements. The Committee knows of no studies specifically examining the effect of jury instructions concerning the failure to electronically record the entire interrogation process. (Such studies are, however, under way). Nevertheless, ample studies show that juries routinely give confessions enormous weight, even under circumstances where there is substantial reason to be concerned about the confessions' accuracy. *See* Leo and Drizin, *supra*, at 25 ("Once a suspect has confessed, the formal presumption of innocence is quickly transformed into an informal presumption of guilt that overrides their analysis of exculpatory evidence"; furthermore noting that juries, upon hearing evidence that the defendant confessed, "tend to selectively ignore and discount evidence of innocence."); G. Daniel Lassiter and Andrew L. Geers, *Bias and Accuracy in the Evaluation of Confession Evidence*, *in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 197, 198-99 (G. Daniel Lassiter ed. 2004) (summarizing the research showing that various forms of cautionary jury instructions concerning the risk of a confession's being involuntary or inaccurate have little impact on the high likelihood of guilty verdicts, concluding that "these studies unequivocally demonstrate that people do not necessarily evaluate and use confession evidence in the ways prescribed by law.").

More specifically, research has shown that jurors are not good at separating true from false confessions—in fact do no better than chance—but do improve their ability to judge confession accuracy when the entire interrogation process is videotaped and proper camera angles are used, that is, angles not focusing solely on the suspect. *See* Leo and Drizin, *supra*, at 25 ("[F]alse confessors whose cases are not dismissed pretrial will be convicted (by plea bargain or jury trial) 78% to 85% of the time, even though they are completely innocent."); G. Daniel Lassiter, Lezlee J. Ware, Matthew J. Goldberg, and Jennifer J. Ratcliff, *Videotaping Custodial Interrogations: Toward a Scientifically Based Policy*, *in* POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 143, 143-57 (G. Daniel Lassiter and Christian A. Meissner ed.s 2010) (collecting research and concluding that jurors are best at differentiating true from false confessions when the camera focuses solely on the interrogator, second best when it focuses equally on the interrogator and the suspect, but suspect-focus camera angles alone "appears to actually diminish the capability of decision makers to arrive at objectively correct assessments."). Jury instructions alone are thus unlikely to improve jurors' accuracy where they are denied recordings of the entire interrogation process. Moreover, where there is no excuse for the police failure to record, there seems little justification for ignoring this risk to the innocent.

Ample social science concerning wrongful convictions in other areas (albeit analogous ones) than custodial interrogations also supports the conclusion that jury instructions will do too little to improve jurors' ability accurately to assess credibility and correctly to determine whether a confession was true or voluntary. (The social science supporting the arguments made in this paragraph is concisely summarized at Andrew E. Taslitz, Memorandum to Drafting Committee on Electronic Recordation of Custodial Interrogations, *Social Science Memorandum on the Impact of Cautionary Jury Instructions Concerning the Unexcused Failure to Record the Entire Custodial Interrogation Process*, October 8, 2008, posted in pdf on the Uniform Law Commission Website).

The effect of instructions on jurors varies with the subject matter of the instruction, and some can be modestly effective. *See id.* Yet, overall, instructions are frequently either ineffective in changing jurors' reasoning or have unintended effects. *See id.* Research examining jury instructions in the most thoroughly-examined cause of wrongful convictions, namely, unreliable eyewitness identification procedures, has particularly shown cautionary instructions to be of little, if any, help to jurors in making good judgments about whether the police had the right man. *See id.* 6-7.

This risk is indeed no minor matter, for innocence concerns were among the primary forces motivating the movement for electronic recording in the first place, and errors can result in an innocent person being sentenced to the death penalty or to life in prison—errors hard to correct where confessions rather than DNA are the primary evidence offered. These worries are important, therefore, even if it is correct that violations of recording mandates will be relatively rare. In other words, deterrence is not the only function to be served by an exclusionary rule in this context. Indeed, critics of the exclusionary rule, including those on the Court, have focused their ire on the rule's application to Fourth Amendment violations while generally embracing the rule's wisdom where the reliability of fact finding is at stake. *See* Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: the Sluggish Life of Political Factfinding*, 94 GEO. L.J. 1589 (2006).

The point of stressing the limitations of cautionary jury instructions as a remedy is not to deny that they may be likely to have some, perhaps substantial, deterrent value or that they may modestly improve jury reasoning. Logic suggests that cautionary instructions should help at least somewhat on both these scores. There is indeed a significant likelihood that they will do both. Furthermore, cautionary instructions are a modest and traditional judicial remedy. Moreover, a court may conclude that, though suppression is not justified, some remedy is needed to reduce the risk of error – of convicting an innocent man – given the absence of the best evidence of the confession's voluntariness and reliability, namely, the absence of electronic recording. The availability of jury instructions should also ally (unjustified) concerns that suppression may prove to be too "draconian" because suppression will not be the only remedial option available to the trial judge.

But the limitations of cautionary instructions counsel against relying on them too heavily as the sole judicial remedy. For example, analogous data suggests that jury instructions' impact can be weak or perverse, at least if not given in conjunction with other remedies, such as expert testimony alerting jurors to the reliability problems with certain evidence and to jurors' own reasoning problems that may interfere with their ability to give evidence its appropriate weight. *Cf.* ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 131-33 (1999) (defending the use of such experts concerning rape victim behavior and jury reasoning processes in rape cases); Jennifer Devenport, Christopher D. Kimbrough, and Brian L. Cutler, *Effectiveness of Traditional Safeguards Against Erroneous Conviction Arising From Mistaken Eyewitness Identification, in* EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 51, 61-64 (Brian L. Cutler ed. 2009) (concluding that jury instructions currently relied upon by the courts concerning eyewitness identification accuracy "either have no effect or enhance juror skepticism rather than juror sensitization to eyewitnessing and identification conditions," leading the authors to suggest that "the courts may benefit from a set of cautionary instructions that more

closely resemble expert psychological testimony," though the authors concede that expert testimony in the eyewitness area might, in the view of some commentators, itself raise different problems). The case for the admissibility of expert testimony in the area of custodial interrogations is even stronger, however, than the case for using social science experts in these analogous areas. *See* RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 314-16 (2009) (arguing that a "substantial and widely accepted body of scientific research" supports using experts on the factors affecting confession accuracy at trial and that such social scientist testimony is needed because traditional safeguards, including cautionary jury instructions, "are not sufficient to safeguard individuals against the likelihood of wrongful convictions based on unreliable confession evidence"); Solomon M. Fulero, *Tales from the Front: Expert Testimony on the Psychology of Interrogations and Confessions Revisited, in* POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 211, 211-22 (G. Daniel Lassiter and Christian A. Meissner ed.s 2010) (arguing that such expert testimony is scientifically valid and reliable, useful to juries, and admissible under existing evidence rules governing experts). Furthermore, in some cases the reliability of the confession may be so in doubt, and the jury's ability adequately to grasp that point so insufficient, that suppression of the confession in its entirety is required to protect against the risk of wrongly convicting the innocent. This circumstance might be sufficiently rare that suppression should neither be routine nor presumptive. Nevertheless, its consequences when it does occur are sufficiently grave that this Committee has incorporated into this Act a provision permitting trial judges to take into account as one factor in deciding suppression motions the risks that confessions obtained in violation of this Act will be more likely to be involuntary or unreliable. *Cf.* LEO, *supra*, at 286-91 (arguing for suppression of confessions where the risk of their inaccuracy is unacceptably high).

SECTION 14. HANDLING AND PRESERVATION OF ELECTRONIC RECORDING.

Each law enforcement officer agency shall establish and enforce procedures to ensure that the electronic recording of any or all of a custodial interrogation is identified, accessible, and preserved in the manner required by [cite statutes, court rules, or other state authority generally governing the manner in which evidence in criminal cases is to be preserved].

Comment

Section 14 requires each law enforcement agency to establish procedures to ensure that electronic recordings of custodial interrogations are properly identified and accessible for later trial and pretrial use by law enforcement, defense counsel, prosecutors, and the judiciary. Section 14 further requires that the recording be preserved in accordance with any state law generally governing the manner in which, and length of time in which, evidence in criminal cases is generally treated.

SECTION 15. RULES RELATING TO ELECTRONIC RECORDING.

(a) [Each law enforcement agency in this state] [insert name of the appropriate state authority] [insert name of the state agency charged with monitoring law enforcement's compliance with this act] shall adopt and enforce rules to implement this [act].

(b) The rules adopted under subsection (a) must address the following topics:

(1) the manner in which an electronic recording of a custodial interrogations must be made;

(2) the collection and review of electronic recording data, or the absence thereof, by superiors within the law enforcement agency;

(3) the assignment of supervisory responsibilities and a chain of command to promote internal accountability;

(4) a process for explaining noncompliance with procedures and imposing administrative sanctions for failures to comply that are not justified;

(5) a supervisory system expressly imposing on specific individuals a duty to ensure adequate staffing, education, training, and material resources to implement this [act]; [and]

(6) a process for monitoring the chain of custody of electronic recordings of custodial interrogations[.][; and]

[(7) insert other topic]

[(c) The rules adopted under subsection (a) for video recording must contain standards for the angle, focus, and field of vision of a recording device which reasonably promote accurate recording of a custodial interrogation at a place of detention and reliable assessment of its accuracy and completeness.]

[(d) Each law enforcement agency shall adopt and enforce rules providing for administrative discipline of a law enforcement officer found by a court or a supervisor of the agency to have violated the terms of this [act]. [The rules must provide a range of disciplinary sanctions reasonably designed to promote compliance with this [act].]]

Legislative Note: *Subsection (a) offers three bracketed choices. The first choice requires each local and state law enforcement agency to draft its own rules. The second choice leaves it to a single state authority to draft rules to govern all state and local law enforcement agencies, though that single state authority is assigned no obligations relevant to this Act other than drafting the rules. The third choice assigns the rule-drafting task to a new or existing agency that is not assigned an additional responsibility, that is, monitoring all state and local law enforcement agencies' compliance with the terms of this Act. The third choice thus differs from the second in that the specified agency would have both rule-drafting and Act-implementation monitoring responsibilities, but the intention would still be that that agency would draft rules meant to govern all state and local law enforcement. Subsection (b)(7) is bracketed, applying if a jurisdiction chooses to add to the topics that the rules discussed in subsection (b) must address. Subsection (c) is necessary only in a jurisdiction that requires both audio and video recording under subsection 3 (a). In collective bargaining states, subsection (d) would not apply. Instead, the matter would be controlled by collective bargaining agreements. Thus subsection (d) is bracketed.*

Comment

A. Monitoring and Guiding Police Performance

1. The Need for Rules Designed to Implement This Act

Building into a statute some means of monitoring police performance is highly desirable. Ample empirical literature demonstrates that transparency and accountability improve police performance. *See generally* DAVID A. HARRIS, GOOD COPS: THE CASE FOR PREVENTIVE POLICING (2005). At its best, these mechanisms function both internally—enabling police administrators to monitor their line officers' efforts—and externally, enabling outside political bodies and the citizenry more generally to provide further layers of review. *Cf.* Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO J. PUB. L., POL'Y, & ETHICS 271 (2006) (explaining the importance of internal/external review processes, albeit in another context). Furthermore, systematic data collection improves law enforcement's ability to see the big picture, enhancing the quality of its services over time and highlighting areas in which further internal regulation or legislative control may be necessary. Regulations also provide clear guidance to line officers charged with implementing the provisions of this Act, anticipating potentially problematic situations, reducing transition costs, and improving police efficacy and efficiency. It is for similar reasons that subsection 14(a) requires adoption and enforcement of rules designed to implement this Act.

Washington, D.C.'s statute provides that police "may" adopt an implementing general order. The police have done just that, by adopting a general order requiring commanders or superintendents of detectives' divisions to approve requests for deviations from standard recording procedures; ensure that adequate manpower and material resources for recording are made available; ensure that prosecution requests for original and backup recordings are timely met; and compile statistics that include the number of custodial interrogations conducted, the number required to be recorded, the subset of these not recorded, the reasons for not doing so, and the sanctions imposed for failing to record when required. Commanders and superintendents of detectives' divisions must also forward the compiled statistics to the Assistant Chief of the Office of Professional Responsibility by a specified date each month; ensure Detective Unit maintenance of an electronic recordings logbook containing detailed information and documenting a chain of custody; and ensure that all officers are aware of and comply with the general order. That order further requires the Assistant Chief of the Office of Professional Responsibility to submit annually to the Chief of Police a report of relevant statistics that includes, but is not limited to, the data categories compiled by commanders. A model statute need not be as detailed as an implementing police general order, but the D.C. order reflects some basic requirements that a sound statute should contain, including:

1. mandates for detailed data collection within, and review by superiors within, each police department;

2. clear, specific assignments of supervisory responsibilities to specific individuals and a clear chain of command to promote internal accountability;

3. a mandated system of explanation for procedural deviations and administrative sanctions for those that are not justified;

4. a mandated supervisory system expressly imposing on specific individuals a duty of ensuring adequate manpower, education, and material resources to do the job; and

5. a mandated system for monitoring the chain of custody and responding to prosecutor evidence and informational requests to ensure responsiveness to the needs of the judicial branch, and to translate police action into reliable evidence ready for efficient use by the courts and by lawyers in both trial and pre-trial proceedings.

More generally, D.C.'s approach suggests a statutory mandate for police to draft detailed internal regulations for implementing general statutory requirements. Subsection 14(a) of this Act accordingly outlines the minimum important subjects to be included in police regulations but leaves those details to other entities. The Act offers states three bracketed options concerning who should draft those details: "[e]ach law enforcement agency in [the] state"; an "appropriate state authority" to be identified by name in the state's version of this Act; or the "state agency charged with monitoring law enforcement's compliance with this Act." The first option leaves drafting to local law enforcement, the second to an existing state agency without otherwise substantially changing its responsibilities, the third to an existing or new state agency where the

state chooses to identify a specific state-level entity charged with monitoring state and local law enforcement's compliance with the Act. There are scores of existing model regulations from police departments already mandated to, or voluntarily choosing to, record upon which drafting entities may draw for models. *See Police Department Regulations: Custodial Interrogation* (unpublished looseleaf collection of all such regulations, collected by, and available from, Thomas P. Sullivan or Andrew W. Vail, attorneys, Chicago, Illinois).

Although the District of Columbia's statute merely authorized police to adopt implementing regulations, it is worth noting that Maine, for example, by statute *requires* all law enforcement agencies indeed to adopt written policies concerning electronic recording procedures and for the preservation of investigative notes and records for all serious crimes. Furthermore, the chief administrative officer of each agency must certify to the Board of Trustees of the Maine Criminal Justice Academy of the State Department of Public Safety that attempts were made to obtain public comment during the formulation of these policies. The statute also requires this same Board, by a specified date, to establish minimum standards for each law enforcement policy. The chief administrative officer for each law enforcement agency must likewise certify to the Board by a specified date that the agency has adopted written policies consistent with the Board's standards and, by a second specified date, certifying that the agency has provided orientation and training for its members concerning these policies. The Board must also review the minimum standards annually to determine whether changes are needed as identified by critiquing actual events or reviewing new enforcement practices demonstrated to reduce crime, increase officer safety, or increase public safety. The chief administrative officer of a municipal, county, or state law enforcement agency must further certify to the Board by a specified date that the agency has adopted a written policy regarding procedures for dealing with freedom of access requests and that he has designated a person trained to respond to such requests—a system that can help to balance privacy concerns of interviewees facing potential trials with the need for public access and evaluation.

Maine's Board, pursuant to this statute, indeed drafted a requirement of a written policy, including at least certain minimum subject matters. More specifically, the Board required written policies to address at least thirteen specific items, including:

a. recognizing the importance of electronic recording;
b. defining it in a particular way;
c. defining custodial interrogation in a particular way;
d. doing the same in defining "place of detention" and "serious crimes";
e. reciting procedures for preserving notes, records, and recordings until all appeals are exhausted or the statute of limitations has run;
f. recognizing a specified list of exceptions to the recording requirement;
g. outlining procedures for using interpreters where there is a need;
h. mandating officer familiarity with the procedures, the mechanics of equipment operation, and any relevant case law;
i. mandating the availability and maintenance of recording devices and equipment;
j. outlining a procedure for the control and disposition of recordings; and
k. outlining procedures for complying with discovery requests for recordings, notes, or records.

The Maine Chiefs of Police Association further drafted a generic advisory model policy to aid local agencies in drafting their own individual policies to comply with the statute's and the Board's mandates. That model policy included a statement disclaiming its creating a higher legal standard of safety or care concerning third party claims and insisting that the policy provides the basis only for administrative sanctions by the individual agency or the Board.

Again, this Act leaves details to each state, but the Maine approach is offered as an example of a state approach far more detailed to that specified in this Act but that may be useful in generating ideas about what details and mechanisms for creating and implementing them a particular state might choose to follow.

2. Delegation Concerns

Many state courts will invalidate statutes that delegate rule-making power without "adequate" guidance to regulatory agencies. But it is unlikely that this provision will prove troublesome in this regard. Illinois' requirements offer a helpful example. In Illinois, a legislative delegation of regulatory authority will be valid if the legislature meets three conditions: first, it identifies the persons and activities subject to regulation; second, it identifies the harm sought to be prevented; and third, it identifies the general means intended to be available to the administrator to prevent the identified harm. *See Stofer v. Motor Vehicle Cas. Co.*, 68 Ill. 2d 361, 12 Ill. Dec. 168, 369 N.E.2d 875 (1977). The statute must also create "intelligible standards" to guide the agency in the execution of its delegated power, but these criteria need not be so narrow as to govern every detail necessary in the execution of the delegated power. *Forest Preserve Dist. of Du Page County v. Brown Family Trust*, 323 Ill. App. 3d 686 (2d Dist. 2001).

This Act, read as a whole, clearly identifies law enforcement agencies and officers as the "persons" regulated by the Act, while further identifying the "activity subject to regulation" as custodial interrogation as defined in *Miranda*, a definition with which law enforcement have been familiar for over four decades. The statute further clearly declares that this activity is regulated in one specific way: it must be electronically recorded, a term defined in the text of the Act. Similarly, the Act clearly aims at preventing three sorts of harms: the creation of involuntary confessions or of false or unreliable ones and the maximization of the factfinder's ability to identify involuntary, false, or unreliable confessions. Moreover, the means for law enforcement agencies to carry out their responsibilities are identified in numerous provisions: those describing when recording is necessary and when it is not (the various exceptions), those identifying what paperwork must be prepared and when, those addressing remedies that include internal discipline being but a few of the provisions offering detailed guidance. Finally, for similar reasons, the Act provides easily intelligible standards to guide the law enforcement agency, for it will know with some specificity when, where, and how it must tell officers to record. It will do so, however, with specificity sufficient to offer law enforcement agencies guidance but not so detailed as to straightjacket their choice of specifics. The delegation doctrine should, therefore not be cause for concern.

B. Content of the Rules

Subsection 14(b) specifies specific areas that the rules must address. As noted above, these areas are those that social science, the content of existing rules in various departments, and the experience of those departments already engaging in electronic recording suggest are most important for the Act's successful implementation. These subject-matter requirements are all procedural in nature. Accordingly, the rules must specify, for example, the manner in which electronic recording is to be done; the assignment of a chain of command and supervisory responsibilities; the collection and review of recording data by superiors; the process for explaining noncompliance with the Act; the identification of specific individuals obligated to ensure adequate staffing, education, and training; and a process for monitoring the chain of custody of electronic recordings to prevent tampering and comply with evidentiary requirements. The rules must necessarily address procedures because the triple goals of mandating such rules are to provide clarity to ease the task of officers and detectives charged with conducting interrogations, to improve transparency, and to aid supervisory review and accountability. Bracketed subsection (b)(7) allows individual jurisdictions to add any further areas that they want to mandate be addressed via rule.

Although the Act recognizes that not all custodial interrogations of the specified crimes can occur at places of detention, recording at such places is the ideal to which the Act aspires. The reason for this is straightforward: only at places of detention must recording be done by audio and visual, rather than only audio, means. Yet audio-visual recording maximizes the benefits of recording. Accordingly, this section requires law enforcement or monitoring agencies to adopt rules expressing a strong preference for recording at places of detention unless otherwise necessary.

C. Numbers of Cameras and Angle

Subsection (c) is bracketed because it applies only in jurisdictions that require both audio and video recording. Requiring rules specifying the number of cameras to use and their angle may seem like a small, unimportant detail. It is not. Indeed, ample research demonstrates that jurors are best at differentiating true from false confessions when the camera focuses solely on the interrogator, second best when it focuses equally on the interrogator and the suspect. *See* G. Daniel Lassiter, Lezlee J. Ware, Matthew J. Goldberg, and Jennifer J. Ratcliff, *Videotaping Custodial Interrogations: Toward a Scientifically Based Policy*, *in* POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 143, 143-57 (G. Daniel Lassiter and Christian A. Meissner ed.s 2010). Yet a suspect-focus camera angles alone "appears to actually diminish the capability of decision makers to arrive at objectively correct assessments." *See id.* at 153. This last point is particularly important because it is particularly counter-intuitive: audio recording may be superior to audio and video combined if the video focuses solely on the suspect. *See id.* at 152 (describing data supporting the conclusion that "confession presentation formats that provide access to suspects' facial cues seem to hinder rather than help observers accuracy with regard to differentiating true from false confessions," and this is particularly true where the sole focus of the camera is on the suspect), 155 ("[T]ime and time again the research demonstrates that this [suspect-focus] perspective leads to biased and inaccurate assessments of videotaped interrogations, which could increase the possibility of an innocent person being wrongfully prosecuted and ultimately wrongfully convicted."). The combination of audio and video, it must be stressed, is the best way to improve

accuracy but *only* if the camera focus is equally and simultaneously on both the suspect and the interrogator or even on the interrogator alone. *See id.* at 154-55 (recommending ideally an audio-video presentation focuses solely on the interrogator, secondarily one focused equally on both interrogator and suspect, but arguing for suppression of the video – and use only of the audio portion and of a transcript – where video was made focusing solely on the suspect). *See also id.* at 155 (discouraging a split-screen presentation of face-on views of both suspect and interrogator as increasing the risks of error, thus favoring instead either a camera angle simultaneously and equally focusing on both suspect and interrogator or on interrogator alone). Additional summaries of relevant empirical studies supporting these conclusions may be found in G. Daniel Lassiter & Andrew L. Geers, *Bias and Accuracy in the Evaluation of Confession Evidence, in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 197, 198-208 (G. Daniel Lassiter ed., 2005); RICHARD LEO, POLICE INTERROGATIONS AND AMERICAN JUSTICE 205, 250-51 (2008); S.M. Kassin & K. McNall, *Police Interrogations and Confessions,* 15 L. & HUMAN BEH. 231, 235 (1991); S.M. Kassin & H. Sukel, *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule,* 21 L. & HUMAN BEH. 27, 27-46 (1996).).

Most statutes and regulations ignore these details. But North Carolina recognizes their importance, declaring that, if a visual record is made, "the camera recording the interrogation must be placed so that the camera films both the interrogator and the suspect." Thomas Sullivan, in his latest proposed statute, also addresses this matter, declaring that, "If a visual recording is made, the camera or cameras shall be simultaneously focused on both the law enforcement interviewer and the suspect." The Innocence Project of Cardozo University Law School, in its proposed model statute, makes a similar recommendation.

D. Internal Discipline

Violations of recording mandates that do not produce confessions or that produce confessions that seem obviously to violate constitutional or other admissibility requirements and thus that are not offered as evidence at a criminal trial cannot be remedied by the criminal justice system. Yet no civil liability may be available either if the law enforcement agency has adopted and enforced reasonable regulations concerning recording, and often potential litigants will not file suit because of minimal recoverable damages. In such cases, the only effective deterrent to an individual officer's future mistakes will be administrative discipline. Moreover, while court remedies may be uncertain, vigorously enforced administrative sanctions are relatively certain and thus likely to deter future error. Furthermore, the mere knowledge that such sanctions may be available can lead officers to act with great care and deliberation concerning recording procedures. For these reasons, section 14(d) mandates that law enforcement agencies adopt rules imposing graded system of sanctions on individual officers, sanctions reasonably designed to promote compliance with this Act. The subsection is bracketed, however, because in collective bargaining states, the subject matter of subsection (d) would be controlled by collective bargaining agreements.

SECTION 16. LIMITATION OF ACTIONS.

(a) A law enforcement agency [in this state] that has adopted and enforced rules

reasonably designed to ensure compliance with the terms of this [act] is not subject to civil liability for damages arising from a violation of this [act].

(b) The only sanction that may be imposed on a law enforcement officer for failure to comply with Section 3(b) [and (d)] is administrative discipline.

(c) This [act] does not create a cause of action against a law enforcement officer.

Comment

Section 16 addresses civil liability. Subsection 16(c) unequivocally states that this Act does not by its terms create a cause of action against an individual law enforcement officer. Subsection (b) adds further clarity by declaring that the only sanction that may be imposed upon an individual officer who violates this Act is administrative discipline, though it does not mandate such discipline. However, the Act recognizes the possibility, without mandating it, that courts or legislatures in individual states might find under legal principles other than those stated in this act a civil cause of action against a law enforcement agency that violates the provisions of this Act. Subsection (a) gives law enforcement agencies a safe harbor against such liability for agencies that adopt *and enforce* rules reasonably designed to ensure compliance with this Act. Subsection 16(a) is thus closely linked with Section 15: a law enforcement agency adopting and enforcing the rules provided for in section 15 will be protected from civil liability should individual officers nevertheless violate the Act despite the reasonable efforts of the law enforcement agency.

The major justification for this provision is that it will provide an incentive to law enforcement agencies to vigorously implement the mandates of this Act, including providing adequate resources to get the job done. If a law enforcement agency creates and enforces procedures designed to, and likely to, result in vigorous enforcement of this Act, there seems little justification in exposing it to civil liability for the occasional error by an individual officer. At the same time, however, because the primary responsibility and power to ensure compliance with this Act rests with the law enforcement agencies, little is gained in terms of fairness or deterrence by exposing individual officers to civil liability.

One helpful analogy occurs in the federal law concerning Title VII hostile environment sexual harassment cases. An employer is vicariously liable for its supervisory employees' actions in such cases but can raise as an affirmative defense that the employer both exercised reasonable care to prevent and correct any sexually harassing behavior and that the plaintiff employee failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. E. Jacob Lindstrom, *All Carrots And No Sticks: Moving Beyond The Misapplication Of Burlington Industries, Inc. V. Ellerth*, 21 HASTINGS WOMEN'S L.J. 111 (2010) (summarizing the law, though criticizing lower courts for giving it an overly expansive application). The result of this defense has been for many employers to adopt and implement anti-harassment policies. *See* Jonathan D. Hoag, *Textual Harassment Trends Particularly Troubling for Illinois Employees*, 22 DCBA Brief 14 (2010).

Critics have charged that courts are often too deferential to employers in upholding defenses based on weak policies – policies unlikely to correct bad behavior and in fact not doing so. *See* Lindstrom, *supra.* But even many critics agree that helpful policies can and have been designed by employers eager to take advantage of the reasonable care defense. *See* Joanna Grossman, *Sexual Harassment in the Workplace: Do Employers Efforts Truly Prevent Harassment, Or Just Prevent Liability?*, http://writ.news.findlaw.com/grossman/20020507.html (posted May 7, 2002) (praising Mitsubishi's recent policies for managing to "change its workplace culture to stem the proliferation of harassment."). Furthermore, there is significant evidence that effective training programs are the most valuable mechanism for improving compliance, and these policies have sometimes promoted such programs. *See id.* (citing social science research demonstrating the effectiveness of certain anti-sexual-harassment training programs in actually reducing sexual harassment). These programs are likely to be most effective when they also contain an individualized component addressing the training needs of particular employees. *See id.* At the same time, critics emphasize the need for employers to track their programs and tinker with them to improve their actual effectiveness, based upon performance, in reducing sexual harassment. *See id.* Such tracking is needed to avoid prevention programs becoming more publicity stunts than serious efforts to resolve the harassment problem. *See id.* These are reasons enough to provide a similar defense to law enforcement agencies under this Act. Indeed, there is substantial evidence that properly designed rules, including training programs, detailed guidance on procedures, and effective internal sanctioning measures are significantly effective in improving police performance in a range of areas. *See generally* DAVID HARRIS, GOOD COPS (2005) (articulating an extended defense of this point); SAMUEL L. WALKER, THE NEW WORLD OF POLICE ACCOUNTABILITY (2005) (similar). Proper program design is key; that is why Section 14 of this Act – seeking to learn lessons from the experience under Title VII – stresses that rules address training and education. It is also why the rules mandated by that section require a process for explaining noncompliance. Ample social science demonstrates that the mere knowledge that one must explain his or her actions improves performance, including that of the police. *See* Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, __ OHIO ST. J. CRIM. L. __ (forthcoming 2010). Moreover, the availability of other potential remedies – not simply a defense against civil liability – provided for in this Act should provide an even greater incentive for creating sound regulatory policies and zealously enforcing them than is true in the case of sexual harassment.

Some commentators have indeed argued that the United States Supreme Court has, in its constitutional criminal procedure jurisprudence, been moving toward recognizing a "reasonable care" defense to suppression motions based on constitutional violations, perhaps doing so as well in civil actions for such violations. *See* Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule***,** 76 MISS. L.J. 483 (2006). That movement is likewise based on an implicit analogy to the law of entity liability in the area of sexual harassment. Although this Act may not be constitutionally mandated, the logic of improving deterrence while avoiding penalties where there is minimal entity or individual culpability makes much sense and is followed here.

SECTION 17. SELF-AUTHENTICATION.

(a) In any pretrial or post-trial proceeding, an electronic recording of a custodial interrogation is self authenticating if it is accompanied by a certificate of authenticity sworn under oath or affirmation by an appropriate law enforcement officer.

(b) This [act] does not limit the right of a defendant under law other than this [act] to challenge the authenticity of an electronic recording of a custodial interrogation.

Comment

Among the anticipated efficiency benefits of electronic recording of custodial interrogations is that it minimizes disputes over what in fact happened during the custodial interrogation process. In many, perhaps most, instances, the recording "speaks for itself." There will be little that officers' testimony can add.

Indeed, where there is no arguable ground for suppression apparent from the recording, suppression motions become unlikely and, if made, can be disposed of quickly. Lacking grounds for suppression, many defendants will have a greater incentive to plead guilty and to do so at an earlier stage of the prosecution than might otherwise be the case. Time, money, and inconvenience are thus saved by police having less frequent need to testify.

Even where suppression motions are made, the only likely grounds for the motion would be that: (1) what is shown in the recording constitutes a violation of some statutory or constitutional provision; (2) the recording is inaccurate, not showing what really happened, thus not being properly authenticated; or (3) the recording is not complete, omitting important portions of the custodial interrogation process. Ground number one implicitly concedes the authenticity of the recording, so there is no real need for officer testimony; placing the burden of nevertheless proving authentication on the state would therefore needlessly reduce cost-savings. Ground number two is likely to arise rarely and to be a meritorious claim still more rarely given various technological and procedural safeguards provided in this Act. Accordingly, it may be appropriate to place the burden of proving *in*authenticity on the defendant, though the Act ultimately leaves it to each individual's state's law to determine how to treat challenges to the presumptive self-authenticating nature of the electronic recording that is created by this Act. Ground number three *does not* challenge the accuracy of what the recording reveals but rather argues that it does not reveal the whole picture, requiring further witness testimony concerning what else happened. It therefore makes sense to presume the authenticity of the electronic recording, but to allow the defendant to rebut that presumption by evidence that it is flawed in an individual case. That is precisely what Section 17 does.

Nor would a presumption of authenticity likely raise federal Confrontation Clause concerns. *See Melendez-Diaz v. United States,* __ U.S. __ (2009) (suggesting in dicta that a mere certification for use at trial of the authenticity of a pre-existing document would not likely violate

the Confrontation Clause). Nevertheless, state constitutional equivalents to the federal Constitution's Confrontation Clause, and judicial interpretations of those state equivalents, vary widely. It may therefore happen that in some, likely few, states Section 17 may be held inconsistent with a state constitution. In that event, 21 on severability should preserve the effectiveness of the remainder of the Act.

Section 17 is divided into subsections (a) and (b) to make clear the relationship between this section and other provisions of state law governing the authenticity of evidence. Subsection (a) of the Act renders the electronic recording self-authenticating. But should a defendant have a good faith basis for nevertheless challenging that authenticity under state laws other than this Act, subsection (b) permits the defendant to do so under those laws.

SECTION 18. NO RIGHT TO ELECTRONIC RECORDING OR TRANSCRIPT.

(a) This [act] does not create a right of an individual being interrogated to require electronic recording of the custodial interrogation.

(b) This [act] does not require preparation of a transcript of an electronic recording of a custodial interrogation.

Comment

Section 18 declares that no right to electronic recording is created by this Act. Vesting a "right" to recording in the individual interrogated would create insuperable problems for crafting an effective statute. For example, were a suspect to have such a right, he could "waive" it, undermining many of the benefits of recording. Although this Act creates an exception permitting non-recording where a suspect refuses to talk if recorded, that exception recognizes a specific sort of necessity, one granting police discretion whether to record. But the exception does not *entitle* the suspect to speak without being recorded. Indeed, the whole tenor of the Act is to encourage recording absent good reason to do otherwise.

Similarly, were there a right to recording, it could not be done without the suspect's knowledge. Law enforcement officers have stressed the need to have the flexibility for covert recording to address situations where they believe overt recording might lead the suspect to alter what he has to say. Covert recording also reduces the likelihood that a suspect will refuse to speak at all if recorded, a circumstance that, again, undermines the Act's goal of encouraging recording of crimes within the Act's mandates, *regardless of the desires of the suspect*. Recording benefits society as a whole through its efficiency gains, improvements in fact-finding accuracy and assessment, and enhancement of police training, among the other advantages discussed in the Prefatory Note. These social benefits favor recording even if contrary to any individual's wishes.

Miranda v. Arizona, 384 U.S. 486 (1966), provides a helpful analogy. The Fifth

Amendment to the United States Constitution prohibits compelling someone to be a witness against himself. Because the United States Supreme Court concluded that custodial interrogations were "inherently" compelling, the Court created two procedural safeguards to dispel compulsion: first, a requirement of the presence of counsel during custodial interrogation; second, a set of warnings to advise the suspect of that right and of his core Fifth Amendment right to silence. However, the suspect's only "right," at most, is to be free from compulsion *while interrogated*. The suspect, therefore, has no right to *Miranda* warnings themselves. If he had such a right, he could sue for not being warned, even if he was ultimately never interrogated and thus never gave a statement. But that is not likely true. *See United States v. Patane*, 542 U.S. 630, 642 (2004) (plurality opinion of Thomas, J.) (noting that a "mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule"). Similarly, a defendant can waive his rights to silence and to counsel during custodial interrogation, yet he is not entitled to counsel during that waiver decision, and the courts readily find knowing, voluntary, and intelligent waivers without counsel's presence (were counsel present, he or she would, absent the most unusual of circumstances, undoubtedly advise his or her client not to talk or waive any rights whatsoever).

Miranda, as later interpreted by the Court, thus recognized that a procedural safeguard (*Miranda)* of a recognized right (the privilege against self-incrimination) need not itself be a right. As applied here, that would mean that the procedural safeguard of electronic recording, if that is how the recording mandate is characterized – a mandate which some might view as protecting some constitutional rights, such as the privilege against self-incrimination and the due process protection against coerced statements, as well as serving other purposes – need not itself be a constitutional right or indeed a right of any kind. Yet a better way to view mandated electronic recording of custodial interrogations is not as specifically protecting any constitutional right at all. Rather, it is better understood as a code governing police procedures concerning one police investigative technique: interrogation. The Act aims at guiding the police to achieve a variety of societal benefits, not at protecting the individual suspect's interests, though the latter result may often obtain.

Of course, *Miranda* arguably gives a nod toward its creating a personal right simply by allowing the defendant to waive *Miranda's* protections, thus perhaps suggesting that he is in control of that decision because the rule is designed to work for his benefit. (That is not the only possible interpretation; he might also simply be seen as the person with the most incentive to act to promote enforcement of a rule that benefits society; see below). To the extent that this argument might be accepted as a correct statement of the *Miranda* Court's intentions, this Act disclaims any similar intentions here. Here, unlike this more capacious interpretation of *Miranda*, the suspect cannot choose to waive recording *because recording is not his right to waive.*

Yet the Act does permit the defendant to seek remedies for the Act's violation. In this respect, he acts as a sort of private Attorney General, his ability to seek remedies being deemed essential to deterring violations of the Act and to minimizing the harms such violations do to society. Another analogy, this time to Fourth Amendment case law, sharpens the point.

The Fourth Amendment declares that the right of the People to be free from unreasonable

searches and seizures shall not be infringed. One well-known remedy for violation of this right of the People is the suppression of evidence obtained because of the violation. The defendant is granted the authority to file a motion to suppress evidence, and should he win that motion, he will of course benefit from it. But recently, in *Herring v. United States*, 129 S. Ct. 695 (2009), the Court unequivocally stated that "the exclusionary rule is not an individual right and applies only where it 'result[s] in appreciable deterrence.' " *Id.* at 700 (quoting in part *Leon v. United States*, 468 U.S. 897, 909 (1984)**,** itself quoting *United States v. Janis*, 428 U.S. 433 (1976)). The right was to be free from unreasonable searches and seizures. But the remedy was one created for deterring violations of the substantive right. The remedy was meant to apply when its social benefits for the People, not its private benefits for the defendant, outweighed its costs to finding truth at trial. Nevertheless, as a practical matter, the remedy would rarely, if ever, be sought were the defendant not empowered to seek it and permitted to benefit from it. So empowering him gives him the incentive to act on society's behalf by seeking a remedy that deters future violations of the People's substantive right.

With electronic recording, however, no substantive constitutional right is involved in the first place. If a remedy that a defendant is empowered to exercise to protect a substantive constitutional right is nevertheless not itself a right, then surely a merely statutory procedure governing an aspect of police investigations can likewise empower a defendant to seek remedies for its violation without thereby vesting in him a "right." As in *Herring*, the question is one of the balance of social costs and benefits, not the rights of the accused.

SECTION 19. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Comment

This section's narrow purpose is to emphasize that this is a uniform act and thus should, absent good reason, be interpreted consistently with the interpretations given by other jurisdictions adopting the Act and with the uniformity goals of the Uniform Law Commission and the National Conference of Commissioners on Uniform State Laws.

SECTION 20. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15

U.S.C. Section 7003(b).

Comment

This is a standard provision of uniform acts and needs no explanation.

SECTION 21. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

Legislative Note: *Include this section only if this state lacks a general severability statute or a decision by the highest court of this state stating a general rule of severability.*

Comment

This section is designed to make clear the state legislature's intention that the remaining provisions of the Act continue in effect even if a court should hold any single provision or small set of provisions unconstitutional.

SECTION 22. REPEALS. The following are repealed: [insert title and section numbers].

Comment

Section 22 serves as a reminder to legislators in each jurisdiction adopting the Uniform Act to repeal with specificity any other applicable statutes that might be inconsistent with the terms of this Act.

SECTION 23. EFFECTIVE DATE. This [act] takes effect . . . .

Comment

Section 23 simply requires the recitation of a specific date on which this Act shall take effect.