DRAFT, October 20, 2009

FOR DISCUSSION ONLY

UNIFORM ELECTRONIC RECORDATION OF CUSTODIAL INTERROGATIONS ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

Post-Style Interim Draft, ~~May~~ November 2009

WITH PREFATORY NOTE AND COMMENTS

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

~~May~~ November 11,~~8,~~ 2009

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UNIFORM ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS ACT

PREFATORY NOTE

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

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

Many academics have recommended, and several states have statutorily-mandated, electronic recording of the entire custodial interrogation process, from the start of questioning to the end of the suspect's confessing, as a way to solve these and related problems.[1] **For example, Illinois, the District of Columbia, Maine, Maryland, Nebraska, New Mexico, North Carolina, and Wisconsin have adopted mandatory recording laws for a variety of felony investigations. *See* Thomas P.**

[1] Illinois, the District of Columbia, Maine, Maryland, Nebraska, New Mexico, North Carolina, and Wisconsin have adopted mandatory recording laws for a variety of felony investigations. *See* Thomas P. Sullivan and Andrew W. Vail, *The Consequences of LawEnforcement Officials'' Failure to Record Custodial Interviews as Required by Law*, 99 NW. U. L. REV. 215, 216-7 (2009). Alaska, Massachusetts, and Minnesota have recording requirements imposed by judicial decision. *See id.* at 216-17. The New Jersey Supreme Court has likewise required recording, doing so via court rule. *See id.* at 217. A significant number of state reviewing courts have declared that recording would have powerful benefits for the justice system but have declined to impose that obligation absent legislative action. *See id.* at 216-17 n.8.

Sullivan and Andrew W. Vail, *The Consequences of LawEnforcement Officials' Failure to Record Custodial Interviews as Required by Law*, 99 NW. U. L. REV. 215, 216-7 (2009). Alaska, Massachusetts, and Minnesota have recording requirements imposed by judicial decision. *See id.* at 216-17. The New Jersey Supreme Court has likewise required recording, doing so via court rule, *See id.* at 217, as has the Indiana Supreme Court just recently. *See Order Amending [Indiana] Rules of Evidence, [Rule 617]*, No. 94S00-0909-MS-4 (filed September 15, 2009) (requiring, subject to seven narrow exceptions, audio and video recording of custodial interrogations in all felony prosecutions). A significant number of state reviewing courts have declared that recording would have powerful benefits for the justice system but have declined to impose that obligation absent legislative action. *See id.* at 216-17 n.8. Furthermore, a United States Naval Criminal Investigative Service Regulation the electronic recording of custodial interrogations involving crimes of violence under their purview, a Report of the Commission on Military Justice also recommends such electronic recording, and a House bill likely to be the basis for final legislation similarly embraces the recording mandate for strategic intelligence interrogations of persons in the custody of or under the effective control of the department of defense. [insert cites]

A significant number of police departments have also voluntarily adopted the recording solution.[2] - *See id.* at 228-34 (listing all such departments, a list encompassing departments in forty states who have voluntarily adopted recording; when the ten states having mandated recording in at least some states are added, all fifty states plus the District of Columbia have at least one police department engaged in recording in at least some cases).Yet the vast majority of police departments still do not record. Moreover, there are wide variations among the state provisions and the voluntarily-adopted programs. Furthermore, some approaches promise to be more effective in protecting the innocent, convicting the guilty, minimizing coercion, and avoiding frivolous suppression motions than others. Additionally, the further spread of the recording process throughout states and localities has been slow when its promised benefits are great. A uniform statute may help to speed informed resolution of the recording issue. Thus the need for this Uniform Act for the Electronic Recordation of Custodial Interrogations (UAERCI).

The Justifications for Electronic Recording

Three broad types of justifications have been offered for electronic recording of interrogations: promoting truth-finding, promoting efficiency, and protecting constitutional values. The list below summarizes the major ways in which electronic recording furthers these goals.

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A. Promoting Truth-Finding

Truth-finding is promoted in seven ways:

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

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

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

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

5. *Filtering Weak Cases*: By permitting police and prosecutors to review tapes in a search for tainted confessions, prosecutions undertaken with an undue risk of convicting the innocent can be nipped in the bud—before too much damage is done—because the tapes can reveal the presence of risky interrogation techniques that may ensnare the innocent.

6. *Factfinder Assessments:* Judges and juries will find it easier more accurately to assess credibility and determine whether a particular confession is involuntary or untrue if these factfinders are aided by recording, which reveals subtleties of tone of voice, body language, and

technique that testimony alone cannot capture.

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

There are also essential economic efficiency benefits to recording.

B. Promoting Efficiency

Efficiency is promoted in these four ways:

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

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

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

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

C. Protecting Constitutional Values

Constitutional values are protected in six primary ways:

1. *Suppression Motion Accuracy*: Valid claims of *Miranda*, Sixth Amendment right to counsel, and Due Process voluntariness violations will be more readily proven, creating a disincentive for future violations, when such violations, should they occur, are recorded.

2. *Brady Obligations*: *Brady v. Maryland* requires prosecutors to produce to the defense before trial all material exculpatory evidence. Some commentators argue that *Brady* does more

than this: it implies an affirmative duty to *preserve* such evidence. Electronic recordings further this preservation obligation.

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

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

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

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

Key Concepts of the Proposed UAERCI

The UAERCI is organized into twenty-three sections. Section one merely contains the Act's title. Section two contains definitions. Section three mandates the electronic recording of the entire custodial interrogation process, by both audio and visual means, for felonies (bracketed alternatives are for crimes or for offenses) where the interrogation is conducted at a place of detention by a law enforcement agency. Section three further mandates electronic recording of the entire custodial interrogation process even outside a place of detention, though audio recording alone suffices at those locations. These mandates are limited by Section two's definition of "custody" to match that in *Miranda v. Arizona.* Therefore, electronic recording is required only when *Miranda* warnings are constitutionally mandated. Section three does not, however, require informing the individual being interrogated that the interrogation is being recorded. Additionally, Section three exempts the interrogation process from any state laws otherwise requiring the consent of parties to a conversation before recording it and from state public disclosure laws.

Sections four through nine outline a variety of exceptions from the recording mandate. Section four creates an exception for exigent circumstances. Section five excepts spontaneous or routine statements. Section six creates an exception where the individual interrogated refuses to participate if the interrogation is electronically recorded, though Section six does, if feasible, require the recording of the interrogatee's refusal to speak if his statements are recorded. Section seven excepts custodial interrogations conducted in other jurisdictions in compliance with their law. Section eight excepts custodial interrogations conducted when the interrogator reasonably believes that the offense involved is not one that the statute mandates must be recorded. Section

nine creates an exception for equipment malfunctions occurring despite the existence of reasonable maintenance efforts and where timely repair or replacement is not feasible. Section ten places the burden of persuasion as to the application of an exception on the state by a preponderance of the evidence. Section eleven requires an officer relying on an exception or otherwise departing from the Section 3 recording mandate to prepare a written report explaining the reasons for his decision, though Section eleven limits the sanctions that may be imposed on an individual officer for violating that Section to administrative discipline. Section twelve requires the state to notify the defense of an intention to rely on an exception if the state intends to do so in its case-in-chief. Although a few of these "exceptions" outline circumstances that would likely not fit the definitions of "custody" or "interrogation," thus not requiring electronic recording in the first place, those exceptions are nevertheless included to resolve any ambiguity and to offer quick-and-easy guidance to specific situations that will aid law enforcement in readily complying with the Act.

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

Section 13(c) provides as a further remedy where a statement obtained in violation of the Act is admitted at trial that the trial judge, in an appropriate case, admit expert testimony concerning the factors that may affect the voluntariness and reliability of a custodial interrogation if the defense first offers evidence sufficient to support a finding by a preponderance of the evidence of facts relevant to the weight of the statement but whose full significance may not be readily apparent to a layperson. That subsection also outlines illustrative factors to guide the court in determining what is an "appropriate" case. Section 13(d) extends qualified immunity from civil suit to any law enforcement agency that has adopted, implemented, and enforced rules reasonably designed to ensure compliance with the terms of the Act and to any individual law enforcement officer who has complied with those rules. Section 13(e) requires each law enforcement agency to adopt and enforce regulations concerning administrative discipline of an officer found by a court or a supervisory official of the agency to have violated the Act. This subsection further provides, however, that those rules must include a range of disciplinary sanctions reasonably designed to promote compliance with the Act.

Section 14 requires the appropriate state agency to monitor compliance with Section 3 of the Act. Section 15 provides that electronic recordings of a custodial interrogation must be identified, accessed, and preserved in compliance with law other than this Act.

Section 16 requires the law enforcement agency (alternatively, in brackets, the "state agency charged with monitoring law enforcement's compliance with this act") to adopt and enforce rules governing the manner in which custodial interrogations are to be made. The subsection specifies a small number of matters that these rules must address, including (1) encouraging law enforcement officers investigating a crime covered by the Act to conduct a custodial interrogation only at a place of detention, unless necessary to do otherwise; (2)establishing standards for the angle, focus, and field of vision of a camera which reasonably promote accurate recording of a custodial interrogation at a place of detention and reliable assessment of its accuracy and completeness; and (3) providing, where a custodial interrogation takes place outside a place of detention, for later electronic recording of a statement from the interrogated individual and, as soon as practicable, the officer's preparing a record explaining the decision to interrogate outside a place of detention and summarizing the custodial interrogation process.

Section 17 requires, giving a choice in brackets, either the law enforcement agency subject to this Act or the state agency charged with monitoring compliance with this Act, to adopt and enforce rules implementing the Act, listing five topics that those rules must, at a minimum, address and providing guidance concerning their content. This provision pairs with subsection 13(d)'s immunity provision, extending qualified immunity from civil suit to agencies adopting rules reasonably designed to ensure compliance with this Act and to individual law enforcement officers complying with those rules.

Section 18 makes electronic recordings of custodial interrogations presumptively self-authenticating in any pretrial or post-trial proceeding if accompanied by a certificate of authenticity by an appropriate law enforcement officer sworn under oath. The presumption may be overcome only if the defendant offers evidence sufficient to support a finding that the recording is not authentic.

Sections 19 through 23 address technical matter. Section 19 declares that the Act does not create a right to electronic recording of a custodial interrogation. Section 20 provides for consideration of the need to promote uniformity of the law in applying and construing the Act. Section 21 addresses the Act's relationship to the Electronic Signature in Global and National Commerce Act. Section 22 provides for repeal of whatever statutory provisions are listed by an individual jurisdiction as inconsistent with the terms of the Act. Section 23 provides for a statement of the Act's effective date.

Title (Section 1)

This section simply recites the Act's title.

Key Definitions (Section 2)

This section recites the key definitions of terms used throughout the Act. Most importantly, the term "custodial interrogations" is defined to track the meaning of that term in *Miranda v. Arizona.* Accordingly, recording is necessary only if *Miranda* warnings would likely

be necessary and if additional recording-triggering circumstances, such as fitting within a statutory list of specified crimes for which recording is required, are present.

The term "place of detention" is defined to mean a "fixed location where an individual may be questioned about a criminal charge or allegations of [insert the state's term for juvenile delinquency]." The term includes jails, police or sheriff's stations, holding cells, and correctional or detention facilities.

The term "electronic recording" is defined to mean either: (1) audio or (2) audio and visual recording that *accurately* records a custodial interrogation.

A "statement" is defined as any communication, whether oral, written, nonverbal, or via sign language.

A "law enforcement agency" is any governmental entity whose responsibilities include~~ing~~ enforcing the criminal laws or investigating suspected criminal activity.

Electronic Recording Mandate (Section 3)

Section 3(a) contains the Act's core mandate: that custodial interrogations conducted at a place of detention, including administration of, and any waiver of, *Miranda* rights must be electronically recorded in its entirety by *both* audio and visual means *if and only if* the interrogation relates to a "[felony] [crime] [offense]" described in applicable sections of the state's criminal and juvenile codes. This provision of the Model Act thus leaves it to each state to determine the precise crimes to list as those for which recording is required. The category of crime to be addressed in this list is noted via three bracketed terms, again giving each jurisdiction leeway, though this body might decide to choose only one or two of the bracketed terms to include in the Act. The choice of the bracketed term "felony" limits the mandate to what each state considers to be its most serious crimes. The bracketed term "crime" would broaden the mandate to any crime whatsoever, an expansion of the mandate that might add more in time-consumption and perhaps other costs than some jurisdictions are willing to accept. On the other hand, other states might consider the benefits discussed in the Prefatory Comment above to substantially outweigh these added costs. The bracketed term "offense" would further broaden the mandate because some jurisdictions label, for example, driving under the influence of alcohol – which many see as a significant violation of social norms – as something less than a misdemeanor or other than a crime. But such a broad term might also encompass a wide range of fairly modest law violations, such as disorderly conduct or even minor traffic violations. The intent of this section is also to treat juvenile and adult offenses identically.

Bracketed section 3(b) would also require recording of the crimes listed in section 3(a) where the custodial interrogation does not occur at a place of detention. However, unlike the mandate for recording at places of detention, section 3(a) permits recording outside such places to be done only by audio means. The additional expense of audio recording seems small and, at least if the Act is limited to felonies in section 3(a), the additional time will likewise seem small relative to the potential benefits of recording. Furthermore, because recording is limited to

"custodial" interrogations, many interrogations taking place outside places of detention will not fit the Act's definition of custody (for example, routine traffic stops and many daytime inquiries made by a single detective at a person's home or office where third parties are present would generally not require recording), so the cost of section 3(a) should also be far less than it might at first appear. The cost of section 3(b) in terms of time will certainly rise, however, if the mandate in section 3(a) extends to all crimes and rise even further if it also extends to all offenses. To alert individual jurisdictions to this choice, the section is bracketed. The full benefits of recording occur, however, only where recording is done by both audio and visual means. For this reason, later provisions encourage custodial interrogations for the specified crimes to occur at places of detention absent good reason to do otherwise.

Section 3(c) makes clear that an interrogator need not inform a suspect that the interrogation is being recorded. Some members of law enforcement worry that lacking this option may mean that suspects who otherwise might talk will not. Section 3(d) is section 3(c)'s twin, excepting interrogations from any state statutes requiring consent to the recording of a conversation; without this exception, law enforcement would be denied the option of covert taping. Section 3(d) excepts the Act from state public records disclosure laws, partly to protect the suspect's privacy, partly the victim's privacy, but also to protect potential jury pools from being tainted by seeing or hearing about aspects of a confession or an interrogation process in advance of trial.

Exception for Exigent Circumstances (Section 4)

This section broadly excepts from the recording requirements any custodial interrogation where exigent circumstances would make recording impracticable, providing that the interrogator records an explanation for the exigency before interrogating or, if not feasible, as soon as practicable thereafter.

Exception for Spontaneous or Routine Statements (Section 5)

Section 5 excepts spontaneous statements or those resulting from routine processing questions (for example, "booking") from the recording mandate. These exceptions track those to *Miranda*'s warning requirement. Although these circumstances might not even constitute "custodial interrogations," the exceptions are included for clarity and because of their familiarity to law enforcement.

Exception for Individual's Refusal to be Electronically Recorded (Section 6)

This section declares recording unnecessary where a suspect refuses to speak if his conversation is recorded, though the agreement to participate only without recording must itself be electronically recorded, if feasible.

Exception for Interrogations Conducted by Other Jurisdictions (Section 7)

This section frees law enforcement in one jurisdiction from the recording mandate where the interrogation took place in other jurisdictions that do not mandate recording, provided that

those other jurisdictions acted in accordance with their own law and did not conduct the interrogation at the direction of law enforcement in the jurisdiction where recording was indeed mandated.

Exception Based On the Actual or Reasonable Belief of Law Enforcement (Section 8)

Where law enforcement officers reasonably believe that the person being interrogated is suspected of a crime for which recording is not required, but they learn during the course of the interrogation that there is reason to believe the suspect was instead or additionally involved in a crime for which recording is required, the officers are excused from the recording mandate, under section 8(1). However, if feasible, they must begin recording once they become aware of circumstance for which recording is required. Section 8(2) creates a flat exception where officers never learn of circumstances indicating that recording was required, though it might later turn out to be the case that the suspect is, for example, ultimately suspected of a recording-mandated class of crime. Section 8(3) creates an exception where the interrogating officer or his superior reasonably believes that recording will jeopardize the safety of the officer, the suspect, or another person, or risk disclosure of the identity of a confidential informant. If feasible, law enforcement must electronically record the basis for its belief at the time of the interrogation.

Exception for Equipment Malfunction (Section 9)

This section excepts from the recording mandate situations in which equipment malfunctions despite reasonable maintenance efforts on the available recording equipment where timely replacement or repair is not feasible.

Burden of Persuasion (Section 10)

Section 10 places on the state the burden of proving by a preponderance of the evidence that one of the above exceptions to the Act's recording mandates applies.

Officer's Report (Section 11)

Section 11 requires an officer to prepare a report giving his or her reasons for not recording, for recording only part of the interrogation process, for recording only by audio when video is also required, and for recording only by video when audio is also required. The only sanctions that may be imposed for violation of this section are administrative ones.

Notice of Intent to Rely on Exception (Section 12)

This section requires the state to serve on the defense a written notice of the state's intention to introduce in its case-in-chief all or part of a statement made during an unrecorded or only partially recorded custodial interrogation. The notice must be served no later than the time specified by law or rules other than this Act and shall specify the place and time at which the defendant made the statement and the exception upon which the state relies.

Remedies (Section 13)

Section 13(a) requires the trial court to consider violation of the Act's recording mandates as one factor in a motion to suppress a statement on grounds of involuntariness or unreliability. Section 13(a) does *not* mandate suppression as a remedy for violation of the recording requirements of the Act.

Section 13(b) requires, upon defense request, giving a cautionary instruction to the jury where the court has admitted a statement obtained in violation of the recording mandates of this Act. Section 13(a) lays out the central language to be included in such an instruction, language to be modified as required to be consistent with the evidence.

Section 13(c) provides as a remedy for violations of the Act's recording mandates the admission, in an "appropriate" case, of expert testimony concerning the factors that may affect the voluntariness and reliability of a statement made during a custodial interrogation *if and only if* the defense first offers evidence sufficient to support a finding by a preponderance of evidence of facts relevant to the weight of the statement the full significance of which may not be readily apparent to a layperson. The section lists a variety of illustrative factors to guide the court's determination of when a case is "appropriate." Moreover, the section does not free the defense of its obligation to comply with rules governing admissibility of expert testimony that are designed to safeguard its reliability, such as the well-known "*Frye"* rule and its more modern *Daubert* alternative.

Section 13(d) effectively eliminates civil damages remedies against a law enforcement agency for violation of this Act by granting those agencies qualified immunity if they have adopted, implemented, and enforced reasonable regulations designed to ensure compliance with the terms of this Act. This section also grants qualified immunity to individual law enforcement officers who comply with such reasonable regulations.

Section 13(e) requires each law enforcement agency to adopt and enforce regulations providing for a range of administrative disciplinary sanctions against any officer found by a court or a supervisory official of the law enforcement agency to have violated any of the provisions of this Act.

Monitoring Requirement (Section 14)

This section requires the appropriate state agency to monitor compliance with the terms of this Act.

Handling and Preservation of Electronic Recordings (Section 15)

This section requires that an electronic recording of a custodial interrogation be identified, accessed, and preserved in compliance with law other than this Act.

Rules Governing the Manner of Electronic Recording (Section 16)

This section requires law enforcement or monitoring agencies (brackets leave which agency to the choice of the individual state to adopt and enforce regulations governing the manner in which electronic recordings of custodial interrogations shall be made. These rules must encourage covered custodial interrogations to take place at places of detention unless necessary to do otherwise and to establish standards for the angle, focus, and field of vision of a camera which reasonably promote accurate recording and reliable assessment of its accuracy and completeness. Finally, where a custodial interrogation occurs outside a place of detention, the rules noted in this section must require later electronic recording of any statement from the individual interrogated and, as soon as practicable, the law enforcement officer's preparation of a record explaining the decision to interrogate outside a place of detention and summarizing the entire custodial interrogation process.

Implementing Rules (Section 17)

Section 17 requires the law enforcement or monitoring agency (as the state chooses) to adopt and enforce implementing rules that provide for the collection and review of data by superiors; the assignment of supervisory responsibilities and a chain of command to promote internal accountability; a process for explaining procedural deviations and for imposing administrative sanctions for those deviations that are not justified; a supervisory system for imposing on specific individuals a duty of ensuring adequate staffing, education, training, and material resources to comply with this Act's mandate; and a process for monitoring the chain of custody of an electronic recording of a custodial interrogation.

Self-Authentication (Section 18)

This section provides that recordings of custodial interrogations are self-authenticating at any pre-or-post-trial proceeding if accompanied by a certificate of authenticity prepared by an appropriate law enforcement officer under oath, unless the defendant offers proof sufficient to permit a finding that the recording is not authentic.

No Right to Electronic Recording Created (Section 19)

This section declares that this Act does not create a right in the individual interrogated to electronic recording of a custodial interrogation.

Uniformity of Application and Construction (Section 20)

This section requires consideration to be given to the need to promote uniformity of the law with respect to its subject matter among the states in applying and construing this Act.

Relation to Electronic Signatures in Global and National Commerce Act (Section 21)

This section addresses the current Act's relationship to the Electronic Signatures in Global and National Commerce Act.

Repeals (Section 22)

This section lists those statutes that the jurisdiction repeals that may be inconsistent with the terms of this Act.

Effective Date (Section 23)

This section simply recites this Act's effective date.

UNIFORM ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS ACT

GENERAL PROVISIONS

General Comment

SECTION 1. SHORT TITLE. This Act may be cited as the Uniform Electronic Recordation of Custodial Interrogations Act.

Comment

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

SECTION 2. DEFINITIONS. In this [act]:

(1) "Custodial interrogation" means questioning or other conduct by a law enforcement officer which is reasonably likely to elicit an incriminating response from an individual and occurs when a reasonable person in the position of the individual would consider that the person is in custody. The term includes a statement made by the individual in response to the questioning or conduct, from the time the individual should have been advised of the individual's Miranda rights until the questioning or conduct and response terminate.

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

(3) "Law enforcement agency" means a governmental entity whose responsibilities include enforcement of criminal laws or the investigation of suspected criminal activity.

(4) "Law enforcement officer" means an individual employed by a law enforcement agency, or someone acting at that individual's behest, where that individual's responsibilities include enforcement of criminal laws or the investigation of suspected criminal activity.

(4) "Place of detention" means a fixed location where an individual may be questioned about a criminal charge or allegation of [insert the state's term for juvenile delinquency]. The term includes a jail, police or sheriff's station, holding cell, and correctional or detention facility.

(5) "Statement" means a communication whether it is oral~~,~~; written, including, but not limited to, e-mail or other electronically transmitted verbal communications; nonverbal~~,~~; or in sign language.

(6) "Qualified immunity" means immunity from civil suit because of the status of the entity or individual, as determined by the facts and law applicable to the circumstances of the case.

Comment

A.The definition of "custodial interrogations" is meant to track that recited by the United States Supreme Court in *Miranda v. Arizona*, ___ U.S. ___ (1968). Law enforcement has proven itself capable over more than four decades of working effectively with the *Miranda* test. Thus, whenever law enforcement would be required to give the warnings established by *Miranda*, they would also be required to conform with this Act. When such warnings are not required by *Miranda*, however, this Act has no application.

B. The term "electronic recording" is broadly defined to include any audio or audio and visual record of a custodial interrogation, provided that that chosen means records accurately. Therefore, whenever an electronic recording of custodial interrogation is required by Section 3 of this Act, that recording must necessarily be one that represents the events that it purports to and does so as those events actually unfolded and without misleading omissions. The record must also remain unaltered or it ceases to comply with the mandates of this Act.

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

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

This definition, of course, creates the danger that law enforcement will routinely choose

to interrogate in locations other than "place[s] of detention." That risk is addressed in section 3(a)of this Act, which requires at least audio recording of custodial interrogations conducted outside places of detention, and by section 16(a), which requires law enforcement adoption of rules encouraging custodial interrogations for the crimes specified in section 3(a) to take place in places of detention unless otherwise necessary.

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

SECTION 3. ELECTRONIC RECORDING REQUIREMENT.

(a) Except as otherwise provided in Sections 4 through 9, a custodial interrogation conducted at a place of detention, including administration of any Miranda warnings to and waiver of Miranda rights by the individual being questioned, must be electronically recorded in its entirety by both audio and visual means if the interrogation relates to a [felony] [crime] [delinquent act] [offense] described in [insert applicable section numbers of the state's criminal and juvenile codes].

[(b) A custodial interrogation or part of a custodial interrogation that relates to a [felony] [crime] [delinquent act] [offense] described in subsection (a) and takes place outside a place of detention must be electronically recorded.]

(c) A law enforcement officer conducting a custodial interrogation ~~at a place of detention~~ is not required to inform the individual being interrogated that an electronic recording is being made of the interrogation.

(d) An electronic recording of a custodial interrogation is exempt from:

(1) requirements under [insert title and section numbers] that otherwise require that an individual be informed of, or consent to, the recording of the individual's conversations; and

(2) disclosure under [insert section numbers of the state's public records disclosure act].

Comment

A. The Electronic Recording Mandate

Paragraph (a) requires audio-visual electronic recording of the entire custodial interrogation process when conducted at places of detention provided certain triggering circumstances are met. Specifically, the person interrogated must be suspected of a crime specifically identified by statutory section and fitting a certain category of crime. The section offers three bracketed options as to the category of crime: "felony," "crime," or "offense." A jurisdiction's choice of felonies would limit the mandate to serious norm violations. Choosing "crime" would instead extend the statute's mandates to all crimes, increasing costs, at least in time-investment, though each jurisdiction should be free to decide whether this increased cost is outweighed by the benefits of broader scope. The term "offenses" extends scope still further to include violations of norms that are often deemed significant yet are not always labeled a "crime" in each jurisdiction or may be considered a mere violation. For example, there are jurisdictions where driving under the influence of alcohol would fit the term "offenses" but not the term "crime." This additional extension in scope would, of course, potentially further expand costs, the brackets again leaving it to each individual jurisdiction to decide whether the benefits nevertheless outweigh that cost. Whichever category a jurisdiction chooses, the recording mandate extends to juvenile offenses equivalent to those in the specified category if committed by an adult. The Act makes no special provisions for juveniles.

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

Jurisdictions vary on this question, but the combination of both is the most effective choice for achieving the goals outlined above. Absent video, demeanor cannot be observed, nor can the subtleties of body language and position that can affect voluntariness and truthfulness. Absent audio, the important effects of tone of voice, volume, and pace are lost. Absent the combination, the overall goal of accurately preserving and reconstructing the entire interrogation process is sacrificed. What is lost can harm the state's efforts to discourage frivolous suppression motions and to present its most powerful case for conviction. Similarly, these lost subtleties hamper each defendant's efforts to prove his innocence or his subjection to

unconstitutional interrogation methods. Moreover, social science research suggests that even subtle variations in how interrogation evidence is preserved and presented can have large effects on how it is perceived by factfinders.

Still, the perfect should not be the enemy of the good. It is plausible that smaller and even medium size agencies will not be able to afford audiovisual equipment outside places of detention, particularly if recording is to be concealed from the suspect, or may have insufficient serious crime to warrant the investment. The worry that equipment and methods that allow concealment of recording are more expensive than are more open recording methods is, however, easily addressed: choose *not* to conceal. Indeed, some social science suggests, concealment will not usually reduce a suspect's willingness to talk, so why bother doing so? Moreover, the costs of the necessary equipment are declining, including the costs of storage, because digital formats rather than videotapes can be used. Furthermore, if the full audio-visual recording requirement is limited to interrogations in police stations and similar venues (a matter addressed below), the quantity of equipment required, and thus its aggregate cost, declines.

The Innocence Project estimates that, at current retail prices, the out-of-pocket costs for recording equipment in a single room would roughly be $550. *See* Innocence Project, *The Recording of Interrogations: A Range of Cost Alternatives* 1 (2008). The Special Committee on the Recordation of Custodial Interrogations, in its report to the New Jersey Supreme Court, estimated that "for under a thousand dollars a video system can be installed recording onto VHS tape." *Cook Report*, www.judiciary.state.nj.us/notices/reports/cookreport.pdf. Denver, Colorado, installed a 25-room system that stores interrogations on a hard drive capable of burning them onto a CD for $175,000 ($7000 per room), spending an additional $11,000 for a mainframe computer to store all interrogation recordings. *See* Innocence Project, *supra*, at 1-2. Illinois embraced an integrated state-of-the-art system that records investigator notes too and can allow each investigator to retrieve interrogation recordings from any computer, thus enabling detective case-collaboration, for $40,000, outfitting four rooms. *Id.* at 2. A less sophisticated one-room system requiring CD burning costs $8000. *See Word Systems*, http://www.systems.com.

Additionally, how much expense is "too much" is subject to debate. Opposition to any recording requirement has often been based on claims of undue expense. The response of the technology's defenders has been to argue that likely cost savings far outweigh initial and continuing out-of-pocket costs, and experience seems to be proving this true (departments of varied sizes adopting recording requirements generally praise them across-the-board, rather than bemoaning their existence). Perhaps legislation should work to overcome cost short-sightedness by localities. Mandating *both* video and audio recording, under this view, would help localities see the low-cost forest through the high-cost trees.[3]

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

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

This Act, however, embraces option four. Although the costs of audio and video electronic recording at fixed places of detention are not high, law enforcement agencies worry, perhaps rightly so, that those costs will be unduly magnified if both audio and visual recording means are required outside places of detention. The audio option outside such places is far cheaper and easier to use; for that reason, this Act finds audio recording acceptable outside places of detention. Nevertheless, the full benefits of recording occur only if audio and visual recording means are used. Accordingly, section 16(a) requires law enforcement or monitoring agencies to adopt and enforce rules that, among other things, require custodial interrogations for statutorily-identified crimes to occur at places of detention unless otherwise necessary.

To adopt option one—mandating that all jurisdictions use both means of recording under all circumstances—is to dismiss cost concerns entirely. But to adopt option three—leaving it up to each law enforcement agency to decide whether to use audio or audio and video recording

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~~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.~~

combined fails adequately to convey the message that the combined approach has far more to commend it as the best way of accurately and completely re-creating the entire series of events in the custodial interrogation process. Option number three is unworkable because it is hard to decide where the population cut-off point should be and, in any event, cost concerns even in smaller jurisdictions are small relative to the benefits of recording if the full audio-visual mandate is limited to places of detention. Only the option in this Act—mandating both recording methods at places of detention, permitting only audio means outside such places, but requiring adoption of rules strongly encouraging that listed custodial interrogations occur only at places of detention – appropriately balances benefits and costs.

2. Temporal Triggers: When Should Recording Be Required?

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

3. Locational Triggers

Limiting the recording requirement solely to custodial interrogations at police facilities is the cheapest, most operationally workable approach and the one least likely to engender 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, 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 modestly, but many investigations involve "jailhouse informants," who may finger other inmates, and it may be hard to justify giving lesser protections to those already incarcerated or, even worse, to those who are simply in jail awaiting trial but unable to make bond. The latter situation in particular makes a person's rights turn on income, surely not a desirable state of affairs. Extending protection in this fashion also ameliorates the danger that police will sometimes (it would admittedly be logistically difficult for police to do this routinely) switch interrogation locations as a way of avoiding the recording requirement.

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. 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.

This Act takes the more conservative approach of limiting audio and visual recording mandates to places of detention while permitting audio recording (a cheaper, simpler method) outside such places. Bracketed language in section 16 also mandates that law enforcement promulgate rules encouraging all recording of custodial interrogations to be done at places of detention (and thus by both audio and visual means) unless necessary to do otherwise. These rules must also provide for later electronic recording of the statement made by the person interrogated. The alternative language finally requires the interrogating officer to prepare a

record justifying the initial decision to record outside a place of detention and to do so by audio only. That record must also summarize the entire interrogation process. The written justification mandate forces potential interrogators carefully to consider whether the interrogation simply cannot wait until the suspect is transported to a place of detention; ensures that these interrogators must justify their decision; creates records that will enable supervisors' review of officer performance and of the adequacy of training programs. The justification requirement further promotes interrogator accountability for his decisions *and*, importantly, his knowledge that he will face such accountability. Such accountability encourages police to favor audio *and* visual recordings at places of detention whenever practicable absent a flat statutory mandate to do so.

4. 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."

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

B. Covert versus Overt Recording

Section 3(c) declares that law enforcement officers need not warn suspects being custodially interrogated that their interrogation is being recorded. The available empirical data strongly suggests that such warnings will not reduce the likelihood that a suspect will talk, will waive *Miranda*, or will agree to be recorded.[4] Thus Professor Richard Leo, perhaps the leading psychological expert in the country who specializes in the interrogation process, notes that "a number of studies—including one by the International Association of Chiefs of Police (1998)—have concluded that electronic recording does not cause suspects to refuse to talk, fall silent, or stop making admissions." LEO, *supra* 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

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Some states prohibit recording conversations where only one party (for example, the police) has agreed to the recording. These statutes may fairly be interpreted as extending to custodial interrogations within the meaning of this Act. Accordingly, absent a special provision to the contrary, police in such jurisdictions would be required both to reveal the fact of recording to the suspect and to get his consent to being recorded. Section 3(d)(1) addresses this problem by specifically exempting custodial interrogations done within the scope of this Act from any otherwise applicable statutory requirements that all parties to a recorded conversation consent to the recording. Other jurisdictions have followed analogous approaches.

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

Section 3(d)(2) addresses the problem of state public records disclosure laws, also sometimes called state freedom of information acts. States with custodial interrogation electronic recording statutes vary on this question. In Chicago, for example, recordings of custodial interrogations are confidential under Section 7 of the Illinois Freedom of Information Act. The Chicago police thus allow only certain officers to have access to the recordings and require them to keep an access log. The defense is also entitled to receive a copy. *See* http://www.chicagopolice.org/LawyersGuide.pdf (at page 6). But Maine's Freedom of Access Statute is broad enough to allow public access to electronic recordings of custodial interrogations because such recordings are not exempted from the statute, Illinois having made precisely the opposite choice. The Maine General Order accepts this interpretation of the state Freedom of Access Act, allowing members of the public to request copies of recordings of custodial interrogations and mandating a positive response to such requests if proper procedures are followed and the Chief Law Enforcement Officer determines that the recording is a public document to which the public has legitimate access.

Section 3(d) of this Act follows an approach similar to that of Illinois, that is, excepting these recordings from the mandatory disclosure requirements of state freedom of information and similar statutes. Strong privacy concerns, the possibility of tainting the jury pool should a confession already in the public domain be suppressed at trial, the misimpressions that might be created in the public mind from a recording being available in which likely only portions would reach the public and would do so out of context counsel against mandatory public disclosure.

SECTION 4. EXCEPTION FOR EXIGENT CIRCUMSTANCES. A custodial interrogation to which Section 3 applies need not be electronically recorded if recording is not feasible because of exigent circumstances and a law enforcement officer conducting the interrogation electronically records an explanation of the exigent circumstances before conducting the interrogation, if feasible, or as soon as practicable thereafter.

Comment

A. Exceptions Overview

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

[5] ~~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 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~~

during a custodial interrogation out-of-state; (6) the statement relates to a crime for which recording would be required but for which the defendant was not then a suspect and is made during interrogation for a crime that does not require recordation; (7) the interrogation occurs at a time during which the interrogators had no knowledge that a crime for which recording would be required had occurred.

This seems like a sensible list of exceptions. For ease of reference by law enforcement, this Act separates variants on these exceptions into separate sections numbered 4 through 9.

One modest cautionary note is required, however, before reviewing these specific exceptions as they are articulated in this Act. Specifically, at least one well-respected academic, Christopher Slobogin, has argued that an exception for the circumstance in which a suspect refuses to talk if taped would be unconstitutional. *See* Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309 (2003). 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

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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 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.

mandate that each defendant have an opportunity for effective cross-examination. Slobogin argues that these constitutional provisions embody an obligation on the state to 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 furthermore 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:

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This Committee concludes, however, that Slobogin's arguments or the knowing, intelligent, and voluntary waiver variant on them are highly unlikely to be accepted by the courts. Accordingly, the text assumes that such arguments will not prevail. Should that prediction

prove wrong as to any individual state, that state's version of this Act will need to be modified accordingly.

B. Exception for Exigent Circumstances

New Jersey's exception to the electronic recording mandate when it is "not feasible" is likely to engender interpretive disputes over what it means to say that recording was "not feasible." This feasibility exception thus has the potential to swallow the rule. Nevertheless, it is hard to foresee every eventuality in which an exception may wisely be needed, and this catchall may allay fears of undue rigidity. But, to avoid circumventing the statute, the catchall *must* be narrowly construed. It should, for example, be noted that a similar statement in another context—the 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. The term "exigent circumstances" was thought to be less likely to be as capaciously interpreted as might "infeasibility" and thus unlikely to swallow the basic rule, while still permitting exceptions from recording for pressing circumstances specific to an individual case and perhaps not foreseen by the Act's drafters. Moreover, the term "exigent circumstances" has been well-defined by extensive case law in other areas of criminal procedure, including particularly under the Fourth Amendment, providing a ready source for analogies and a term familiar to courts and law enforcement. That familiarity should diminish the scope of interpretive disputes and provide an effective means for resolving them. Accordingly, Section 4 of this Act excepts from the electronic recording requirement situations of non-recording stemming from exigent circumstances.

SECTION 5. EXCEPTION FOR SPONTANEOUS OR ROUTINE STATEMENT.

A statement made by an individual need not be electronically recorded if:

(1) it is a spontaneous statement made outside the course of a custodial interrogation; or

(2) the statement is made in response to questioning that is asked routinely during the processing of the arrest of the individual.

Comment

Exception number one of Section 5 is done for clarity, as it would not fit most understandings of the term "interrogation" because a spontaneously-made statement or "blurt-out" is not the result of any action by law enforcement that they should reasonably expect will result in a statement. Exception number two of Section 5 tracks one of *Miranda*'s exceptions.

This latter exception recognizes that routine questioning, such as during "booking," is not done with either the purpose or likely effect of obtaining incriminating statements and is necessary to identifying an arrestee and preparing for a bail or detention hearing. Yet booking and other processing of an arrestee may nevertheless sometimes result in an incriminating statement. To avoid unjustified claims that this occasional result means that law enforcement should reasonably expect that booking and related processing will elicit incriminating statements, the Act expressly makes such statements an "exception" to the Act's electronic recording requirements.

SECTION 6. EXCEPTION FOR INDIVIDUAL'S REFUSAL TO BE ELECTRONICALLY RECORDED. A custodial interrogation to which Section 3 applies need not be electronically recorded if, before the interrogation, the individual to be interrogated indicates that the individual will participate in the interrogation only if it is not electronically recorded and, if feasible, the agreement to participate without recording is electronically recorded.

Comment

The exception recited in Section number six is based on the sound idea that doing some interrogation is better than none if a suspect will not cooperate in recording. Although the suspect has no "right" to be recorded or to avoid recording, as a practical matter the only way to obtain an otherwise voluntary and reliable confession where the suspect refuses to speak if recording is to comply with his wishes. Because it his wishes that lead to non-recording, not prompting by law enforcement, it also seems entirely fair to dispense with recording under those circumstances. At the same time, the requirement that his refusal to be recorded must itself be recorded where feasible," avoids factual disputes over whether he did indeed so refuse. The "feasibility" language in effect creates an exception from this mandate to record the refusal to talk if recorded where, for example, the suspect refuses to talk if even such a preliminary recording of his refusal is made.

SECTION 7. EXCEPTION FOR INTERROGATIONS CONDUCTED BY OTHER JURISDICTIONS. A custodial interrogation need not be electronically recorded if the interrogation is conducted, not at the direction of a law enforcement officer of this state:

(1) in another state in compliance with that state's law; or

(2) by a federal law enforcement agency in compliance with federal law.

Comment

The exception in Section 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 (subsection (1)) or is conducted by federal law enforcement officers (subsection (2)).[6] On the other hand, this exception applies only if the other jurisdiction's interrogations were not done "at the direction of a law enforcement officer" of the state that wants to introduce the statement at trial. This requirement seeks to avert variants of the now-discredited "silver platter doctrine," "under which evidence illegally obtained by state actors and subsequently excluded from trial was 'served up' to federal prosecutors for use in companion charges by a second sovereign alleging the same conduct as that unsuccessfully charged by the first sovereign."[7] *See* David Lane, *Twice Bitten: Denial Of The Right To Counsel In Successive Prosecutions By Separate Sovereigns*, 45 HOUSTON L. REV. 1769, 1887 (2009).

SECTION 8. EXCEPTION BASED ON ACTUAL OR REASONABLE BELIEF OF LAW ENFORCEMENT OFFICER. A custodial interrogation to which Section 3 applies need not be electronically recorded if:

(1) the interrogation occurs when the individual being interrogated is suspected of a crime for which an electronic recording is not required, but the individual reveals facts giving a law enforcement officer conducting the interrogation reason to believe that a [felony] [crime]

[6] 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 (or from the federal government) in conducting the interrogation there.

[7] David Lane, *Twice Bitten: Denial Of The Right To Counsel In Successive Prosecutions By Separate Sovereigns*, 45 HOUSTON L. REV. 1769, 1887 (2009).

[offense] has been committed for which Section 3 requires that a custodial interrogation be recorded; however, if feasible, continued custodial interrogation concerning the [felony] [crime] [offense] revealed must be electronically recorded;

(2) the interrogation occurs when no officer conducting the interrogation has actual knowledge of facts and circumstances suggesting that a [felony] [crime] [offense] has been committed for which Section 3 requires that a custodial interrogation be recorded; or

(3) the officer conducting the interrogation or the officer's superior reasonably believes that making an electronic recording will jeopardize the safety of an officer, the individual being interrogated, or another person, or risk disclosure of the identity of a confidential informant, and, if feasible, an explanation of the basis of that belief is electronically recorded at the time of the interrogation.

Comment

Exceptions numbers (1) and (2) in Section 8 of this Act address some drafting problems by not expecting the police to record in instances where it is so early in the investigation that they do not know that an offense for which recording is required is involved.

Exception number 3 of Section 8 is modeled after one of Wisconsin's exceptions, addressing public safety, and an analogous exception in Illinois. The Wisconsin exception reads as follows: "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. This Act, relying upon the same public safety logic, also creates exceptions to recording where it might risk disclosure of the identity of a confidential informant whose covert aid to police is helpful in preventing future crimes or in prosecuting current or past dangerous offenders.

SECTION 9. EXCEPTION FOR EQUIPMENT MALFUNCTION.

(a) If both audio and video recording of a custodial interrogation are required, recording by audio alone is acceptable if a technical problem in video recording occurs despite reasonable maintenance efforts on the available recording equipment, and timely repair or replacement is not feasible.

[(b) If both audio and video recording of a custodial interrogation are required, recording by video alone is acceptable if a technical problem in audio recording occurs despite reasonable maintenance efforts on the available recording equipment, and timely repair or replacement is not feasible.]

([b][c]) All or part of a custodial interrogation need not be electronically recorded if recording is not possible because the available electronic recording equipment fails, despite reasonable maintenance efforts, and timely repair or replacement is not feasible.

Comment

Section 9 allows for mere audio recording even in places of detention instead of audio and video recording where technical breakdown in video recording capabilities has occurred. Similarly, mere video recording is acceptable where audio capabilities break down. However, the breakdown must have occurred despite adequate maintenance efforts, thus providing an incentive for devising sensible maintenance protocols. Moreover, recording solely by audio or solely by video must still be the only reasonable available alternative to not recording at all, a principle conveyed by the Act's permitting the audio substitute for audio and video recording (or vice-versa) at places of detention only where "delay to await repair is not feasible." Section 9 further excuses the failure to record at all if it is likewise due to a complete failure of recording equipment, whether at or outside a place of detention, if reasonable maintenance efforts were

made and timely repair or replacement is not feasible.

Section 9(b) is bracketed because some members of the drafting committee believed that a failure of audio recording is so egregious as to render the purely visual recording virtually useless. The Committee concluded that the full body should decide whether the failure of audio recording due to maintenance issues should ever be an acceptable exception.

SECTION 10. BURDEN OF PERSUASION. If the [state] [prosecuting attorney] relies on an exception in Sections 4 through 9 to justify a failure to make an electronic recording of a custodial interrogation, the [state] [prosecuting attorney] must prove by a preponderance of the evidence that the exception applies.

Comment

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

Sections 10 of this Act adopts a similar approach. The section places on the state the burden of proving the applicability of an exception by a preponderance of the evidence. Although some proposed statutes suggest a clear and convincing evidence standard, that imposes an undue burden on the state. The preponderance standard is also consistent with that embraced in much of the law of constitutional criminal procedure. Yet the burden is not so low that the state can readily use the exceptions to nullify the electronic recording rule.

SECTION 11. OFFICER'S REPORT.

(a) When a law enforcement officer conducts a custodial interrogation [at a place of detention] without complying with Section 3, the officer shall prepare a [written report] [electronic record] explaining the reasons for the decision:

(1) not to make an electronic recording;

(2) to make an electronic recording only of part of the interrogation;

(3) to make an electronic recording only by audio recording; or

(4) to make an electronic recording only by video recording.

(b) A law enforcement officer shall prepare the [report] [record] required by subsection (a) as soon as practicable after completing the interrogation, even if the officer has made a contemporaneous electronic recording explaining the reasons for not complying with Section 3.

(c) The only sanction that may be imposed on a law enforcement officer for failure to comply with subsection (a) or (b) is administrative discipline.

Comment

This section requires law enforcement officers to prepare reports justifying deviations from the recording mandates of section 3. These reports must be prepared as soon as practicable after the custodial interrogation. The burden of report-writing should not be large because police obtaining statements are generally already required to prepare reports on the results of their interrogations pursuant to internal departmental policies. On the other hand, justifying the deviation decision does impose some additional burden in the time taken to expand the otherwise-required report to address a new item. That additional burden itself acts as a deterrent to too-easy deviation from section 3's recording mandates; partly for this reason, the report is required even if an electronic recording of the deviation-decision reasons was already prepared.

Having a record of the reasons for deviation and the circumstances surrounding it has several benefits. First, it requires officers to justify their actions, and the mere knowledge that they must do so and will be held accountable for them will encourage greater care and deliberation on the officer's part in deciding whether to deviate. Second, the record, which includes an explanation of the officer's thought processes in deviating, will better enable superiors to monitor compliance and to improve training in recording procedures. Third, a record might reveal flaws in office policies if certain problems are recurrent, enabling the law enforcement agency to revise its policies. Fourth, the record helps to protect the officer from allegations of negligence or abuse at a later date, at which time memories about events and about the officer's reasoning processes may have faded. However, where the required record is not made, there are a wide range of reasons that such failure may be excusable. If not excusable, there may be varying degrees of culpability. For these reasons, the remedy for violation of this record-keeping requirement is limited to administrative discipline.

SECTION 12. NOTICE OF INTENT TO RELY ON EXCEPTION.

(a) If the [state] [prosecuting attorney] intends to introduce in its case-in-chief a statement made during a custodial interrogation and to rely on an exception in Sections 4 through 9 to justify a failure to make an electronic recording of the interrogation, the [state] [prosecuting attorney] shall serve on the defendant written notice of that intent not later than the time specified by law or rules other than this [act].

(b) The notice required by subsection (a) must state the specific place and time at which the defendant made the statement and identify the exception upon which the state intends to rely.

Comment

Whenever the state plans to offer into evidence a statement subject to this Act but relying on an exception, Section 12 requires the state to notify the defendant of its intention so to rely. Section 12 further requires that this notice must state the specific place and time at which the defendant made the statement and the specific exception or exceptions upon which the state intends to rely.

These notice and hearing provisions are modeled on New Jersey Supreme Court Rule 3:17(c), governing electronic recordation of custodial interrogations. These provisions have two major advantages. First, they prevent the numerous exceptions from swallowing the general rule of electronic recording of custodial interrogations at places of detention. Law enforcement officers will know that they must justify their reliance on any exception not only to their superiors but to a court. Moreover, they must be able to state with specificity what exceptions they rely upon. Furthermore, they will understand that they will have to testify at a hearing to support their reliance on an exception – a hearing at which the state will face a burden of persuading the court by at least a preponderance of the evidence that the facts exist justifying the officer's decision not to record. Similarly, the provision is likely to motivate supervisors to ensure that their officers think carefully about whether to rely on an exception and are able to justify it in a way that will be convincing to a trial judge.

Second, these provisions ensure minimally fair process. This Act generally leaves discovery matters to the law of the individual states. But the default position underlying the Act is that it is in society's best overall interest that electronic recording occur. Although there are sound reasons for creating exceptions to that mandate, given that default position, the state should have to justify its deviation from such mandates. The defendant is the person with the greatest motivation to test the government's capacity convincingly to make its case for such deviation. The defendant needs the minimal tools necessary to fulfilling this function. But,

equally importantly, the electronic recording requirement is designed to protect the defendant's rights to be free from coercion and from mistaken conviction. The recording requirement thus helps to protect against convicting an innocent person while aiding in protecting that person's fundamental constitutional rights. Without at least notice of the nature of the state's claim that an exception applies, and without provision of a hearing at which the state must meet the burden of proof by an appropriate level, a defendant will have little ability to protect his rights and to reduce the chances of his facing wrongful conviction.

SECTION 13. REMEDIES.

(a) Unless the [appropriate court] finds that an exception in Sections 4 through 9 applies, the court shall consider the failure to make an electronic recording of all or part of a custodial interrogation to which Section 3 applies in determining whether a statement made during the interrogation is inadmissible because it was not voluntarily made [or was not reliable].

(b) Unless the [appropriate court] finds that an exception in Sections 4 through 9 applies, if the court admits into evidence a statement made during a custodial interrogation that was not electronically recorded in compliance with Section 3, the court shall, upon request of the defendant, give appropriate instructions to the jury. Those instructions must, at a minimum, explain to the jury that the police did not electronically record the entire interrogation process, though the law required them to do so, and that the jury is therefore deprived of the most reliable and complete evidence of what was said and done by each of the participants. ~~instruct the jury as follows, with modifications necessary to be consistent with the evidence:~~

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

~~In this case, the law enforcement officers did not comply with that law. They did not make an electronic recording of the interview of the defendant. [They made an electronic recording that did not include the entire process of interviewing the defendant, from start to finish.] The prosecution has not presented to the court a legally sufficient justification for not complying with that law. Instead of an electronic recording, you have been presented with testimony about what took place during the custodial interrogation, based upon the recollections of the law enforcement officers [and the defendant]. [Instead of a complete record of the entire process of interviewing the defendant, they have left you with only a partial record of the events.]~~

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

~~Because the interview was not electronically recorded as required by our law, you have not been provided the most reliable evidence about what was said and what was done by the participants. You cannot hear the exact words used by the participants, or the tone or inflection of their voices. [Because the interview process was not electronically recorded in its entirety as required by law, you have not been provided with the most reliable and complete evidence of what was said and done by the participants].~~

~~Accordingly, as you go about determining what occurred during the interview, you should give special attention to whether you are satisfied that testimony of the participants accurately [and completely] reported what was said and what was done, including testimony about statements attributed by law enforcement witnesses to the~~

~~defendant. It is for you, the jury, to decide whether the statement was made and to determine what weight, if any, to give to the statement.~~

[(c) Unless the [appropriate court] finds that an exception in Sections 4 through 9 applies, if the court admits into evidence a statement made during a custodial interrogation that was not electronically recorded in compliance with Section 3, the court, in an appropriate case, shall admit expert testimony about factors that may affect the voluntariness and reliability of a statement made during a custodial interrogation, if the defendant first offers evidence sufficient to permit a finding by a preponderance of the evidence of facts relevant to the weight of the statement the full significance of which may not be readily apparent to a layperson. In deciding whether to admit expert testimony, the court may consider: the vulnerability to suggestion of the individual who made the statement; the individual's youth, low intelligence, poor memory, or mental retardation; use by a law enforcement officer of sleep deprivation, fatigue, or drug or alcohol withdrawal as an interrogation technique; the failure of the statement to lead to the discovery of evidence previously unknown to a law enforcement agency or to include unusual elements of a crime that have not been made public previously or details of the crime not easily guessed and not made public previously; inconsistency between the statement and the facts of the crime whether an officer conducting the interrogation educated the individual about the facts of the crime rather than eliciting them or suggested to the individual that the individual had no choice except to confess; promises of leniency; and the absence of corroboration of the statement by objective evidence. The court shall permit appropriate expert testimony offered by the prosecution to rebut expert testimony introduced by the defendant. Nothing in this subsection prohibits the court from admitting under law other than this [act] expert testimony about the

voluntariness or reliability of the statement whether the testimony is offered by the defense or the prosecution.]

(d) A law enforcement agency that has adopted~~, implemented,~~ and enforced rules reasonably designed to ensure compliance with the terms of this [act] and a law enforcement officer of the agency who has complied with those rules have qualified immunity from any civil suit for damages allegedly arising from violation of this Act.

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

Comment

A. Pretrial Motions

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

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

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).

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.

Nevertheless, exclusion is generally understood as a remedy turning on a cost-benefit analysis. Among the primary social benefits of an exclusionary remedy for violation of this Act's electronic recording mandate are deterring future violations, protecting accuracy in fact-finding, protecting against false confessions occurring in the first place, and adding a statutory layer of protection to other relevant constitutional rights, such as the due process right to be free from coercive interrogations and the Fifth Amendment right to be free from compelled custodial interrogations, including the *Miranda* prophylactic protection of that right. But where violation of the Act has only minimally implicated these social interests, the cost of suppression may not be worth the benefits. Therefore, the Act merely requires the trial court to consider the relevance and weight of violation of the electronic recording mandate as a factor in pretrial suppression motion decisions. On the other hand, rendering violation of the Act irrelevant to pre-trial suppression motions would not adequately serve the Act's goals in cases where the interests the Act serves are substantially implicated, a point explained more fully below.

Mandating such consideration promotes sound deliberation by the court. But whether to suppress will be a case-by-case judgment. Furthermore, violation of the Act's recording mandates is never itself a ground for even potential suppression of evidence. Rather, non-recording is a factor to be considered when a suppression motion is made on one or both of two other grounds: that the confession was coerced or that it was unreliable. Additionally, even the possibility of non-recording's being a consideration in suppression motions made on either or both of these two grounds arises only when *Miranda* warnings would also be required, the offense is one covered by this Act, *and* one of the Act's extensive set exceptions does not apply.

Statutory mandates for decision-makers to consider factors without requiring that they thereby decide a particular way are common. In the area of constitutional law, one well-known such statute was unsuccessfully challenged as violating free speech rights in *NEA v. Finley*, 524 U.S. 569 (1998).[8] There, Congress amended the statute governing National Endowment of the Arts (NEA) procedures for awarding grants to encourage proposed artistic endeavors. The amended statute directed the NEA chairperson, in establishing procedures for determining the artistic merit of grant applications, to "take into consideration general standards of decency and respect for the diverse beliefs of the American public." Several grant-applicants denied funding sued the NEA, claiming that the statute as applied had violated their First Amendment right to free speech by directing funding-denial for projects espousing a particular viewpoint.

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

[8] ~~524 U.S. 569 (1998).~~

undermining "respondents' argument that the provision inevitably will be utilized as a tool for invidious viewpoint discrimination."

Relatedly, the Court rejected the claim that if the mandate to "consider" a factor does not require a particular result on the statute's face, it will render the statute so impermissibly vague and subjective as to allow the agency to be thoroughly unconstrained, again permitting invidious discrimination to occur below the radar. A mandate to "consider" a factor is no more vague, however, concluded the Court, than the ultimate question to which this consideration contributes to an answer: whether the grant application is for a project that is likely to exemplify "artistic excellence." Only a case-by-case consideration of a wide array of information can lead to a decision on such a question in an individual case.

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

It also might be argued that a statue may not "mandate" that anything be considered in making a constitutional decision because constitutions trump statutes. This argument fails for several reasons. First, the constitutional question whether a confession is "voluntary" is to be made based upon the "totality of the circumstances." Among the recording mandate's purposes is to give the courts a fuller picture of the circumstances relevant to a confession's voluntariness (by recording the events fully and as they actually unfolded) and a stronger appreciation of the significance for the voluntariness determination of the absence of that fuller picture. That absence occurs where recording that should have taken place did not. Violation of the Act's recording mandate thus logically entails its consideration in the "totality of the circumstances" test of voluntariness. The Act does spell out this logic and its consequences by mandating that courts consider the Act's violation as a factor in the voluntariness inquiry. But doing so does not require any outcome concerning whether the confession in the particular case was indeed constitutional or not. That decision remains the judge's. There is thus no conflict between statute and constitution, and other jurisdictions, to be discussed shortly, have seen no such conflict.

Furthermore, even were a court to disagree, this Act can and should be understood as creating a statutory ground for suppression of a confession on grounds of involuntariness, albeit, given such a ruling, a ground that is co-terminus with the constitutional due process involuntariness doctrine, with the sole exception that violation of the Act's recording mandates must be considered in the voluntariness determination, even if such consideration is not otherwise constitutionally required.

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

Remember that Alaska and Minnesota have adopted a simple, rigid rule of per se exclusion for violation of their recording mandates. Washington, DC creates a softer rule of presumed inadmissibility that can be rebutted by clear and convincing prosecution evidence that the statement was nevertheless voluntary. Illinois also creates a rule of presumed inadmissibility that can be rebutted but differs from the DC rule in two ways: (1) the prosecution must prove not only that the statement was voluntarily given *but also* that it is reliable, given the totality of the circumstances; and (2) the prosecution's burden of proving these matters is only a preponderance of the evidence.

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 than under a per se rule of inadmissibility and will kick in only where there is reason to worry that we are in danger of convicting the wrong man.

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

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

Indeed, of the states that have enacted recording statutes with remedies, only Wisconsin and Nebraska limit the remedy *solely* to a cautionary jury instruction or, in a bench trial in Wisconsin, permits the judge to consider the weight of the recording requirement violation in judging the worth of the confession. Maine, Maryland, and New Mexico are simply silent about remedies, which may or may not preclude the courts from crafting their own.

Although not yet adopted by any state, there is still another approach to the exclusionary rule: that proposed by the Constitution Project. 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.

3 .*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."[9] *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.] 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."[10] *Id.* The Constitution Project's approach has the virtue of flexibility but the vice of complexity.

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

The approach of this Act is to fuse aspects of the Illinois and New Jersey approaches. Illinois requires that the prosecutor prove by a preponderance of the evidence *both* that an unrecorded statement was voluntary *and* that it was reliable. Absent such proof, exclusion of the confession is mandated. North Carolina similarly recognizes both involuntariness and unreliability as grounds for suppressing a confession. This Act, unlike that in Illinois, never

[9] *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.

[10] *Id.*

mandates the exclusionary remedy but makes violation of the Act one factor in the admissibility decision. In this respect, this Act's approach mirrors New Jersey's, which also makes the failure to record but one factor in the admissibility decision. But, unlike New Jersey, but like Illinois and North Carolina**,** this Act expressly recognizes two potential grounds for excluding a confession based at least partly on the failure to record: that failure's relevance to proving the confession's *involuntariness* and its relevance to proving the confession's *unreliability.*

The latter ground for suppression is not one regularly recognized in constitutional law or in most state statutory law as a ground for suppression of confessions, though, as noted above, several states have recently done so. Accordingly, in many states this Act would create a new basis for potential exclusion of a confession—and it is worth emphasizing again that this is only *potential* exclusion via a multi-factor weighing process and if none of the exceptions to the Act are met. Because of the novelty of this approach in many states, further comment on the role of reliability in suppression motions is warranted. Relative novelty is also why the language of reliability in this section is bracketed.

The most common constitutional grounds for suppression of confessions are violations of the *Miranda* rule and the involuntariness of the confession under the due process clauses of the United States Constitution. A confession is "involuntary" only if coercive police activity has overborne the suspect's will.

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

Read in isolation, this quote might suggest that the majority was thoroughly unconcerned with "reliability," that is, with whether there is good reason to trust that the confession was truthful, the defendant therefore guilty. But that impression would be misleading, for in other cases the Court, lower courts, and commentators have recognized that one important function of the voluntariness test is to reduce the chances of convicting the innocent. The Court's point was that the danger of wrongful convictions is not *alone* sufficient to violate due process. The exclusionary rule's purpose in this area is to deter police overreaching. Where there is no such

overreaching to deter, the due process clauses are irrelevant, despite the risk to the accuracy of the adjudication of guilt. Yet the Court recognized that a fundamental purpose of a criminal trial is to admit "'*truthful* and probative evidence before state juries. . . .'" *Id.* at 166 (quoting Lego v. Twomey, 4044 U.S. 4477, 488-89 (1972)). The Court additionally recognized that, even where coercive police activity is lacking, "this sort of inquiry . . . [may] be resolved by state laws governing the admission of evidence. . . . A statement rendered by one in the condition of respondent might be proved to be quite *unreliable*, but this is a matter to be governed by the evidentiary laws of the forum." *Id.* at 167 (emphasis added).

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

> Since the Court redefines voluntary confessions to include confessions by mentally ill individuals, the reliability of these confessions becomes a central concern. A concern for reliability is inherent in our criminal justice system, which relies upon accusatorial rather than inquisitorial practices. While an inquisitorial system prefers obtaining confessions from criminal defendants, an accusatorial system must place its faith in determinations of "guilt by evidence independently and freely secured."

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

In other areas of due process, the Court has reaffirmed that police overreaching is indeed a requirement for a due process violation. But the Court has also made its continuing concern with the reliability of factfinding under the due process clauses evident. A particularly apt example is the Court's due process analysis of eyewitness identifications, such as lineups or photospreads. *See* ANDREW E. TASLITZ, MARGARET L. PARIS, & LENESE HERBERT, CONSTITUTIONAL CRIMINAL PROCEDURE ___-___ (3~~3~~d ed. 2007). The Court will not suppress an identification resulting from a suggestive identification procedure unless that suggestion was unnecessarily created by the police. *See id.* at ___-___. But if the police have overreached in this area, the sole remaining question for the Court in deciding the admissibility of the out-of-court identification procedure is reliability. *See id.* at ___-___. Indeed, says the Court, reliability

is the "linchpin" of the analysis. The Court will go even further and under certain conditions suppress an in-court identification if it is the fruit of an unreliable out-of-court one. The reason for this is that the reliability of the in-court identification then itself becomes suspect.

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

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

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

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

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

Id. at 1161 (emphasis added).

Commentators have also argued that Federal Rule of Evidence ("FRE") 403 and its state law equivalents already authorize suppression of evidence, including interrogations, that is unreliable. The argument is straightforward. Rule 403 gives the trial judge discretion to exclude even relevant evidence if its probative value is substantially outweighed by a variety of countervailing concerns, including the dangers of unfair prejudice and misleading the jury. Given the psychological data showing the powerful tendency of even false confessions to induce juries to convict, argue these commentators, a confession obtained under circumstances having strong indicia of unreliability will mislead the jury. Accordingly, the trial court has the discretion to exclude such evidence.[11] *See* RICHARD LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 288 (2008).

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

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

[11] *See* RICHARD LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 288 (2008).

into evidence.[12]

See id. at 284.

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

State constitutional due process clauses as interpreted by their courts and those courts' interpretations of the scope of their inherent supervisory power over the admission of evidence will vary widely. Reliance on state equivalents to FRE 403 as grounds for exclusion based upon unreliability is uncertain, given the dearth of court decisions on the point. Some courts articulate fuzzy grounds for their approach to reliability questions, and some approaches are too inflexible and harsh. Legislative action, by contrast, brings a democratic imprimatur and the significant investigative resources of the legislature to bear on designing appropriate remedies. A Uniform Act's attention to remedies thus promises sounder and more uniform approaches to the remedies question. At the same time, this Act's approach does not even arguably intrude in any significant way upon judicial prerogatives because the Act merely makes violation of its provisions *one factor* for courts to consider in making the admissibility decision.

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

[12] ~~*See id.* at 284.~~

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

B. Jury Instructions and Their Relative Efficacy

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

Thomas Sullivan, one of the leading national advocates for electronic recording of custodial interrogations, and his co-author, Andrew Vail, have strongly endorsed cautionary jury instructions as a remedy for violation of recording mandates. Sullivan and Vail argue that fear of such instructions will provide a significant deterrent to law enforcement violations of the provisions of mandatory recording acts. They further argue that jury instructions will help to improve the reliability of jury fact finding when the jury is faced with mere oral testimony rather than having a verbatim recording of the entire custodial interrogation process. New Jersey has followed just such an approach, declaring in its recording statute that, "in the absence of electronic recordation required … [under this Act], the court shall, upon request of the defendant, provide the jury with a cautionary instruction." Pursuant to that mandate, the New Jersey judiciary has prepared model jury charges for violation of the statute.

Sullivan and Vail's proposed instruction would caution jurors that the officers in the case before them inexcusably failed to comply with a recording requirement—one designed to give jurors a complete record of what occurred; that the jurors consequently have been denied "the most reliable evidence as to what was said and done by the participants" so that the jurors "cannot hear the exact words used by the participants or the tone or inflection of their voices."[13] *Id*. at 7. The proposed instruction would conclude as follows: "Accordingly, as you go about determining what occurred during the interview, you should give special attention to whether you are satisfied that what was said and done has been accurately reported by the participants, including testimony as to statements attributed by law enforcement witnesses to the defendant."[14] *Id.*

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

[13] *Id.* at 7.

[14] *Id.*

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

In this case, the law enforcement officers did not comply with that law. They did not make an electronic recording of the interview of the defendant. [They made an electronic recording that did not include the entire process of interviewing the defendant, from start to finish.] The prosecution has not presented to the court a legally sufficient justification for not complying with that law. Instead of an electronic recording, you have been presented with testimony about what took place during the custodial interrogation, based upon the recollections of the law enforcement officers [and the defendant]. [Instead of a complete record of the entire process of interviewing the defendant, they have left you with only a partial record of the events.]

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

Because the interview was not electronically recorded as required by our law, you have not been provided the most reliable evidence about what was said and what was done by the participants. You cannot hear the exact words used by the participants, or the tone or inflection of their voices. [Because the interview process was not electronically recorded in its entirety as required by law, you have not been provided with the most reliable and complete evidence of what was said and done by the participants].

Accordingly, as you go about determining what occurred during the interview, you should give special attention to whether you are satisfied that testimony of the participants accurately [and completely] reported what was said and what was done, including testimony about statements attributed by law enforcement witnesses to the defendant. It is for you, the jury, to decide whether the statement was made and to determine what weight, if any, to give to the statement.

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

Sullivan and Vail at least implicitly argue that many jurisdictions might give cursory

cautionary instructions without a fairly detailed model. Specifically, many courts might give standard instructions about treating a confession with caution without specifying the reasons why jurors should do so in a way that will enable the jurors truly to understand the dangers to reliability created by the failure to record. There is also reason to believe that more detailed instructions explaining precisely why caution is needed may more effectively improve the jury's ability fairly to assess the evidence. For that reason, they counsel providing a standard instruction in the recording statute itself. Sullivan has been more explicit on this point in drafting a model federal statute that includes standard jury instructions on the ill consequences of the unexcused failure to record.

The Committee agrees with much of this reasoning but has concluded that trial judges need to retain ample discretion in crafting instructions meeting the needs of each individual case. Consequently, the Act mandates that remedial instructions be given, specifying only the core information that should be common to each instruction but otherwise leaving the details to the court. However, the Committee has endorsed a variant of Sullivan and Vail's proposed instruction as one basis for a model instruction and has included it in the comments above. ~~and has accordingly included standard instructions as part of the uniform act.~~ On the one hand, these suggested model ~~These~~ instructions are not meant to be exhaustive. ~~but rather the minimum that is required.~~ Counsel are free in any individual case to argue for additional, even more detailed instructions. On the other hand, some judges may favor more concise instructions and are, in any event, free to craft whatever instructions they deem appropriate, including as is necessary to address the peculiarities of each specific case, so long as the instructions contain the core information provided for in the Act. ~~Furthermore, the uniform act makes clear that the instructions must be modified to address the peculiarities of each specific case. The standard instructions set forth in the Act are modeled significantly after Sullivan's proposed federal instructions, as well on his later-proposed and similar state-level instructions, with modifications made to adjust the instruction to a uniform act recommended for adoption at the state level.~~

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

Nevertheless, it is important to explain why such instructions will not suffice as a sole remedy, as some maintain. Notably, there is no empirical data on whether the availability of jury instructions will be an adequate deterrent to violations of recording mandates. Opinions differ on the point, raising cause for concern were such instructions to be the sole available judicial remedy. Furthermore, jury instructions will also be unavailable in bench trials.

More importantly, however, there is ample reason to question whether jury instructions alone will adequately improve jurors' accuracy in assessing the weight to give confessions obtained in violation of recording requirements. ~~Indeed, although the~~ The Committee knows of no studies specifically examining the effect of jury instructions concerning the failure to electronically record the entire interrogation process.~~,~~[~~15~~] (Such studies are, however, under way, including one

[~~15~~] ~~Such studies are, however, under way, including one by this Act's Reporter in conjunction with several social scientist colleagues.~~

by this Act's Reporter in conjunction with several social scientist colleagues.). Nevertheless, ample studies show that juries routinely give confessions enormous weight, even under circumstances where there is substantial reason to be concerned about the confessions' accuracy.

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 alone are thus unlikely to improve jurors' accuracy where they are denied recordings of the entire interrogation process. Moreover, where there is no excuse for the police failure to record, there seems little justification for ignoring this risk to the innocent.

Ample social science concerning wrongful convictions in other areas (albeit analogous ones) than custodial interrogations also supports the conclusion that jury instructions will do too little to improve jurors' ability accurately to assess credibility and correctly to determine whether a confession was true or voluntary.[16] (The social science supporting the arguments made in this section is concisely summarized at Taslitz, *Social Science*, *supra*). The effect of instructions on jurors varies with the subject matter of the instruction, and some can be modestly effective. Yet, overall, instructions are frequently 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.

This risk is indeed no minor matter, for innocence concerns were among the primary forces motivating the movement for electronic recording in the first place, and errors can result in an innocent person being sentenced to the death penalty or to life in prison—errors hard to correct where confessions rather than DNA are the primary evidence offered. These worries are important, therefore, even if it is correct that violations of recording mandates will be relatively rare. In other words, deterrence is not the only function to be served by an exclusionary rule in this context. Indeed, critics of the exclusionary rule, including those on the Court, have focused their ire on the rule's application to Fourth Amendment violations while generally embracing the rule's wisdom where the reliability of fact finding is at stake.[17] *See* Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: the Sluggish Life of Political Factfinding*, 94 GEO. L.J. 1589 (2006); *See* ANDREW E. TASLITZ, MARGARET L. PARIS, & LENESE HERBERT, CONSTITUTIONAL CRIMINAL PROCEDURE ___ - ___ (3rd ed. 2007).

The point of stressing the limitations of cautionary jury instructions as a remedy is not to

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[16] ~~The social science supporting the arguments made in this section is concisely summarized at Taslitz, *Social Science*, *supra* note 7.~~

[17] ~~*See Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: the Sluggish Life of Political Factfinding*, 94 GEO. L.J. 1589 (2006); *See* ANDREW E. TASLITZ, MARGARET L. PARIS, & LENESE HERBERT, CONSTITUTIONAL CRIMINAL PROCEDURE ___ ___ (3rd ed. 2007).~~

deny that they may be likely to have some, perhaps substantial, deterrent value or that they may modestly improve jury reasoning. Logic suggests that cautionary instructions should help at least somewhat on both these scores. There is indeed a significant likelihood that they will do both. Furthermore, cautionary instructions are a modest and traditional judicial remedy.

But the limitations of cautionary instructions counsel against relying on them too heavily as the sole judicial remedy. For example, analogous data suggests that jury instructions' impact can be significantly improved if given in conjunction with expert testimony alerting jurors to the reliability problems with certain evidence and to jurors' own reasoning problems that may interfere with their ability to give evidence its appropriate weight. Furthermore, in some cases the reliability of the confession may be so in doubt, and the jury's ability adequately to grasp that point so insufficient, that suppression of the confession in its entirety is required to protect against the risk of wrongly convicting the innocent. This circumstance might be sufficiently rare that suppression should neither be routine nor presumptive. Nevertheless, its consequences when it does occur are sufficiently grave that this Committee has incorporated into this Act a provision permitting trial judges to take into account as one factor in deciding suppression motions the risks that confessions obtained in violation of this Act will be more likely to be involuntary or unreliable.

3. *Separation of Powers Concerns*

Because this Uniform Act would mandate the general form of remedial instructions, some concern might be raised that this unduly impinges on exclusive judicial authority, violating the separation of powers under state constitutions. No universal response is possible to this objection because of the wide variations in the text and history of particular state constitutional provisions. Nor is there case law precisely on point. Nevertheless, this Committee concludes that separation of powers concerns in the vast majority of states will not provide a roadblock to remedial jury instructions.

a. *The Legislative Role in Serving the State Interest in Juries Making Decisions Based Upon Accurate, Complete Information*

One reason for this conclusion is the importance of the state interest in ensuring that jurors in criminal cases are fully and accurately informed of matters relevant to their fact determinations, an interest that does not conflict with core judicial functions, indeed enhancing the effectiveness of the judiciary's operation. *Teague v. State*, 946 S.W.2d 670 (Ark. 1997), illustrates the point. There, an Arkansas statute declared that evidence of the law applicable to parole, meritorious good time, or transfer was relevant to sentencing by a court or jury. Pursuant to this statute, the lower court instructed the sentencing jury on just these matters, the jury imposing a sentence of two consecutive six years terms on each of two counts of aggravated assault. On appeal, defendant Jack Wayne Teague argued that the jury instruction and the statute authorizing it violated the state constitution's separation of powers principle. That violation occurred, Teague insisted, because the statute in effect directed the judiciary to give an instruction on matters of executive power. The Supreme Court of Arkansas rejected this argument, affirming the sentence.

The court began by emphasizing that all statutes are presumed constitutional, with the burden being on the person challenging that presumption to prove it faulty. Moreover, the court noted that the statute did not require either the legislature or the judiciary to *exercise* the executive power of parole but merely to inform the jury of the scope and limits of that power. Indeed, the court emphasized, the public policy of the state inheres in its legislation, and it is not for the courts to declare or override such policy. The statute at issue reflected a state public policy to promote truth in sentencing. There was a strong democratic pedigree, moreover, supporting this policy choice. As the Court put it, "The State argues that the citizens of this State, through their elected legislators, have indicated their desire for truth in the sentencing of criminal defendants with the enactment of section 16-97-103(1).

In reaching its decision, the *Teague* court relied partly on *California v. Ramos*, 463 U.S. 992 (1983), for the proposition that state legislative decisions concerning the wisdom of jury consideration of sentencing factors deserve great weight. *Ramos* arose in the special context of the death penalty and did not expressly involve separation of powers. Nevertheless, *Ramos* is worth exploring in more detail precisely on the importance of a fully and accurately informed jury in finding facts.

Ramos concerned the constitutionality of a California statute mandating that trial judges inform juries in death cases that the Governor has the authority to commute a sentence of life imprisonment without the possibility of parole to a sentence that includes the possibility of parole. The *Ramos* trial judge gave just such an instruction, and the jury sentenced Ramos to death. Ramos challenged the instruction under the Eighth and Fourteenth Amendments to the United States Constitution, arguing that it would encourage a death sentence, partly by freeing the jury of a full sense of ultimate responsibility for its decision. The Court affirmed the death sentence, rejecting all Ramos's arguments. In doing so, the Court noted that it would aid the jury in sound decisionmaking on the question of future dangerousness by informing them that there was a chance that he could be free in society again were he not sentenced to death. Nor would the instruction diminish the reliability of the jury's judgments – indeed it would enhance that reliability by preventing their deciding based upon incomplete or potentially misleading information from which they might assume that a living Ramos could never prey on society again. The virtue of the instruction was thus that it "corrects a misconception and supplies the jury with accurate information for its deliberation…." *See id.* at 1009 (citing American Law Institute, Model Penal Code sec. 210.6 (Proposed Official Draft, 1962) (requiring the court at the penalty phase of a capital trial to "inform the jury of the nature of the sentence of imprisonment that may be imposed, including its implications with respect to possible release upon parole, if the jury verdict is against sentence of death."). The Court concluded, however, by noting that such an instruction was merely permitted by the federal Constitution, it being a question of state legislative prerogative whether the instruction should actually be given.

Teague made clear that the importance of the state legislative interest in seeing that jury instructions in specified areas contribute to decisionmaking by a fully and completely informed factfinder extends beyond the death penalty context. Moreover, there is no logical reason that that interest should be limited to sentencing but ignored in the adjudicative process that is a

prerequisite to sentencing and that imposes more stringent procedural protections than exist in the sentencing context. The proposed jury instruction in this Uniform Act would serve precisely that interest in fully and accurately informing the jury of matters relevant, indeed essential to, the accuracy of its factfinding. The Act constitutes a legislative recognition of the importance of videotaping the entire custodial interrogation process to ensuring that confessions are neither false nor involuntary. The legislative embrace of the instruction requires only that jurors be informed of the unexcused absence of this critical procedural safeguard and of its significance. Further details of the instruction are left entirely to judicial discretion. Such modest legislation designed to improve jury accuracy by "truth in adjudication" hardly constitutes an interference with judicial functioning rising to the level of a violation of the separation of powers.

b. *The Legislative Role in Serving the State Interest in Regulating Potentially Overzealous Law Enforcement*

Several cases have also recognized the importance of the legislative interest in preventing overzealous police officer investigation. In *State v. Umezulike*, 866 So. 2d 794 (La. 2004), for example, a state statute authorizing a non-judicial officer, the Commissioner of the Fifteenth Judicial District, to issue search warrants was unsuccessfully challenged on state constitutional separation of powers grounds. The Supreme Court of Louisiana held that the power to issue search warrants merely involved a "quasi-judicial" function. The function's quasi-judicial nature rested on its source in the Louisiana state constitution's search and seizure provision, which largely, though not entirely, paralleled the language of the Fourth Amendment to the United States Constitution. That provision sought to protect individuals from overzealous police investigation but did not specify who must issue the warrants, how, or when. Although the judiciary clearly had the authority to do so, the absence of any limitation of that power solely and exclusively to the judiciary in the constitutional search and seizure provision meant that the legislature retained authority to provide alternative means for protecting the rights embodied in the provision. The court summarized its reasoning thus:

> In contrast to a procedure necessary to exercise the jurisdiction of the court, the issuance of the search warrant is concerned with investigatory procedure, as evidenced by the primary function of the warrant to protect individual privacy rights from the unfettered investigations of police officers. In issuing the warrant, a non-judicial officer does not detract or interfere with the jurisdiction of the court, but simply provides a check and balance to the investigatory process. The issuance of a search warrant is not a preliminary procedure which requires a judicial determination to protect the independence of the judiciary; it is a protective procedure afforded an individual, insuring his privacy will not be invaded absent a determination by a neutral and detached magistrate. Therefore, we cannot conclude that exclusive control over issuance of search warrants is necessary to enable the Fifteenth Judicial Court to function as a court or to preserve its independence. Thus, the issuance of a search warrant is not an inherent judicial power which a court may exercise exclusively.

Id. at 801. Granted, *Umzelike* merely permitted two entities – Commissioners and the judiciary – to issue search warrants rather than, as here, two entities jointly, cooperatively sharing a single task – the articulation of jury instructions. But *Umzelike*'s central lesson, namely that the legislature has a critical role to play in crafting policy affecting limitations upon the risk of overzealous police law enforcement, especially when the legislation is rooted in underlying constitutional values – makes this a distinction without a difference. Here, as in *Umzelike*, there is no constitutional mandate for the legislation but also no constitutional prohibition on it. The video-recording mandate of this Act is not necessarily one mandated by the state or federal constitutions. But it is legislation, like that in *Umzelike*, designed to vindicate underlying core constitutional values, specifically in this instance values rooted in the due process bar against the admissibility of involuntary confessions and the privilege against self-incrimination's embrace of *Miranda* rights. When the video-recording mandate is violated, the instruction provides a remedy for that violation, a remedy designed to deter police overreaching while promoting jury accuracy and the reliability and completeness of the information upon which the jury relies. It is thus another tool to limit police discretion without tying police hands while promoting the accuracy of the truth-finding process. Such an effort does not disable the court from "function[ing] as a court" nor mar judicial independence.

c. *The Necessity of Deference to Legislative Judgments That Advance Responsible Government by Interbranch Sharing of Responsibilities Absent Extreme Instances in Which Cooperation Shades into Legislative Domination*

Finally, widely recognized separation of powers principles further support the constitutionality of the Uniform Act's jury instruction provision. The separation of powers is more about maintaining the integrity and power of separate institutions in checking and balancing one another than it is about some rigid, formal demarcation of supposedly pure and distinct "legislative," "judicial," and "executive" powers. Many states thus recognize that there cannot be "watertight" separation, that the distinction between "substantive" and "procedural" matters is an elusive one, that governmental powers are more "interdependent" than distinct, and that the "principle of the separation of powers is not inconsistent with the notion of cooperation among the several branches toward the common goal of achieving responsible government." *See In the Matter of P.L.* 895 A.2d 1128, 1135-38 (2006). These courts thus tend to accept legislation affecting the judiciary that serves a legitimate governmental purpose without seriously encroaching upon judicial prerogatives and interests. *See id.* at 1137. Accordingly ,they make it their policy to defer to legislation even affecting court administration unless there is strong reason to do otherwise rooted in the reality of a serious interference with the effective functioning of the courts. *See id.* at 1137. As one court has noted, state statutes are "replete with enactments by the General Assembly relating to practice and procedure, including discovery and disclosure, in connection with civil actions, and the same is true with respect to criminal actions." *Miffit v. Statler Hilton, Inc.*, 248 A.2d 581 (1968). This extensive legislative involvement in procedure is essential because the

> "great functions of government are not divided in any such way that all acts of the nature of the functions of one department can never be

> exercised by another department; such a division is impracticable, and if carried out would result in the paralysis of government. Executive, legislative, and judicial powers, of necessity overlap each other, and cover many acts which are in their nature common to more than one department. These great functions of government are committed to the different magistracies in all their fullness, and involve many incidental powers necessary to their execution, even though such incidental powers in their intrinsic character belong more naturally to a different department."

See id at 583 (quoting *In re Application of Clark*, 65 Conn. 17, 38, 31 A. 522, 527, 28 L.R.A. 242.). Indeed, public policy not only does not forbid but may often require legislation "to facilitate the administration of justice, particularly by means of mandating full disclosure. *See Mofitt*, 248 A. 2d at 35 (holding that a statute mandating the revelation during the discovery portion of litigation of the amount of liability insurance policy limits did not violate separate of powers principles.). For reasons like these, courts that do invalidate legislation affecting judicial procedures on separation of powers grounds do so only in extreme cases, such as where the legislature seeks to turn probation officers traditionally serving in a particular state as arms of the court into de facto police officers, *see In the Matter of P.L., supra;* where the legislature manipulates judicial salary rules in a way compromising the judiciary's power and independence, *see [insert cite;* and where the legislature mandates overturning final court orders retroactively, then requiring re-sentencing. *See Commonwealth v. Sutley*, 378 A.2d 780 (1977). This Act's jury instruction provision falls far short of such an extreme case. Finally, and coming full circle back to where this analysis of the jury instruction provision began, leading historians and law professors have argued that the judicial branch really itself consists of two entities: judges and juries. Indeed, juries function in the judicial branch much like the more populist House of Representatives in the legislative branch. Juries act as a check on the instinct of elites and bring the voice of the community directly into the judicial process. A statutory provision, like that here, that seeks to improve the base of accurate, complete information available to the jury thus, under this conception, not only does not undermine the independence of the judicial branch but advances it as it should properly be understood.

C. 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. This precise remedy for violating recording mandates has not been tried in practice; it has apparently also not been studied empirically. Nevertheless, there is growing recognition of the need for expert testimony whenever the risk of wrongful convictions looms. Indeed, that is why the American Bar Association has included similar provisions meant to encourage expert testimony in the area of eyewitness identifications in the ABA's Innocence Standards. Similarly there is cause for optimism in using expert testimony as a remedy based upon empirical 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.[18] *See* BRIAN CUTLER & STEVEN PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 239-40 (1995) (summarizing the research). 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.[19]

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

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. Because jury instructions alone likely do too 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.[20] Indeed, 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*,

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

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[20] 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 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.").

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 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.").

Accordingly, this Section of the Act crafts a rule urging the admissibility of expert testimony 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, that is, with state expert evidence rules analogous to those in FRE 702 through 706.[21] (The courts of a variety of jurisdictions are divided on the *Frye/Daubert* question. *See* Kyle C. Reeves, *Prosecution Function: False Confessions and Expert Testimony*, *in* AMERICAN BAR ASSOCIATION, THE STATE OF CRIMINAL JUSTICE: 2008 123, 123-29 (2009).)

Moreover, the "appropriateness" decision need not even be considered unless "the defendant first offers evidence sufficient to permit a finding by a preponderance of the evidence of facts relevant to the weight of the statement the full significance of which may not be readily apparent to a layperson." Furthermore, the Act provides guidance to the trial court in making its decision about whether a case is an "appropriate" one for admitting expert testimony by listing a set of common but non-exclusive circumstances that the empirical research suggests may affect a confession's reliability, a point that might not be readily apparent to layperson jurors. Such a listing of illustrative but not exclusive situations or factors to consider in applying an evidentiary standard is common, most familiarly in FRE 404(b). The factors listed to guide the appropriateness decision in this Act include:

> the vulnerability to suggestion of the individual who made the statement; the individual's youth, low intelligence, poor memory, or mental retardation; use by a law enforcement officer of sleep deprivation, fatigue, or drug or alcohol withdrawal as an interrogation technique; the failure of the statement to lead to the discovery of evidence previously unknown to a law enforcement agency or to include unusual elements of a crime that have not been made public previously or details of the crime not easily guessed and not made public previously; inconsistency between the statement and the facts of the crime; whether an officer conducting the interrogation educated the individual about the facts of the crime rather than eliciting them or suggested to the individual that the individual had no choice except to confess;

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[21] ~~The courts of a variety of jurisdictions are divided on the *Frye/Daubert* question. *See* Kyle C. Reeves, *Prosecution Function: False Confessions and Expert Testimony*, *in* AMERICAN BAR ASSOCIATION, THE STATE OF CRIMINAL JUSTICE: 2008 123, 123-29 (2009).~~

promises of leniency; and the absence of corroboration of the statement by objective evidence.

This approach thus does not mandate admissibility of expert testimony as a remedy in every case and does put the initial burden of demonstrating the potential value of such testimony on the defendant. Even once that demonstration is made, however, the trial court must determine that the case is an appropriate one for expert testimony. The admissibility of such testimony is thus an individualized determination but with substantial guidance given trial courts concerning how to make that determination. Of course, expert testimony on these subjects might be admissible even absent a recording act violation, as the Act also makes clear. But such testimony is especially urgent given such a violation because of the jury's reduced evidentiary basis for making a sound decision about the weight to give the confession. The expert testimony provision is also needed because some courts have expressed undue reluctance to admit such testimony where needed. To promote fairness and accuracy, the Act also expressly provides that the prosecution may offer its own expert evidence in rebuttal.

Apart from promoting more reliable fact-finding, the expert testimony provision has the virtue of 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 than they otherwise would be about the weight of the unrecorded confession. The systemic goal, of course, is that jurors be no more or less skeptical than the evidence warrants, but adversaries fear contrary outcomes and are thus motivated to avoid the risk of such outcomes in the first place.

D. Civil Remedies

This Uniform Act takes no position on whether civil remedies, including damages remedies, should be available for violation of the Act. That question is left up to the law of each state. Existing common law actions, such as negligence actions, might conceivably provide a basis for suit. Furthermore, some courts will read civil remedies into new statutes – even though the statutes are silent about remedies – under certain circumstances. What this Act does accomplish, however, is to provide a complete defense to law enforcement agencies and officers under specified circumstances should a particular state recognize a cause of action arising from violation of this Act. Specifically, that complete defense exists where the agencies have adopted, implemented, and enforced regulations reasonably designed to ensure compliance with the terms of this Act. Such regulations must, at a minimum, provide for adequate equipment, training, internal discipline, and accountability to promote compliance.

The major justification for this provision is that it will provide an incentive to law enforcement agencies to vigorously implement the mandates of this Act, including providing adequate resources to get the job done. If a law enforcement agency creates and enforces procedures designed to, and likely to, result in vigorous enforcement of this Act, there seems little justification in exposing it to civil liability for the occasional error by an individual officer. At the same time, however, individual officers who comply with those regulations should be entitled to rely on that regulatory guidance for assurance that the officer is doing what the Act requires of him. Neither principles of deterrence nor culpability justify exposing the individual

officer to liability under such circumstances.

One helpful analogy occurs in the federal law concerning Title VII hostile environment sexual harassment cases. An employer is vicariously liable for its supervisory employees' actions in such cases but can raise as an affirmative defense that the employer both exercised reasonable care to prevent and correct any sexually harassing behavior and that the plaintiff employee failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. The result of this defense has been for many employers to adopt and implement anti-harassment policies.

Critics have charged that courts are often too deferential to employers in upholding defenses based on weak policies – policies unlikely to correct bad behavior and in fact not doing so. But even many critics agree that effective policies can and have been designed by employers eager to take advantage of the reasonable care defense. Furthermore, there is significant evidence that effective training programs are the most valuable mechanism for improving compliance, and these regulations have sometimes promoted such programs. These are reasons enough to provide a similar defense to law enforcement agencies under this Act. Indeed, there is substantial evidence that properly designed rules, including training programs, detailed guidance on procedures, and effective internal sanctioning measures are significantly effective in improving police performance in a range of areas. Moreover, the availability of other potential remedies – not simply a defense against civil liability – provided for in this Act should provide an even greater incentive for creating sound regulatory policies and zealously enforcing them than is true in the case of sexual harassment.

Some commentators have indeed argued that the United States Supreme Court has, in its constitutional criminal procedure jurisprudence, been moving toward recognizing a"reasonable care" defense to suppression motions based on constitutional violations, perhaps doing so as well in civil actions for such violations. That movement is likewise based on an implicit analogy to the law of entity liability in the area of sexual harassment. Although this Act may not be constitutionally mandated, the logic of improving deterrence while avoiding penalties where there is minimal entity or individual culpability makes much sense and is followed here.

E. Internal Discipline

Violations of recording mandates that do not produce confessions or that produce confessions that seem obviously to violate constitutional or other admissibility requirements and thus that are not offered as evidence at a criminal trial cannot be remedied by the criminal justice system. Yet no civil liability may be available either if the law enforcement agency has adopted and enforced reasonable regulations concerning recording, and often potential litigants will not file suit because of minimal recoverable damages. In such cases, the only effective deterrent to an individual officer's future mistakes will be administrative discipline. Moreover, while court remedies may be uncertain, vigorously enforced administrative sanctions are relatively certain and thus likely to deter future error. Furthermore, the mere knowledge that such sanctions may be available can lead officers to act with great care and deliberation concerning recording procedures. For these reasons, section 13(e) mandates that law enforcement agencies adopt rules

imposing graded system of sanctions on individual officers, sanctions reasonably designed to promote compliance with this Act.

[SECTION 14. MONITORING REQUIREMENT. The [appropriate state agency] shall monitor compliance with the requirement under Section 3 of electronic recording of custodial interrogations].

Comment

The need for monitoring and concerns about the delegation doctrine are discussed in the Comment to other sections of this Act. Section -- of this Act. Section 13 addresses, however, the procedures for law enforcement agencies' supervisory personnel to monitor line officers. Section 14, by contrast, addresses the need for independent, external monitoring of law enforcement agencies. To promote uniformity, that monitoring should ideally be the responsibility of a statewide agency. Much social science research supports this use of two levels of review: internal and external.

SECTION 15. HANDLING AND PRESERVATION OF ELECTRONIC RECORDING. An electronic recording of a custodial interrogation must be identified, accessed, and preserved in compliance with law other than this [act].

Comment

This provision's goal is straightforward: to ensure that electronic recordings of custodial interrogations are properly identified, and readily accessible, while being preserved until no longer needed for use in the criminal justice system. It is important to stress these matters – to make clear that they apply to electronic recordings as much as to other evidence -- and, for that reason, they are mandated in the Act. However, state procedural requirements of this sort vary widely, and little seems served by mandating special procedures for this context. Thus the Act leaves the details to the generally applicable law of each jurisdiction.

SECTION 16. RULES GOVERNING MANNER OF ELECTRONIC RECORDING.

(a) [Law enforcement agencies] [the state agency charged with monitoring law enforcement's compliance with this act] shall adopt and enforce rules governing the manner in which electronic recordings of custodial interrogations are to be made.

(b) The rules adopted under subsection (a) must:

(1) encourage law enforcement officers investigating a [felony] [crime] [offense] designated in Section 3(a) to conduct a custodial interrogation only at a place of detention unless it is necessary to do otherwise;

(2) establish standards for the angle, focus, and field of vision of a camera which reasonably promote accurate recording of a custodial interrogation at a place of detention and reliable assessment of its accuracy and completeness;

(3) provide, when a custodial interrogation occurs outside a place of detention:

(A) for ~~later~~ electronic recording at a place of detention of a statement from the individual who was interrogated; and

(B) that, as soon as practicable, a law enforcement officer conducting the interrogation shall prepare a written record explaining the decision to interrogate outside a place of detention and summarizing the custodial interrogation process.

Comment

A. Preference for Interrogation at Places of Detention

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

B. 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.[22] (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).).

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

B. Later Recording and Records

Given that recording at a place of detention is the ideal, this section further requires that, where recordings are made outside a place of detention, the suspect's statement later be electronically recorded at a place of detention, getting some of the benefits of the audio-visual combination, and that the officer conducting the interrogation prepare a record explaining the decision to record outside a place of detention and summarizing the custodial interrogation process. The benefits of requiring such records have been noted in other comments above.

~~[22] 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).~~

SECTION 17. IMPLEMENTING RULES. [A law enforcement agency subject to this [act]] [the state agency charged with monitoring law enforcement's compliance with this act] shall adopt and enforce rules that implement this [act]. The rules must provide for:

(1) collection and review of electronic recording data or the absence thereof by superiors within [the agency] [each law enforcement agency];

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

(3) a process for explaining procedural deviations and imposing administrative sanctions for deviations that are not justified;

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

(5) a process for monitoring the chain of custody of an electronic recording of a custodial interrogation.

Comment

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 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.

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.

This Act offers two alternative approaches, indicated by brackets. These alternatives are for this Committee's consideration and not alternatives intended to be offered to adopting jurisdictions. The first bracketed alternative takes the general approach of the DC statute, though using mandatory rather than permissive language. Thus this Act requires that each law enforcement agency adopt implementing regulations or a general order designed to implement the terms of the Act. This mandate is necessary to ensure that the Act's provisions are enforced in a consistent and careful way rather than varying based upon the individual judgments of lower-level supervisors or line officers. However, this first alternative version of Act takes the position that, when required to do so, law enforcement have proven willing to adopt regulations implementing statutory requirements and are best situated to make the judgments about the details of such regulations. This comment is, however, meant to offer helpful guidance to law enforcement agencies in completing this endeavor.

The second bracketed alternative reflects the viewpoint that greater guidance in the text of the Act allows for easier access for law enforcement to the basic principles that should guide their drafting of regulations or general orders in this area, adds the authoritative command that is otherwise absent when such guidelines do not appear in the statute itself, and even more effectively avoids any concerns about inappropriate delegation of rule-making authority to law enforcement agencies by the legislature, a matter discussed below. Accordingly, this second bracketed alternative specifies five areas that police regulations must address at a minimum: detailed data collection, specific assignment of responsibilities, a system for explaining deviations from regulatory requirements, a supervisory system to ensure adequate training and resources, and a system for monitoring the chain of custody and responding to any informational requests. These categories are derived from the major areas covered by the DC Police Department in its General Order adopted pursuant to the DC Act. Under either bracketed alternative of this section of this Act, the DC General Order may serve as an excellent model for law enforcement agencies in adopting their own local general orders or regulations on electronic recording of custodial interrogations.

Delegation

Many state courts will invalidate statutes that delegate rule-making power without "adequate" guidance to regulatory agencies. But it is unlikely that this provision will prove troublesome in this regard. Illinois' requirements offer a helpful example. In Illinois, a legislative delegation of regulatory authority will be valid if the legislature meets three conditions: first, it identifies the persons and activities subject to regulation; second, it identifies the harm sought to be prevented; and third, it identifies the general means intended to be available to the

administrator to prevent the identified harm. The statute must also create "intelligible standards" to guide the agency in the execution of its delegated power, but these criteria need not be so narrow as to govern every detail necessary in the execution of the delegated power.

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

The above analysis should govern even under the first bracketed alternative, which simply mandates regulations or general orders rather than specifying their content, so long as that provision is read, as it should be, in the context of the entire statute. The analysis is even stronger, however, under the second bracketed alternative, which not only mandates regulations or general orders but more precisely specifies five areas that such regulations or general orders must address.

Who Should Draft the Regulations or General Orders?

This section also provides bracketed alternatives concerning who should draft the regulations or general orders. One alternative leaves that decision to each local law enforcement agency on the theory that it will be attentive to concerns particular to its mission or geographic location. The second alternative assigns the drafting obligation to the relevant state agency to ensure statewide uniformity. The Act leaves to the states the decision of which mechanism will best further the Act's goals given local conditions and culture.

[SECTION 18. SELF-AUTHENTICATION. In any pretrial or post-trial proceeding, an electronic recording of a custodial interrogations is self-authenticating if it is accompanied by

a certificate of authenticity by an appropriate law enforcement officer sworn under oath, unless the defendant offers evidence sufficient to permit a finding that the recording is not authentic.]

Comment

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

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

Even where suppression motions are made, the only likely grounds for the motion would be that: (1) what is shown in the recording constitutes a violation of some statutory or constitutional provision; (2) the recording is inaccurate, not showing what really happened, thus not being properly authenticated; or (3) the recording is not complete, omitting important portions of the custodial interrogation process. Ground number one implicitly concedes the authenticity of the recording, so there is no real need for officer testimony; placing the burden of nevertheless proving authentication on the state would therefore needlessly reduce cost-savings. Ground number two is likely to arise rarely and to be a meritorious claim still more rarely given various technological and procedural safeguards provided in this Act. Accordingly, it is appropriate to place the burden of proving *in*authenticity on the defendant. Ground number three *does not* challenge the accuracy of what the recording reveals but rather argues that it does not reveal the whole picture, requiring further witness testimony concerning what else happened. It therefore makes sense to presume the authenticity of the electronic recording, but to allow the defendant to rebut that presumption by evidence that it is flawed in an individual case. That is precisely what Section 18 does.

SECTION 19. NO RIGHT TO ELECTRONIC RECORDING CREATED.

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

Comment

Section 19 declares that no right to electronic recording is created by this Act. Vesting a "right" to recording in the individual interrogated would create insuperable problems for crafting an effective statute. For example, were a suspect to have such a right, he could "waive" it, undermining many of the benefits of recording. Although this Act creates an exception

permitting non-recording where a suspect refuses to talk if recorded, that exception recognizes a specific sort of necessity, one granting police discretion whether to record. But the exception does not *entitle* the suspect to speak without being recorded. Indeed, the whole tenor of the Act is to encourage recording absent good reason to do otherwise.

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

Miranda v. Arizona provides a helpful analogy. The Fifth Amendment to the United States Constitution prohibits compelling someone to be a witness against himself. Because the United States Supreme Court concluded that custodial interrogations were "inherently" compelling, the Court created two procedural safeguards to dispel compulsion: first, a requirement of the presence of counsel during custodial interrogation; second, a set of warnings to advise the suspect of that right and of his core Fifth Amendment right to silence. However, the suspect's only "right" is to be free from compulsion while interrogated. The suspect, therefore, has no right to *Miranda* warnings themselves. If he had such a right, he could sue for not being warned, even if he was ultimately never interrogated and thus never gave a statement. But recent case law rejects that possibility. Similarly, a defendant can waive his rights to silence and to counsel during custodial interrogation, yet he is not entitled to counsel during that waiver decision, and the courts readily find knowing, voluntary, and intelligent waivers without counsel's presence.

Miranda, as later interpreted by the Court, thus recognized that a procedural safeguard of a recognized right need not itself be a right. Yet electronic recording of custodial interrogations is not a constitutional right at all, unlike the Fifth Amendment right in *Miranda.* This Act's electronic recording mandate is thus not even a procedural safeguard of another right. Rather, it is better understood as a code governing police procedures concerning one police investigative technique: interrogation. The Act aims at guiding the police to achieve a variety of societal benefits, not at protecting the individual suspect's interests, though the latter result may often obtain. Like *Miranda,* there is thus no right to counsel accompanying the electronic recording process. But unlike *Miranda*, the suspect cannot choose to waive recording because recording is not his right to waive.

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

The Fourth Amendment declares that the right of the People to be free from unreasonable searches and seizures shall not be infringed. One well-known remedy for violation of this right of the People is the suppression of evidence obtained because of the violation. The defendant is granted the authority to file a motion to suppress evidence, and should he win that motion, he will of course benefit from it. But recently, in *Herring v. United States*,[23] 129 S. Ct. 695 (2009), the Court unequivocally stated that "the exclusionary rule is not an individual right and applies only where it 'result[s] in appreciable deterrence.' "[24] *Id.* at 700 (quoting in part Leon v. United States, __ U.S. __, 909 (19--), itself quoting United States v. Janis, 428 U.S. 433 (1976)). The right was to be free from unreasonable searches and seizures. But the remedy was one created for deterring violations of the substantive right. The remedy was meant to apply when its social benefits for the People, not its private benefits for the defendant, outweighed its costs to finding truth at trial. Nevertheless, as a practical matter, the remedy would rarely, if ever, be sought were the defendant not empowered to seek it and permitted to benefit from it. So empowering him gives him the incentive to act on society's behalf by seeking a remedy that deters future violations of the People's substantive right.

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

SECTION 20. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Comment

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

~~[23] 129 S. Ct. 695 (2009).~~

~~[24] *Id.* at 700 (quoting in part Leon v. United States, __ U.S. __, 909 (19__), itself quoting United States v. Janis, 428 U.S. 433 (1976)).~~

SECTION 21. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in section 103(b) of that act, 15 U.S.C. Section 7003(b).

Comment

This Act contains notice provisions, specifically imposing on the prosecutor a duty to notify the defense of an intention to rely on statutory exceptions to the electronic recording requirement – exceptions recited in this Act – and to provide further notice of the witnesses the state plans to call in support of its claim that an exception applies. Section 11 of this Act simply ensures that such notices will be consistent with federal laws governing notice or will supersede such federal law where appropriate.

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

Comment

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

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

Comment

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