MEMORANDUM

TO: Drafting Committee on Electronic Recordation of Custodial Interrogations
Members, Advisors, and Observers

FROM: Andrew E. Taslitz, Reporter

DATE: October 8, 2008

RE: *Issues to be Resolved Concerning the Content of a Uniform Statute on Electronic Recording of Interrogations*

I. *Introduction*

The purpose of this memorandum is to identify the issues that must be resolved before drafting can begin on a uniform statute on electronic recording of the process of police interrogation. Rather than burden you with the law-review length commentary that can easily be written on any one of these topics, I will simply try to identify each issue and comment on the arguments for and against resolving each one in particular ways. I will not hesitate to express my opinion, where appropriate, as a way of promoting discussion. Where I think you may find it important, I will also attach other documents that provide useful background or elaborate further on some of these issues. I will sometimes use text, other times lists or charts—whatever I think is the most concise and effective way to convey the information. I will also generally eschew footnotes, except concerning what I think will be the most controversial issue before the Committee—what remedy to provide for the statute's violation. I will further often review what approaches various jurisdictions have followed in solving certain problems. But I will do so for illustrative purposes rather than making an effort at being comprehensive about every jurisdiction's stand on every issue. Even so, there are a sufficient number of drafting issues to discuss that this memorandum will be significantly

longer than a simple set of talking points. These drafting issues will be summarized in Part III of this memorandum.

Although the mere existence of this Committee constitutes a commitment to draft a uniform statute, it is also worth beginning by summarizing the justifications for electronic recording of the entire police interrogation process—not simply the confession itself—because those justifications will often be relevant to resolving the various issues to be discussed shortly. Outlining this summary of justifications for recording the *entire* interrogation process is the task to which I now turn in Part II.

II. *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. 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*: By "risky," I mean interrogation techniques reasonably like 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 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.

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. 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. *Improve 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, as I now discuss.

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* 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.

> ***CAUTION:*** Recording is *not* without its costs—both financial and otherwise. Nor is it a panacea. I will address relevant costs and limitations, and suggestions about how to minimize them, where they become relevant, in addressing drafting issues below.

III. *Drafting Issues*

There are twelve major drafting issues to be resolved:

A. ***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.

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, 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? 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 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.

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.[1]

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); or (3) either audio or video is acceptable. The last 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

---

[1] 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.

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 to have been willing to try option two.

B. ***Temporal Triggers: When Should Recording Be Required?***

Police departments embracing recording might someday decide that it is worth the cost of installing portable equipment in every police car. For now, however, cost and political implications likely limit the technology's availability to particular locations. 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.

C. ***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 police 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 to me, 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, raises costs, 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.

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.

On the other hand, the exception can protect police departments from the potentially vast expense and logistical problems of having no locational restrictions on the must-record rule. It would be helpful for the Committee to have law enforcement advise it, in the form of hard numbers, if available, concerning the actual (perhaps New Mexico and Massachusetts have collected this data) or projected expense of greater breadth, that is, of at least sometimes requiring recording for custodial interrogations beyond "places of detention." Yet, despite such fears of high-costs, New Mexico has followed its approach, and Massachusetts has gone even further, creating not even any arguable locational limits.

D. **Subject Matter Limitations**

To what crimes should the mandate apply? Seven out of nine 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."

E. ***Numbers of Cameras and Angle***

Specifying the number of cameras to use and their angle may seem like a small, unimportant detail. It is not. Significant empirical evidence demonstrates that juries are more likely to judge a confession truthful and voluntary if the camera focuses on the defendant, more likely to find a confession false, involuntary, or both if the camera focuses on the police. Indeed, there is reason to believe, based upon significant psychological research, that improving jurors' ability accurately to determine the voluntariness and accuracy of a confession depends upon the proper camera angles. All agree that a focus solely on the suspect is unwise. Some researchers recommend a focus solely on the interviewer as most likely to promote accuracy, while other researchers recommend focusing on both the interviewer and the suspect. Leaving either the interrogator or the interrogatee outside the picture also hides the actions and demeanor of persons central to determining the confession's value and the soundness of the interrogation process.[2]

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

---

[2] Empirical studies supporting these conclusions are summarized 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).

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."[3]

F. ***Exceptions***

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);[4] (5) the

---

[3] *See* Thomas P. Sullivan & Andrew W. Vail, *The Consequences of Law Enforcement Officials' Failure to Record Custodial Interviews as Required by Law*, __ J. CRIM. L. & CRIMINOLOGY __ , 6 (forthcoming 2008) (draft manuscript).

[4] One well-respected academic, it should be noted, has argued that electronic recording is constitutionally mandated and is a *non-waivable* right. *See* Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309 (2003). Slobogin roots his constitutional argument in the Due Process Clauses' obligations for the state to preserve exculpatory evidence and avoid coercing involuntary confessions; the Fifth Amendment's bar on compelled testimonial communications and on violations of the *Miranda* rule; and the Sixth Amendment Confrontation Clause's mandate that each defendant have an opportunity for effective cross-examination. Slobogin argues that these constitutional provisions embody an obligation on the state to

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.

---

achieve the most accurate re-creation of events feasible, that no truly useful accurate re-creation is possible without recording given the subtlety of the issues involved, and that technology has now made recording not merely feasible but relatively cheap and easy given its benefits. The *Miranda* experience teaches, says Slobogin, that rights made waivable will too often be waived because the police convince the suspect to do so, because the suspect mistakenly believes that untaped confessions are inadmissible, or because the suspect is subtly compelled to waive. These rights would, therefore, become meaningless in practice if they are waivable. But, says Slobogin, it is not only the defendant's rights that matter but the state's obligation, implicit in the constitution and the adversarial system, to strive toward accuracy in factfinding, particularly where a suspect's constitutional rights are vulnerable. Slobogin explains:

> The insistence that taping occur regardless of the defendant's desires rests on more than concern for the constitutional rights of defendants, however. Government and society at large also have a strong interest in verbatim recording of interrogation, an interest that defendants should not be able to waive even if they can give rational reasons for doing so. A defendant may not be tried while incompetent, regardless of his or her desires, because society wants to ensure the integrity of the trial process and a meaningful confrontation between the accused and the accusers. Similarly, the taping requirement should be sacrosanct because government should want to know precisely what happens in the interrogation room as a means of protecting the accuracy and fairness of the criminal process.

Id. at 321. Courts have generally not been receptive to variants of the due process argument, although, for example, the Alaska Supreme Court relied on its state constitution's due process protections in mandating recording. *See* Stephan v. State, 711 P.2d 1156 (Alaska 1985). But, so far as I know, no court has yet considered all Slobogin's constitutional arguments, including his particular variant of the due process argument. If Slobogin is right in all that he says, then a suspect's willingness to proceed -- indeed insistence upon doing so – without recording must be ignored. If he is wrong about the non-waivable nature of the right but correct that the recording mandate is rooted in the constitution, then any waiver would need to be knowing, voluntary, and intelligent. The tenor of the courts seems for now to be to leave the whole area of recording to the legislature. But should any state court in the future accept Slobogin-like constitutional arguments, though treating the rights as waivable, then any implementing statutory or rule-based exception, like that in New Jersey, where the suspect refuses to talk unless he is not taped might need to require a set of warnings and procedures to build a record that the "waiver" of the right is knowing, voluntary, and intelligent. Law enforcement might fear that such waivers would discourage any statement at all, but those fears are likely unwarranted, given analogous social science research. The drafting question for this Committee is whether to build in such waiver procedures or to assume that the constitutional argument is simply not one likely to gain traction. Alternatively, the Committee might simply note the point in commentary.

This seems like a sensible list of exceptions. Exception number one is done for clarity, as it would not fit most understandings of the term "interrogation," and exception three tracks one of *Miranda*'s exceptions. Exception number four is based on the sound idea that doing some interrogation is better than none if a suspect will not cooperate in recording. Exception five simply recognizes that police cannot ensure 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.[5] Exceptions six and seven address some drafting problems noted above 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. Exception one is the one most likely to engender interpretive disputes over what it means to say that recording was "not feasible." I am for this reason uncomfortable with this feasibility exception, which also has the potential to swallow the rule. Nevertheless, it is hard to foresee every eventuality in which an exception may wisely be needed, and this catchall may allay fears of undue rigidity and thus soften political opposition. Perhaps the text of the Rule or the comments can address this problem by urging narrow interpretation of the catchall. It

---

[5] The Study Committee, whose work led to the appointment of the current Drafting Committee, on Electronic Recordation of Custodial Interrogations expressed concern about multi-state interrogation issues. For example, if a suspect commits a crime in State A – which has a recording statute – and is interrogated in State B, which has no recording statute, then is the suspect entitled to the protection of the former state's recording statute when tried there? What if both states have recording statutes, but they differ concerning proper procedures and remedies; which state's law should control? Numerous factual variations on these multi-state scenarios are possible. One solution is to let the general conflict of laws principles of the states control, remaining silent about the multi-state issues in the recording statute. A second option is to address the various complex alternative multi-state situations in the recording statute, superseding conflict of laws principles that would otherwise control. A further option is to do just what Illinois did in its exception five: declare that the recording statute in the state where the criminal trial is held (here, Illinois) is inapplicable where the interrogation took place in another state. This exception is wise because it seems unfair to hold police in Illinois responsible for that which they could not control, namely the behavior of police from another state in conducting the interrogation there. If this Committee disagrees or wishes to examine this question in further detail, however, a more detailed analysis may be required via a separate memorandum.

should, however, be noted that a similar statement in another context—the Advisory Committee Notes to the Federal Rules of Evidence—urging narrow interpretation of the catchall exception to the hearsay rule has not achieved the desired effect. This observation might counsel placing limiting language in the rule itself. 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.

New Mexico has similar exceptions for spontaneous statements, interrogations outside the State of New Mexico, and those where law enforcement did not, at the time of interrogation, suspect the interrogatee of committing a crime for which recording was required. New Mexico also excepts recording (or, alternatively, excepts recording the *entire interrogation*) for "good cause." Some definite meaning is given to the term because it is defined to include recording equipment's failing and not being readily feasibly replaced or its otherwise not being reasonably available; the individual's refusing to be recorded; or the statements' being made during a grand jury proceeding (this last example would likely not, however, fit *Miranda*'s definition of "custodial interrogation."). But since these are non-exclusive examples of "good cause," the exception remains a broad catchall raising the same concerns that I noted above for the infeasibility exception. New Mexico also adds an exception for statements used solely for the purposes of impeachment at trial, an exception consistent with the long-prevailing evidentiary principle that a witness "opens the door" to otherwise inadmissible evidence if, without it, testimony that he has offered on a related subject would be incomplete in a

way that makes it misleading. New Mexico's final "exception"—for interrogations occurring in a "correctional facility"—is better understood as a locational limitation.

North Carolina's statute has exceptions similar to those in New Mexico but adds exceptions for statements made during preliminary hearings (not only grand jury hearings) and for those obtained by a federal law enforcement officer, expanding upon the idea that the state cannot be held accountable for recording during interrogations that may be beyond its control. North Carolina also has a broad "good cause" exception that includes, but, once again, is not limited to, (1) the accused's refusing to speak if his statement is recorded and (2) the *unforeseeable* failure of equipment where obtaining replacement equipment is not feasible.

Wisconsin's exceptions are likewise similar to Illinois's but add this exception: "Exigent public safety circumstances existed that prevented the making of an audio or audio and visual recording or rendered the making of such a recording infeasible." The wisdom of this exception depends upon the breadth of interpretation given to the term "exigent public safety circumstances." If the term contemplates power failures, hurricanes, earthquakes, and other natural or man-made disasters (man-made including, for example, terrorist attacks with a dirty bomb) that disable equipment or create an emergency drain on resources that make taping infeasible, that seems to make much sense. On the other hand, if the interrogation is for a very serious crime, perhaps finding the perpetrators of an act of terrorism, such crimes are among those where the risk of abusive interrogation techniques endangering the innocent, and the state's need to ensure its ability to prove the voluntariness of truthful confessions, is at its highest. The severity of the offense alone seems a poor justification for an exception. A more debatable

instance arises where the investigation is for imminent (not simply planned) terrorist acts, for the need to act with dispatch then is great. Yet it still seems hard to understand why recording should be dispensed with for this reason alone. If the interrogation takes place where the equipment is readily available, using it should not delay matters. If the interrogation occurs where the equipment is not readily available and cannot feasibly be made so, that reason, not the feared harm, is what justifies an exception.

G. *Consent and Covert versus Overt Recording*

Opponents of taping long worried that suspects who were aware that they were being taped would refuse to talk or would alter what they have to say in ways that make it harder for law enforcement to solve crimes. This concern evaporates, of course, if the taping is done surreptitiously. Although surreptitious taping is unlikely to violate any constitutional rules, it may most obviously run afoul of state electronic surveillance statutes, some of which would prohibit secret recording even with the consent of one of the parties (the police) to the conversation. In such states, either the recording statute itself or an amendment to the electronic surveillance statute will be required to exempt recording of custodial interrogations from the usual electronic surveillance rules. It is always possible that other statutes unique to a particular state may be implicated, requiring exemptions from those statutes, but that seems a matter for commentary.

Even if police do not reveal to a suspect that he is being recorded, a suspect might on his own agree to speak *only* if he is *not* recorded. As noted above, several jurisdictions simply recognize this situation as an exemption from the recording requirement.

Experimental data and experience seem to suggest, however, that concerns about open recording discouraging statements are misplaced. Such statements do not seem to be deterred and, indeed, open taping may *encourage*, rather than discourage, suspect statements.[6]

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.

H. ***Remedies for Violations***

There are two major remedies for violations: (1) jury instructions and

---

[6] 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* note 2, 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).

(2) evidence-suppression. Ancillary remedies also might theoretically include administrative disciplinary action, civil liability, expert testimony, and publicity given to violations and to the efforts made to avoid them in the future. This section will focus primarily on briefly outlining the arguments for and against jury instructions as compared to other remedies. This question of remedies is one of the few areas in which I and Thomas Sullivan, probably the leading national proponent of videotaping, disagree. That disagreement is, for me, partly rooted in social science findings suggesting that jury instructions are unlikely to be an effective remedy where recording mandate violations occur. For those who believe that detailed information concerning that social science and concerning related matters will help them to decide what remedies are appropriate, I have attached a separate memorandum on that subject.[7]

1. *The Arguments in Favor of Instructions as the Sole Remedy*

Tom was originally supportive of a suppression remedy. However, as he explains thoroughly in an attached forthcoming article co-authored with Andrew W. Vail, he and Vail have, over the last several years, talked to hundreds of law enforcement officers, prosecutors, defense lawyers, and others in the course of addressing state legislative committees, various legal organizations, and numerous other persons and entities about the virtues of electronic recording.[8] Tom and his co-author have formed two impressions as a result of these conversations. First, he and Vail explain:

> [T]he inclusion of provisions for inadmissibility has proven to be a major stumbling block in achieving enactment of mandatory recording legislation. We, and others who have

---

[7] *See* Andrew E. Taslitz, *Custodial Interrogations Social Science Memorandum* (2008) [hereinafter *Social Science*] (attached).
[8] *See* Sullivan & Vail, *supra* note 3, at 3-4.

> supported mandatory recording legislation, have encountered strong opposition from police, sheriffs and prosecutors, and their organizations, to provisions that threaten admissibility of testimony about confessions and admissions that should have been recorded. They are concerned that felons will either not be charged or will be acquitted for lack of sufficient evidence of guilt.[9]

Sullivan and Vail acknowledge that governors and legislators are indeed quite worried about the potential effects of an exclusionary remedy on public safety and, therefore, conclude that "[t]here is a greater likelihood of obtaining favorable consideration of state recording statutes if the proposed bills do not contain provisions that potentially prohibit testimony of unrecorded custodial interviews."[10]

Second, Sullivan and Vail are convinced that where recording mandates have been adopted, the police and other system actors are so enthusiastic about the process that they are eager to comply with the mandates. Strong external incentives in the form of threatened harsh penalties like that imposed by the exclusionary rule are, therefore, not necessary to deter police non-compliance, for such non-compliance will be rare.[11] What deterrence is required, argue Sullivan and Vail, can adequately be achieved by cautionary jury instructions, which will also help to promote reliable jury decision making.

Their 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

---

[9] *Id.* at 5.

[10] *Id.*

[11] *See id*. at 4-5.

jurors "cannot hear the exact words used by the participants or the tone or inflection of their voices."[12] 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."[13]

2. *The Arguments in Favor of Using **Both** Exclusion and Jury Instructions as Remedies*

I accept that jury instructions are unlikely to do any harm and conceivably may add to any deterrent value provided by the exclusionary rule. But I do not agree that an exclusionary remedy should, therefore, never be available. My reasons are these: (1) jury instructions will likely be ineffective at preventing juror error; (2) the exclusionary remedy has proven politically feasible in the majority of (the admittedly few) states that have adopted recording statutes; (3) rather than a mandatory exclusionary rule, a variety of flexible ones can narrow exclusion only to the instances where it is truly needed; (4) jury instructions are a useless remedy in bench trials; and (5) a proper remedy must be concerned with more than deterrence, namely with protecting the innocent and preserving constitutional values, concerns that can be addressed by exclusion but are ignored or ill-served by jury instructions.

a. *Jury Instructions Will Likely Have Little Useful Effect in Protecting the Innocent, an Important Concern Separate from Deterrence*

---

[12] *Id*. at 7.

[13] *Id.*

First, where a violation of recording mandates occurs, jury instructions are likely to be ineffective in improving jurors' ability to decide credibility questions and to determine correctly whether a confession was true or voluntary. Ample social science supports this conclusion.[14] The effect of instructions on jurors varies with the subject matter of the instruction, yet, overall, instructions are largely either ineffective in changing jurors' reasoning or have unintended effects. 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.

Although I know of no studies specifically examining the effect of jury instructions concerning the failure to electronically record the entire interrogation process, 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. 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. Jury instructions are thus highly 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.

---

[14] The social science supporting the arguments made in this section is concisely summarized at Taslitz, *Social Science*, *supra* note 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 embracing the rule's wisdom where the reliability of fact finding is at stake.[15]

b. *Exclusion Has Proven Politically Feasible in the Majority of Jurisdictions Addressing the Question*

---

[15] *See* Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court:The Sluggish Life of Political Factfinding*, 94 GEO. L. J. 1589 (2006) (noting the current Court's preference for trial accuracy and adversary-system-enhancing rules over those that serve primarily to deter law-enforcement over-reaching as a value in itself); *See* ANDREW E. TASLITZ, MARGARET L. PARIS, & LENESE HERBERT, CONSTITUTIONAL CRIMINAL PROCEDURE 557, 567 – 74 (3rd ed. 2007) (noting Court's distinction between the exclusionary Rule's function in deterring Fourth Amendment and other police abuse of power violations versus its function in other areas of constitutional criminal procedural law in promoting accuracy or furthering adversarial values). In Nix v. Williams, 467 U.S. 431 (1984), the Court made a similar point thus:

> Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial. The Sixth Amendment right to counsel protects against unfairness by preserving the adversary process in which the reliability of proffered evidence may be tested by cross-examination. Here, however, Detective Leaming's conduct did nothing to impugn the reliability of the evidence in question – the body of the child and its condition as it was found, articles of clothing found on the body, and the autopsy. No one would seriously contend that the presence of counsel in the police car when Leaming appealed to Williams' decent human instincts would have had any bearing on the reliability of the body as evidence. Suppression, in these circumstances, would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice.

Id.

(1) Overview

Second, I do not doubt that many members of law enforcement and many legislators are uncomfortable with the prospect of an exclusionary rule. But that discomfort does not necessarily mean that political resistance on that score cannot be overcome.

Indeed, five states and the District of Columbia have adopted some version of the exclusionary rule. These states are in widely disparate areas of the country: Alaska (the Northwest); Minnesota and Illinois (the Midwest); New Jersey and DC (the Northeast); and North Carolina (the South). The Uniform Law Commission's leadership could add weight to an effort to expand upon the political successes in these states.

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. Alaska and Minnesota have adopted just such a simple, rigid rule, showing that its adoption is nevertheless not beyond political reach in at least some states.

(2) Softer Versions of the Exclusionary Rule

But softer versions of the exclusionary rule are available. Thus DC creates a 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.

The Illinois rule in particular permits 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 state has the opportunity to prove that its non-compliance has created no harm, exclusion will be applied less frequently under this approach and will kick in only where there is reason to worry that we are in danger of convicting the wrong man.

(3) The Softest Versions of the Exclusionary Rule

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.

(4) The Remaining States

Indeed, of the states that have enacted recording statutes with remedies, only Wisconsin limits the remedy *solely* to a cautionary jury instruction or, in a bench trial, 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 and more promising approach to the exclusionary rule: that proposed by the Constitution Project. 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. I turn to that remedy immediately below.

c. *The Institutional Approach of the Constitution Project Is Most Likely to Maximize Deterrence While Adequately Protecting the Innocent and Core Constitutional Values*

(1) The Constitution Project's Substantiality/ Discretionary Weighing Approach and Its Three-Circumstance Mandatory Exclusion Approach Summarized

The Constitution Project has proposed another variant on the exclusionary remedy. The American Law Institute ("ALI") long ago recommended recording the entire interrogation process and provided an exclusionary remedy where police do not do so. However, that remedy combined a cost-benefit analysis of whether exclusion was desirable in some contexts with a clear exclusionary rule in other contexts. The

Constitution Project, seeking to build on the ALI's prestige, updated the ALI formula and sought to improve upon it as follows.

The Constitution Project would apply the exclusionary remedy only where the violation of the recording mandate is "substantial."[16] Substantiality is determined case-by-case pursuant to a multi-factor weighing process. However, in three circumstances the violation *must* be deemed substantial: (1) where the police encourage the suspect to waive recording; (2) where the violation created a significant risk of a false confession, recognizing that such a risk is likely high where non-recording occurs in a department with a proven record of using flawed interrogation methods; or (3) where a "gross, willful" violation occurs that is "prejudicial to the accused." A violation is "deemed" "gross, willful, and prejudicial" if either: (a) non-compliance was part of a practice of the law enforcement agency or authorized by a high authority within it or (b) the violation was "caused by the police department's failure adequately to train its officers and other relevant personnel or by its failure to adequately provide officer and other relevant personnel with properly maintained and adequate equipment to comply with this recommendation."[17]

(2) *The Advantages of the Constitution Project's Approach to Exclusion Over that of Its Competitors*

The Constitution Project's approach has several important advantages over the other exclusionary remedies discussed above. Importantly, the rule focuses on

---

[16] *See* THE CONSTITUTION PROJECT, MANDATORY JUSTICE: THE DEATH PENALTY REVISITED 50 (2006). A copy of the custodial interrogations portion of the Constitution Project's report is attached to this memorandum. *Full Disclosure:* I was the Co-Reporter for this publication and the author of the videotaping custodial interrogations section.

[17] *Id.*

institutional incentives, that is, it aims primarily, though not solely, at changing the behavior of each police department as an entity, and on changing the behavior of supervisory level personnel, rather than aiming at the individual police officer. That is why the Project's second circumstance of mandatory exclusion focuses on whether the police *department* involved has a record of using risky interrogation techniques[18] and why the third circumstance of mandatory exclusion focuses on the *practices of the law enforcement agency* or high level officials within it and on its failure adequately to train and equip individual officers to comply with recording rules.

(a) *The Constitution Project's Primary Institutional Focus is Both a Better Deterrent and Fairer than Other Approaches*

This primary institutional focus makes excellent sense in deterrence terms. Empiricists disagree on whether the exclusionary rule in the Fourth Amendment context deters at all, but even those finding that it does deter find the effect to be a fairly modest one.[19] However, there is strong reason to believe, based on psychological and economic theory and on analogous empirical data in many areas, that exclusionary remedies that aim expressly at wrongdoing by institutions (the police *department*) rather than individuals (the beat cop) are more likely to be effective deterrents than are more individually-focused exclusionary rules.[20] In other words, a pure institutionally-focused

---

[18] Perhaps a better approach would look to the record or practices of each police *precinct* or unit, such as the Street Crimes Unit in New York City, because individual precincts or specialized units are more likely to be the source of risky, innocence-endangering practices than the department as a whole, at least in large cities. Thus, if only one precinct is a problem, it may make sense to focus reform on that precinct rather than to say that its behavior taints the whole department or, alternatively, to take no action on the theory that the department is doing just fine if it has only one precinct to worry about.

[19] *See, e.g.*, Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363[hereinafter *Chuck Exclusionary Rule*]; SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950-1990 (1993).

[20] *See generally* Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483 (2006).

exclusionary rule, if applied to the interrogations context, would not suppress a statement obtained by an individual officer's inexcusable violation of the recording mandate *if* his bosses and the department as a whole have been doing all that they reasonably can to prevent such violations. Such a rule places the incentive for training, equipping, and monitoring line officers squarely on the entity most able to have a powerful influence on the bottom line: the police department (or perhaps the precinct or unit).

The institutional approach is also likely to be perceived by the public as fairest because the public views the police as an entity capable of engaging in culpable conduct, thus mandating punishment for the entity itself if justice is to be done where police wrongdoing occurs.[21] This public need for entity punishment is separate and apart from public responses to any wrongdoing done by the individual officer.[22] Such perceptions of fair procedures also add to governmental legitimacy and help to reduce future crime.[23]

(b) *The Constitution Project's Approach is Not Entirely Institutional, and It's a Good Thing Too*

But the Constitution Project's approach is not a *purely* institutional one, and for good reason. Non-recording occurring *where a suspect insists on such non-recording* will not violate many versions of the recording statute. If police can encourage such "waivers" (an imprecise term that I use here as a shorthand for the suspect's insisting that he will not confess if his statement, or the events leading up to it, are recorded), there is a danger

---

[21] *See id.*
[22] *See id.*

[23] *See id.*

that they will be able to accomplish end-runs around the exclusionary rule with no penalty whatsoever.

One way to guard against this prospect – an approach already followed by some states -- is still to require recording of at least the waiver to show that it is voluntary. But this is an incomplete approach precisely because it is hard to evaluate voluntariness of even such a waiver absent recording of the entire interrogation process leading up to the waiver. Moreover, "involuntariness," in the constitutional sense at least, requires a good deal of police pressure; will not exist even with such pressure if the individual suspect seems able to resist; and is notoriously hard to prove given the amorphous nature of voluntariness.[24] The Constitution Project, as a way to prevent such end-runs, thus mandates exclusion where police encourage waiver.

Furthermore, even if one of the three mandatory exclusion circumstances is absent, that does not necessarily mean that the confession will be admitted. Rather, the trial judge is simply expected to return to the case-specific weighing process to determine whether violation of the recording mandate was "substantial." Additionally, the Constitution Project's approach *presumes* that any violation is substantial unless the state proves the contrary by a preponderance of evidence. This default approach is, of course, similar to that in the jurisdictions rebuttably presuming inadmissibility, such as Illinois and DC.

(c) *The Constitution Project's Approach Protects the Innocent and Core Constitutional Values*

The reason for retaining this default presumption is precisely because deterrence is not the sole purpose of the exclusionary rule here. Rather, the rule should also serve to

[24] *See*. TASLITZ,. PARIS, & HERBERT, *supra* note 15, at 648-53, 661-72.

protect against the risk of convicting the innocent, thereby encouraging a continuing effort to identify and convict the guilty. Moreover, as discussed at the start of this memorandum, another important purpose of the recording requirement is to protect *constitutional values* contained within the Sixth Amendment right to counsel, the Fifth and Fourteenth Amendment's due process clauses, the Fourteenth Amendment's Equal Protection Clause, the First Amendment's protections of free speech, press, and assembly, and the Fifth Amendment's *Miranda* rule. These constitutional values counsel exclusion in appropriate cases to give these values practical protection and symbolic reaffirmation, to strengthen our political culture's commitment to these values, to protect governmental legitimacy while promoting accurate constitutional fact finding, and to limit unwarranted exercises of state power, as well as helping to deter future constitutional violations. The Constitution itself thus provides further reason to make the exclusionary rule available in some instances.

(d) *Variations on the Constitution Project's Approach*

Further variations on the Constitution Project's approach are conceivable. The approach might be strengthened, for example, if a clear and convincing evidence standard were used to determine whether the presumption of inadmissibility had been rebutted, as DC does.

Alternatively, if the Committee decides that its sole (or overwhelmingly primary, if not necessarily sole) concern is deterrence rather than protecting the innocent where deterrence fails or shielding core constitutional values, a simpler rule might be adopted: exclude *only* in the three circumstances specified in the Constitution Project's approach. This latter approach would protect against exclusion where individual officers

intentionally or carelessly violate the recording mandate but the department has done all that is reasonably within *its* power to avoid such violations. In effect, the department can rely on a "safe harbor": do your reasonable best, and you will be protected against the consequences of individual error. That gives clear guidance to the police and gives them the power to avoid exclusion, thus making fears of unjustified exclusion harder to defend, thereby hopefully also minimizing any likely political opposition.

(e) *Concluding Comments*

Two concluding comments: first, the jury instruction remedy is, of course, meaningless in bench trials, and in many jurisdictions those constitute the bulk of criminal cases going to trial; second, exclusion would occur, if at all, for *unexcused* violations, yet there are numerous exceptions to the recording mandate in any existing statute; third, even if the Committee's focus is on deterrence and the political obstacles to passing legislation, there is no hard data *squarely* on the question whether, for example, jury instructions alone can do the deterrence job adequately or whether insistence on some sort of exclusionary remedy will make reform a political dead letter; these matters are, therefore, ones of judgment, informed speculation, and reasonable disagreement.

(f) *Summary of the Remedial Options*

In sum, the primary remedial options for this Committee to choose among are as follows:

Option One: Cautionary jury instructions only.

Option Two: A per se exclusionary rule for all unexcused violations of the recording mandate.

Option Three: A rebuttable presumption of inadmissibility for unexcused violations.

Variant A: The state can rebut by proving by a preponderance of the evidence that the confession was nevertheless voluntary.

Variant B: The state can rebut by proving by a preponderance of the evidence that the confession was *both* voluntary *and* reliable.

Variant C: Either variant A or B but with the state's burden increased to clear and convincing evidence. *Note*: Any of these variants could be supplemented with a cautionary jury instruction if exclusion is not ordered as a remedy in a particular case.

Option Four: The Constitution Project's approach of automatic exclusion in three circumstances (where police encourage suspect insistence on non-recording; where non-recording has created a significant risk of a false confession, especially in departments with proven records of using risky interrogation techniques; and where violations stem from departmental practice, supervisory level authorization, or departmental failure adequately to train and equip its officers) *combined with* presumptive rebuttable exclusion in other circumstances. (Once again, jury instructions might be a supplementary back-stop remedy where exclusion for a violation is not ordered).

Option Five: A "safe harbor" variant of the Constitution Project's approach in which exclusion would be an automatic remedy but *solely* in the three circumstances identified in Option Four immediately above. Outside these three circumstances, the exclusionary rule would never apply.

A Brief Note on Additional Remedies: No current statute provides for civil remedies, leaving open whether tort law or other sources of law outside the recording statute could provide damages or injunctive relief as remedies for recording violations. Although there is some dispute on the point, in the constitutional context, at least in the Fourth Amendment area, various procedural obstacles to successful tort suits and the limited availability of compensable damages have, in my view, rendered civil remedies ineffective.[25] Nevertheless, if this Committee believes that better civil remedies can be created, it might want to consider the prospect of creating *new* civil remedies, though I suspect that any serious civil remedies would engender even stronger law enforcement resistance than would an exclusionary remedy. Likewise, if the Committee believes that civil remedies would in fact be counter-productive, the Committee could recommend a statute protecting the police from civil liability or limiting such liability to, for example, intentional violations. Such a provision, if combined with an exclusionary remedy, might even soften or nearly eliminate opposition to the latter. It would be important to link the two, however – limited or non-existent civil liability *in exchange for* an exclusionary rule. Otherwise, no remedy at all might be the unfortunate outcome.

Internal disciplinary measures are another potential remedy. However, my own view is that it would be unwise to assume that they will occur with sufficient frequency and force absent some externally-imposed remedy. Nor would internal

---

[25] *See* Slobogin, *Chuck Exclusionary Rule, supra* note 18 (outlining what would be required for a civil penalty system to serve as an effective deterrent – a system radically different from our current one and, in my view, thus unlikely to become a political reality any time soon).

discipline address concerns about innocence where violations do occur or about constitutional values, for discipline necessarily addresses preventing future harms rather than correcting past ones. Internal discipline is, however, a good thing, and it can be encouraged by approaches like that of the Constitution Project. But to dictate specific disciplinary measures rather than simply encouraging the police to craft effective ones on their own seems to me to be an undue interference with police operations in an area of their particular expertise and wades into an area wisely subject to enormous jursidictional variation. If the Committee wants to delve into this area in greater depth, I would recommend at most crafting in general terms features that must characterize a sound program of internal discipline, leaving much to police department judgment.

I. *Expert Testimony*

One remedy not yet tried for violation of recording requirements is to admit expert testimony on the factors contributing to involuntary or false confessions, the reasons why videotaping is desirable, and the risks of not doing so. Not only has this remedy not been tried in practice; it has apparently also not been studied empirically. Nevertheless, there is cause for optimism based upon research in the area of eyewitness identifications. That research reveals that expert testimony on the factors affecting eyewitness accuracy substantially improved jurors' sensitivity to the relevance and weight of those factors—even when the science contradicted jurors' preconceptions—and this effect was apparently even greater among jury-eligible adults than among

undergraduate jurors.[26] Moreover, critics' fears that such testimony would unduly increase acquittals of the innocent have proven unwarranted. One recent review of the literature explained this last point thus:

> Some judges have objected to psychologist experts on the ground that they might have too much influence on the jurors, causing them to undervalue, as opposed to overvalue, the eyewitness. However, a series of experiments conducted by different researchers have shown that this is not likely to happen. The studies have found that testimony by an expert increased the amount of time that mock jurors spent discussing the reliability of the witness and made jurors more sensitive to the effects of different viewing conditions and other factors relevant to the ability to identify a defendant. There was no indication in the experiments that the jurors accepted the expert testimony uncritically or that they completely discounted the eyewitness testimony. The findings are consistent with research we've noted elsewhere regarding the ability of jurors to keep expert evidence in perspective and to evaluate it in conjunction with other evidence.[27]

The consistency of the eyewitness research with other research on experts suggests that similar results might obtain with experts on interrogations. Expert testimony might be wise independently of any recording requirement. But should this Committee reject an exclusionary remedy for violating recording mandates, expert testimony becomes all that much more important. Because jury instructions alone likely do little to help a jury evaluate a confession's voluntariness or accuracy where there is no recording of the interrogation process, expert testimony suggests itself as an important supplementary remedy.[28] Conceivably, this Committee could craft a rule urging the

---

[26] *See* BRIAN CUTLER & STEVEN PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 239-40 (1995) (summarizing the research).

[27] *See* NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 195 (2007).

[28] Ample empirical and theoretical work suggests that jurors are ignorant of important lessons learned from the empirical study of interrogations and confessions and thus should benefit substantially from testimony on those topics if offered by a qualified expert. *See, e.g.,* Danielle E. Chojnacki, *An Empirical Basis for the Admission of Expert Testimony on False Confessions,* 40 ARIZ. ST. L. J. (2008) (analyzing surveys revealing the average person's ignorance of the likelihood that innocent persons may confess and the

ready admissibility of expert testimony combined with jury instructions as a remedy for recording violations where such testimony has not otherwise been admitted. The testimony would still need at least to be consistent with supporting scientific data, but, so long as that modest requirement is met, the expert's testimony would readily be admissible. That approach has the virtue of aiding the jury in assessing the significant risks arising from the recording rule violation while likely adding deterrent value precisely because police and prosecutors will fear that the expert testimony would work, that is, that it will make jurors more skeptical about the weight of the unrecorded confession. This approach would, however, be justified by informed speculation based upon analogous empirical data rather than studies done precisely on point. For this and the other reasons noted above, some sort of suppression remedy still seems a better option.

J. *Should There Be Special Treatment for Juveniles*?

Juveniles are at greater risk than adults of giving false or involuntary confessions. The younger the juvenile, the greater the risk. These observations might suggest that juveniles deserve greater procedural protections than do adults. A variety of options suggest themselves, the most obvious being that no interrogation may take place without the presence of a parent or guardian. However, empirical research undermines the assumption that parental presence reduces the risk of false or coerced confessions.[29]

---

factors affecting that likelihood); LEO, *supra* note 2, at 314 ("The use of social science expert testimony involving a disputed interrogation or confession has become increasingly common…. There is now a substantial and widely accepted body of scientific research on this topic, and the vast majority of American case law supports the admissibility of such expert testimony.").

[29] *See* Steven A. Drizin & Beth A. Colgan, *Tales From the Juvenile Front: A Guide to How Standard Police Interrogation Tactics Can Produce Coerced and False Confessions From*

Another option might be flatly to prohibit juvenile interrogations unless they are recorded. Police would thus either have to use portable recording equipment to record outside police stations or other places of detention or would have to move all interrogations of juveniles to police stations, thus ensuring that judges and juries have the best means available to assess the truthfulness and voluntariness of statements made by under-age confessors. Alternatively, this per se bar on questioning without recording might include an escape hatch, for example, requiring recording outside police stations only when "reasonably practicable." Meatier protections, such as requiring the presence of counsel when interrogating a juvenile, are likely politically dead-on-arrival.

Illinois takes a variant of the modified per se ban approach, though Illinois limits its ban to custodial interrogations made at police stations or other places of detention. Where this locational requirement is met, any statements made by a juvenile under the

---

Juvenile Suspects, *in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 127, 154-55 (F. Daniel Lassiter ed., 2004). Drizin and Colgan put the point thus:

> On the other hand, if parents are present during the interrogations or confession of their children, it is almost certain that courts will find the child's statements admissible. This practice also must change. The mere presence of a parent is often of little use to a child and may, in fact, compound the coercion inherent in the interrogation. In one study analyzing data from more than three hundred police interviews of children, it was found that parents halted interrogations only about 2% of the time. Approximately 16% of the time, they encouraged their children to talk to the police. The overwhelming majority of the time (71%) parents did absolutely nothing.
>
> The fact that parents fail to protect children is not necessarily their fault. Interrogators are trained to make sure parents are passive participants in the interrogation process.

Id. at 154. Drizin and Colgan go on to summarize the techniques that police use to induce parental passivity. *See id.* at 155. Nevertheless, these two researchers still favor parental presence, partly based on the idea of a parental right to participate in important decisions affecting their children and partly based on parents' ability to be witnesses to the interrogation at suppression hearings or trial. Drizin and Colgan also express the hope that parental presence will at least encourage police "to refrain from using the *most* coercive tactics in their arsenal." *Id.* at 155 (emphasis added).

age of 17 are presumptively inadmissible at criminal or juvenile proceedings for specified types of crimes, unless the state proves that they have been electronically-recorded and that the recording is substantially accurate and not intentionally altered. Violation of this rule presumptively mandates suppression for substantive, but *not* for impeachment, purposes. This presumption may be rebutted, however, if the state proves by a preponderance of evidence that the statement was both voluntarily given and reliable under the totality of the circumstances. This approach may be questionable given that the very purpose of electronic recording is both to discourage unreliable or coerced interrogations and to improve the accuracy of judicial and jury determinations of allegations that such flawed interrogations took place. A flat rule of inadmissibility would send a clearer message and create a simpler rule: if the police record, the interrogation and confession are likely admissible; if they do not record and, if no exceptions apply, the highly questionable statement is automatically excluded.[30]

Some jurisdictions also mandate special procedures, specifically the presence of an interpreter, for one other vulnerable group: the deaf.

K. *Monitoring Police Performance*

Building into a statute some means of monitoring police performance seems advisable. Ample empirical literature demonstrates that transparency and accountability improve police performance. 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

[30] The District of Columbia considered juveniles to present a sufficiently distinct set of problems from those posed by adults as to justify an entirely separate police General Order governing videotaping custodial interrogations of the underage.

layers of review. 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.

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.

Maine 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.

L. *The Tension Between Generality and Specificity*

Maine's approach simply mandated policies covering certain broadly-defined subjects but left the details of what the policy must contain to a supervising statewide administrative agency (the "Board") rather than to local law enforcement, assisted by a still more detailed model policy crafted by the statewide police chiefs' association to comply with Board mandates. The implicit justification seems to be that the statewide administrative agency is free of local political pressures for policy-dilution and is more easily-monitored by the state legislature than would be true if localities governed all the details, yet the state agency also has more expertise than the legislature for initially deciding just what a model policy must contain. An alternative approach would have the state legislation be more precise about what local policies must minimally contain, assigning to a state agency primarily the task of overseeing implementation, rather than also crafting initial policy requirements.

In Massachusetts, the Municipal Policy Institute crafted a detailed model policy covering many of the same subjects as in D.C. and Maine, based in turn upon one

developed jointly by the Massachusetts Chiefs of Police Association, the District Attorneys Association, and the Massachusetts State Police.

M. *Discovery*

For defense counsel to function effectively, clear provisions concerning discovery seem wise. Full, fair, and open discovery requirements may encourage early guilty pleas when a defendant is confronted early on with the strength of the case against him. This result is just what happened with broader (not limited to the recording issue) discovery provisions in the State of Florida. There, depositions were authorized in most felony cases. Rather than crippling the system with an onerous new burden, however, expanded discovery led to a large increase in guilty pleas, and those pleas occurred at earlier points in the litigation, resulting in significant net time and financial savings relative to the earlier system of narrow discovery.

At a minimum, statutes should provide for defense entitlement (perhaps upon payment of a fee) to accurate copies of any recordings and to any law enforcement agency notes and recordings relevant to the interrogation, its recording, and any resulting statement. Defense probably should be entitled as well to supervised access to original recordings, at least where plausible claims are raised that they have been tampered with or that copies do not accurately reflect the original's content.

State statutes are often ambiguous or completely silent about the discovery issue. North Carolina's statute, however, addresses a more difficult discovery issue head on: to what discovery is a suspect entitled when the state relies on *an exception* to the recording requirement? North Carolina answers that the state must give notice of its intent to rely on an unrecorded statement, noting the place and time made and the exceptions relied

upon. Furthermore, the prosecutor must, upon written demand, furnish the defendant or defense attorney with the names and addresses of the witnesses upon whom the state intends to rely to establish one of the exceptions. The trial court must then hold a hearing on whether any identified exceptions apply.

IV. *Attachments*

I have attached a small number of documents to this memorandum to provide further background into these issues to those who feel the need, even after reading the current document. These attachments are as follows:

1. May 13, 2008 version of a memorandum by Tom Sullivan entitled "Summaries of Text of Statutes and Cases" and the accompanying statutes on which the memorandum is based.
2. The Constitution Project provisions on electronic recording and the supporting report.
3. A checklist that I have prepared of issues for this Committee to resolve.
4. A memorandum that I have prepared reviewing the social science on the ineffectiveness of jury instructions.
5. Tom Sullivan's forthcoming article arguing that jury instructions should be the sole remedy for violating recording mandates.
6. The just-adopted Maryland statute.

V. *Conclusions*

There are clearly numerous issues for this Committee to resolve. This Committee also has the opportunity to promote greater state uniformity, fill gaps in state legislation, suggest improvements to current state approaches, and create a product informed by the best available current social science. I have tried to offer options, and arguments for and against these options, on the major issues. However, I have in some instances also argued in favor of a particular provision, most importantly suggesting some sort of

suppression mechanism as the primary remedy for state violations of recording requirements, with cautionary jury instruction availability offering a secondary remedy. The attached summary of issues and options may help to ease your decision-making task. Please feel free to contact me with any questions or concerns. I look forward to seeing all of you at our first meeting.

Enclosures