CAUTION: THE FOLLOWING PREFATORY NOTE AND SET OF COMMENTS IS PROVIDED SOLELY TO AID THIS COMMITTEE IN ASSESSING THE ACT'S INITIAL DRAFT; IT IS INCOMPLETE, MISSING SOME IMPORTANT CITATIONS; AND HAS NOT BEEN REVIEWED BY ANYONE BUT ITS AUTHOR, THE COMMITTEE'S REPORTER. NEVERTHELESS, THE REPORTER THOUGHT IT WOULD BE HELPFUL TO PROVIDE THIS DOCUMENT IN ADVANCE OF OUR MARCH MEETING.

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. A significant number of police departments have also voluntarily adopted the recording solution. Yet there are wide variations among the state provisions and the voluntarily-adopted programs. Moreover, some approaches promise to be more effective in protecting the innocent, convicting the guilty, minimizing coercion, and avoiding frivolous suppression motions than others. Additionally, the further spread of the recording process throughout states and localities has been slow when its promised benefits are great. A uniform statute may help to speed informed resolution of the

recording issue. Thus the need for this Uniform Act for the Electronic Recording of Custodial Interrogations (UAERCI).

The Justifications for Electronic Recording

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

A. Promoting Truth-Finding

Truth-finding is promoted in seven ways:

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

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

3. *Deterring Risky Interrogation Methods*: "Risky" interrogation techniques are those reasonably likely to elicit false confessions. Police are less likely to use such techniques when they are open for public scrutiny. Clearly, harsh techniques that police understand will elicit public and professional disapproval are most likely to disappear initially. But more subtle techniques creating undue dangers of false confessions of which the police may indeed be unaware will, over time, fade away if exposed to the light of judicial, scientific, and police administrator criticism—criticism that electronic recording of events facilitates.

4. *Police Culture*: Taping enables supervisors to review, monitor, and give feedback on detectives' interrogation techniques. Over time, resulting efforts to educate the police in the use of proper techniques, combined with ready accountability for errors, can help to create a culture valuing truth over conviction. Police tunnel vision about alternative suspects and insistence on collecting whatever evidence they can to convict their initial suspect (the "confirmation bias") have been shown to be major contributors to wrongful convictions. A more balanced police culture of getting it right rather than just getting it done would be an enormously good thing.

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

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

technique that testimony alone cannot capture.

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

There are also essential economic efficiency benefits to recording.

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 thirteen sections. Section one contains definitions. Section two mandates the electronic recording of the entire custodial interrogation process, by both audio and visual means, for serious felonies where the interrogation is conducted at a place of detention by a law enforcement agency in a city, town, or village of over 100,000 residents. In cities, towns, or villages of under 100,000 residents, audio recording alone suffices. Section two also mandates that law enforcement agencies adopt regulations encouraging the use of audio recording outside a place of detention whenever practicable. Section three outlines a variety of exceptions from the recording mandate. Section four outlines remedies where the Act is violated, including pretrial motions, cautionary jury instructions, loss of protection from civil suit, expert testimony, and internal discipline. Section 5 requires the preparation and publication to the jury of transcripts of the entire custodial interrogation upon motion by the prosecution or the defense and actual playback of the recording for the jury only upon a judicial determination of need. Section 6 creates procedures for monitoring law enforcement's compliance with the Act, including by judicial and legislative review of reports prepared by the [Department of Public Safety] based upon forms and other documentary records that the Act mandates police create in every case where a confession has been admitted at trial or resulted in a guilty plea and any violation of the Act occurred. Section 7 outlines procedures for the proper handling and preservation of electronic recordings. Section 8 requires law enforcement agencies to establish effective training programs concerning procedures for recording custodial interrogations. Section 9 requires law enforcement agencies to adopt implementing regulations or general orders concerning the recording of custodial interrogations, mandating that such regulations or orders must address at least five listed subjects in a particular manner. Section 10 addresses discovery procedures, while Section 11 recites the Act's effective date. [more detail nec.? More paragraphs nec.?]

Key Definitions (Section 1)
[insert summary later]

Electronic Recording Mandate (Section 2)
[insert summary later]

Exceptions
[insert summary later]

Remedies
[insert summary later]

Transcript Preparation and Publication (Section 5)
[insert summary later]

Compliance Monitoring (Section 6)
[insert summary later]

Handling and Preservation of Electronic Recordings (Section 7)
[insert summary later]

Training Programs (Section 8)
[insert summary later]

Implementing Regulations and General Orders (Section 9)
[insert summary later]

Discovery (Section 10)
[insert summary later]

Effective Date (Section 11)
[insert summary later]

ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS ACT

GENERAL PROVISIONS

General Comment

SECTION 1. SHORT TITLE. This Act may be cited as the 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.

(A) "Place of detention" means a jail, police or sheriff's station, holding cell, correctional or detention facility, or other fixed location where persons may be questioned in connection with criminal charges or juvenile delinquency proceedings.

(B) "Custodial interrogation" means any questioning or other conduct by a law enforcement officer that is reasonably likely to elicit incriminating responses and in which a reasonable person in the subject's position would consider himself to be in custody, beginning when a person should have been advised of his Miranda rights and ending when the questioning has completely finished.

(C) "Electronic recording" or "electronically recorded" means an audio or audio and visual recording that is an authentic, accurate, unaltered record of a custodial interrogation.

(D) "Statement" means an oral, written, sign language, or nonverbal communication.

(E) "Law enforcement agency" means any governmental entity whose responsibilities include enforcement of any criminal laws, the investigation of suspected criminal activity, or both.

Comment

A. 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, not "fixed" as those 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, 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 2B of this Act, which requires at least audio recording of custodial interrogations conducted outside places of detention "whenever practicable." The definition also assumes that each law enforcement agency will, through internal regulations, general orders, or office policies encourage custodial interrogations to be conducted at places of detention absent good reason to do otherwise.

B. 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.

C. The term "electronic recording" is broadly defined to include any audio or audio and visual record of a custodial interrogation, provided that that record is an "authentic, accurate, unaltered" one. Therefore, whenever an electronic recording of custodial interrogation is required by Section 2 of this Act, that recording must necessarily be one that represents the events that it purports to ("authentic") and does so as those events actually unfolded and without misleading omissions "accurate." The record must also remain unaltered or it ceases to comply with the mandates of this Act.

D. "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.

E. "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.

SECTION 3. ELECTRONIC RECORDING REQUIREMENTS.

(A) (1) Absent application of one of the exceptions described in section 3 of this Act, all statements made by a person during a custodial interrogation conducted at a place of detention and relating to a felony described in the following sections of the [jurisdiction's name] [Criminal and Juvenile Codes] shall be electronically recorded in their entirety, from the time that interrogation of the subject begins, including the Miranda warning and waiver of the subject, and continues until the time the interrogation ends.: [insert section numbers].

(2) [In cities, towns, or villages with a population of over 100,000 residents,] both audio and visual recordings of statements made by a person during a custodial interrogation conducted at a place of detention shall be made.

(3) [In cities, towns, or villages with a population under 100,000 residents, audio recording is an acceptable alternative to audio and visual recording.]

Alternative A

(B) If any part of a custodial interrogation takes place outside of a place of detention, audio recording is an acceptable alternative to audio and visual recording [and shall be done whenever practicable].

Alternative B

(B) [(1) Law enforcement agencies shall promulgate and enforce regulations governing the manner in which custodial interrogations are to be taken when they occur outside a place of detention.

(2) Such regulations shall:

(a) encourage law enforcement officers to conduct custodial interrogations

only at places of detention absent its being necessary to do otherwise;

(b) provide for later electronic recording of the statement; and

[(c) further provide that, as soon as practicable, the interrogating officer shall prepare a detailed written account [as well as an electronically recorded one] justifying the decision to interrogate outside a place of detention and summarizing the entire custodial interrogation process.]]

End of Alternatives

(C) (1) Where electronic recording includes video, the camera shall be simultaneously focused upon both the interrogator and the suspect.

(2) The electronic recording must be of sufficient visual quality so that faces, facial expressions, and bodily movements of the suspect and the interrogator(s) are clearly discernible and of sufficient audio clarity so that word content, tone of voice, loudness of speech, identity of the speaker, and all other sounds can readily be identified and understood.

(D) (1) Law enforcement officers conducting a custodial interrogation at a place of detention are not required to inform a subject that a recording is being made of the custodial interrogation.

[(2) Such recordings are exempt from statutory requirements under [insert title and section numbers] that otherwise mandate that a person be informed of, or consent to, his conversations being recorded.]

[(3) Such recordings are further exempt from the public records disclosure laws of this state.]

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 and cities, towns, and villages with over 100,000 residents, albeit only for felonies specifically identified in the Act. The justifications for this paragraph are set forth below.

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

Additionally, how much expense is "too much" is subject to debate. Opposition to any recording requirement has often been based on claims of undue expense. The response of the technology's defenders has been to argue that likely cost savings far outweigh initial and continuing out-of-pocket costs, and experience seems to be proving this true (departments of varied sizes adopting recording requirements generally praise them across-the-board, rather than bemoaning their existence). Perhaps legislation should work to overcome cost short-sightedness by localities. Mandating *both* video and audio recording, under this view, would help localities see the low-cost forest through the high-cost trees.[1]

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[1] The Innocence Project estimates that, at current retail prices, the out-of-pocket costs for recording equipment in a single room would roughly be $550. *See* Innocence Project, *The Recording of Interrogations: A Range of Cost Alternatives* 1 (2008). The Special Committee on the Recordation of Custodial Interrogations, in its report to the New Jersey Supreme Court, estimated that "for under a thousand dollars a video system can be installed recording onto VHS tape." *Cook Report*, www.judiciary.state.nj.us/notices/reports/cookreport.pdf. Denver, Colorado, installed a 25-room system that stores interrogations on a hard drive capable of burning them onto a CD for

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

Washington, DC's statute seems to embrace option 1, declaring that custodial interrogations must not only be recorded in their entirety but "to the greatest extent feasible," apparently meaning "to capture the most information feasible." The General Order of the Chief of Police goes still further, largely eliminating the feasibility 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 precisely this option. Although the costs of audio and video electronic recording at fixed places of detention are not high, law enforcement agencies in smaller jurisdictions still worry that they will lack the resources to do the job right. Accordingly, this Act limits the mandate of using *both* audio and visual means of recording solely to cities, towns, or villages with a population of over 100,000 residents. In areas with under 100,000 residents, only audio recording is required. Population is a crude measure of affordability, and any population number used as a dividing line will be somewhat arbitrary. Nevertheless, some line must be drawn if concerns about cost are neither to be ignored nor to become too easy a rationale for avoiding the Act's spirit of encouraging audio and video recording to become the default norm. Indeed, some local law enforcement agencies with under 100,000 residents have voluntarily chosen to adopt audio-visual recording methods.

To adopt option one—mandating that all jurisdictions use both means of recording—is too dismiss cost concerns entirely. Both to adopt option three—leaving it up to each law enforcement agency to decide whether to use audio or audio and video recording 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. The middle option chosen in this Act—mandating both recording methods, with an exception for smaller departments likely to face tighter budgetary restraints, avoids either undesirable extreme.

$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.

2. Temporal Triggers: When Should Recording Be Required?

Police departments embracing recording might someday decide that it is worth the cost of installing portable equipment in every police car. For now, however, cost and political implications likely limit the technology's availability to particular locations. Furthermore, police often conduct interviews of numerous witnesses before focusing on, or questioning, a suspect. Moreover, many such interviews are informal or open to observation by persons other than the police, reducing the chances of abuse. Mandating recording all such interviews would be an enormous burden. One relatively easy time to start the recording clock running is when police engage in "custodial interrogation," as that term is defined in *Miranda* and its progeny, thus a definition with which police have long been familiar. Maine, for example, takes this approach, defining "custodial interrogation" as occurring when "(1) a reasonable person would consider that person to be in custody under the circumstances, and (2) the person is asked a question by a law enforcement officer that is likely to elicit an incriminating response." This definition is slightly narrower than *Miranda*'s (for example, *Miranda* recognizes that police words or actions other than asking questions can be likely to elicit an incriminating response) but tracks it closely. New Mexico, North Carolina, Illinois, and the District of Columbia follow a similar approach.

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, 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 mandates that law enforcement promulgate regulations 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. This alternative language is needed only if the Committee ultimately decides that it does not wish to mandate audio recording alone outside places of detention but rather to permit no electronic recording whatsoever outside those places. This alternative language also requires the law enforcement regulations to provide for later audio and visual electronic recording at places of detention where only an audio recording was made outside such a place. This later, more complete recording helps to reduce, without completely recording, the disadvantages of much of the original custodial interrogation process being only audio-recorded. The alternative language finally requires the interrogating officer to prepare a detailed written account [or, in bracketed language, an electronically recording one] justifying the initial decision to record outside a place of detention and to do so by audio only. 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 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" 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 recoding 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 bracketed language offers this Committee the option of limiting the Act not only to "felonies" but rather to "serious" felonies, a change that would send the message that legislatures are expected to apply recoding mandates only to a narrow circle of the most serious offenses. Such an approach may, however, suffer from two vices: First, adding ambiguity concerning the meaning of the term "serious"; second, narrowing the Act's scope for an important guarantor of due process when the recording mandate already excludes misdemeanors and interrogations that are not "custodial" within the meaning of *Miranda* and further reduces the recording mandate outside places of detention from combined audio and video recording to mere audio recording.]

B. Audio versus Video Redux

Paragraph 3A governed when electronic recording is ordinarily required at places of detention, mandating audio-visual recording of custodial interrogations at such places in cities, towns, or villages of over 100,000 population. Paragraph 3B provides alternatives concerning when recording should be required *outside of places of detention.* Alternative A accepts mere audio recording outside such places, adding a bracketed option requiring it to be done only "whenever practicable." Alternative B leaves the details concerning recording outside places of detention to law enforcement regulation but does require such regulation to *encourage* at least audio recording, to provide for later electronic recording of any statement obtained outside a place of interrogation where the entire custodial interrogation process at the original location was not recorded, and to provide further that the interrogating officer shall prepare a detailed written account justifying his or her decision to interrogate outside a place of detention and memorializing the entire interrogation process.

C. Numbers of Cameras and Angle

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

[2] Empirical studies supporting these conclusions are summarized in G. Daniel Lassiter & Andrew L. Geers, *Bias and Accuracy in the Evaluation of Confession Evidence, in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 197, 198-208 (G. Daniel Lassiter ed., 2005); RICHARD LEO, POLICE INTERROGATIONS AND AMERICAN JUSTICE 205, 250-51 (2008); S.M. Kassin & K. McNall, *Police Interrogations and Confessions*, 15 L. & HUMAN BEH. 231, 235

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."

D. Covert versus Overt Recording

Section 3D declares that law enforcement officers need not warn suspects being custodially interrogated at a place of detention 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.[3] Nevertheless, some law enforcement agencies are unconvinced. This provision addresses their concerns, unambiguously leaving up to the interrogators to decide whether they want to reveal the fact of the recording to the suspect or not.

[Some states prohibit recording conversations where only one party (for example, the police) has agreed to the recording. These statutes may fairly be interpreted as extending to custodial interrogations within the meaning of this Act. Accordingly, absent a special provision to the contrary, police in such jurisdictions would be required both to reveal the fact of recording to the suspect and to get his consent to being recorded. Bracketed Section 3D2 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

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(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).

[3] Professor Richard Leo, perhaps the leading psychological expert in the country who specializes in the interrogation process, notes that "a number of studies—including one by the International Association of Chiefs of Police (1998)—have concluded that electronic recording does not cause suspects to refuse to talk, fall silent, or stop making admissions." LEO, *supra* note 2, at 303. This is so, says Leo, both because most states where recording does occur do not require prior notice to suspects and because "even in those states where permission is required, most suspects consent and quickly forget about the recording (which need not be visible) . . . ." *Id.* Indeed, concludes Leo, "The irony of the criticisms that electronic recording has a chilling effect on suspects is that exactly the opposite appears to be true." *Id.*; *see also* Thomas Sullivan, *Police Experience with Recording Custodial Interrogations* 22 (2004) (report published by Northwestern University School of Law Center on Wrongful Convictions) ("[T]he majority of agencies that videotape found that they were able to get more incriminating information from suspects on tape than they were in traditional interrogations."); *cf.* David Buckley & Brian Jayne, *Electronic Recording of Interrogations* (2005) (report published by John E. Reid and Associates) (observing that in a survey of Alaska and Minnesota police conducting interrogations, 48 percent believed electronic recording benefits the prosecution more than the defense, 45 percent believed recording benefits both sides equally, and only 7 percent believed that recording gave the defense the comparative advantage).

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. The material is bracketed because an alternative option is simply to let whether the suspect must consent to recording vary state-by-state.]

[Section 3D3 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 requires 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 3D3 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. EXCEPTIONS.

(A) The requirement of electronic recording imposed by Section 3 does not apply if:

(i) A statement made during a custodial interrogation is not recorded because exigent circumstances rendered doing so not feasible and an explanation of the exigent circumstances, where feasible, is electronically recorded before conducting the interrogation and, if not feasible, is recorded as soon as practicable thereafter;

(ii) A spontaneous statement is made outside the course of a custodial interrogation;

(iii) A statement is made in response to questioning that is routinely asked during

the routine processing of the arrest of the suspect, also known as during the suspect's "booking";

(iv) A statement is made during a custodial interrogation by a suspect who indicated, prior to making the statement, that the suspect would participate in the interrogation only if it were not electronically recorded; provided, however, that the agreement to participate under that condition is itself electronically recorded;

(v) A statement is made during a custodial interrogation that is conducted out-of-state in compliance with that state's law and without involvement of or connection to an officer of this state;

(vi) A statement is made during a custodial interrogation conducted by federal law enforcement in compliance with federal law and without involvement of or connection to an officer of this state; [Reporter's note: as an alternative, make exceptions (v) and (vi) into a separate, and perhaps more detailed, section on interstate solutions?]

(vii) A statement is given at a time when the subject is not a suspect for the crime to which the statement relates while the subject is being interrogated for a different crime that does not require electronic recordation;

(viii) The interrogation during which the statement is given occurs at a time when the interrogators have no knowledge that a crime for which electronic recording is required has been committed;

(ix) [The officer conducting the interview or the officer's superior reasonably believed that the making of an electronic recording would jeopardize the safety of any officer, the suspect being interrogated, or another person, or the identity of a confidential informant, and, if feasible, an explanation for the basis of that belief was electronically recorded at the time of the interview;]

(x) [The statement is offered solely to impeach or rebut the defendant's prior [trial] testimony, not as substantive evidence.]

(B) Where no such exception applies, electronic recording must occur in the manner described in section 3 of this Act, except that:

(i) where audio and video recording are required, audio recording alone is acceptable where technical problems in video recording occur despite adequate maintenance efforts on equipment ordinarily sufficient to make a clear and accurate video and audio recording of the custodial interrogation and where delay to await repair is not feasible.

(ii) where either audio and video recording or audio recording alone are required but no recording occurs, or only a portion of the interrogation is recorded, the complete failure to record or the partial failure to record are respectively acceptable only if they occur despite adequate maintenance efforts on equipment ordinarily sufficient to make a clear and accurate recording of whatever nature is ordinarily required by Section 3 of this Act.

(iii) [Whenever an interrogating officer conducts a custodial interrogation [at a place of detention]:

(a) without electronically recording the interrogation, or

(b) only by recording a portion of the interrogation process, or

(c) recording only by means of audio when video is also ordinarily required, then

the officer shall prepare a detailed written report justifying:

(a) the decision not to record, or

(b) to record only part of the interrogation process, or

(c) to record only via audio.

The officer shall prepare that report as soon as reasonably practicable after completing the interrogation and even if the officer has made a contemporaneous electronic account of the justifications.]

(C) [The state shall bear the burden of proving by [a preponderance of the evidence][clear and convincing evidence] that one of the exceptions is applicable.]

(D) (1) If the state intends to rely on any of the exceptions set forth in subsections A or B of this Section in offering a defendant's statement that does not comply with the electronic recording requirements set forth in Section 3 of this Act, the State shall furnish a written notice of that intent.

(2) The notice shall 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.

(3) The prosecutor shall, on written demand, furnish the defendant or defendant's attorney with the name and address of the witnesses upon whom the state plans to rely to establish one of the exceptions set forth in subsections (A) or (B) of this Section.

(4) The trial court shall then hold a hearing to determine whether one of the exceptions applies.

Comment

A. Exceptions

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

statement, indicated refusal to do so if it were taped (although the agreement to participate if there is no recording of the interrogation must itself be recorded);[4] (5) the statement is made during a custodial interrogation out-of-state; (6) the statement relates to a crime for which recording would be required but for which the defendant was not then a suspect and is made during interrogation for a crime that does not require recordation; (7) the interrogation occurs at a time during which the interrogators had no knowledge that a crime for which recording would be required had occurred.

This seems like a sensible list of exceptions. Exception number one is done for clarity, as it would not fit most understandings of the term "interrogation," and exception three tracks one of *Miranda*'s exceptions. Exception number four is based on the sound idea that doing some

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[4] One well-respected academic, it should be noted, has argued that electronic recording is constitutionally mandated and is a *non-waivable* right. *See* Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309 (2003). Slobogin roots his constitutional argument in the Due Process Clauses' obligations for the state to preserve exculpatory evidence and avoid coercing involuntary confessions; the Fifth Amendment's bar on compelled testimonial communications and on violations of the *Miranda* rule; and the Sixth Amendment Confrontation Clause's mandate that each defendant have an opportunity for effective cross-examination. Slobogin argues that these constitutional provisions embody an obligation on the state to achieve the most accurate re-creation of events feasible, that no truly useful accurate re-creation is possible without recording given the subtlety of the issues involved, and that technology has now made recording not merely feasible but relatively cheap and easy given its benefits. The *Miranda* experience teaches, says Slobogin, that rights made waivable will too often be waived because the police convince the suspect to do so, because the suspect mistakenly believes that untaped confessions are inadmissible, or because the suspect is subtly compelled to waive. These rights would, therefore, become meaningless in practice if they are waivable. But, says Slobogin, it is not only the defendant's rights that matter but the state's obligation, implicit in the constitution and the adversarial system, to strive toward accuracy in factfinding, particularly where a suspect's constitutional rights are vulnerable. Slobogin explains:

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

Id. at 321. Courts have generally not been receptive to variants of the due process argument, although, for example, the Alaska Supreme Court relied on its state constitution's due process protections in mandating recording. *See* Stephan v. State, 711 P.2d 1156 (Alaska 1985). But 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.

interrogation is better than none if a suspect will not cooperate in recording. Exception five simply recognizes that police cannot ensure recording of statements occurring outside their control, or at least outside their guarantee of access to recording equipment, in this case, when the interrogation occurs in another state.[5] Exceptions six and seven address some drafting problems noted above by not expecting the police to record in instances where it is so early in the investigation that they do not know that an offense for which recording is required is involved. Exception one is the one most likely to engender interpretive disputes over what it means to say that recording was "not feasible." 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, however, be noted that a similar statement in another context—the Advisory Committee Notes to the Federal Rules of Evidence—urging narrow interpretation of the catchall exception to the hearsay rule has not achieved the desired effect. This observation might counsel placing limiting language in the rule itself.]

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

Sections 4D and E of this Act adopt a similar approach. The brackets in those sections leave it to each jurisdiction to decide whether the burden of persuasion placed on the state to prove applicability of an exception is a preponderance of the evidence or clear and convincing evidence. New Mexico has similar exceptions for spontaneous statements, interrogations outside the State of New Mexico, and those where law enforcement did not, at the time of interrogation, suspect the interrogatee of committing a crime for which recording was required. New Mexico also excepts recording (or, alternatively, excepts recording the *entire interrogation*) for "good cause." Some definite meaning is given to the term because it is defined to include recording equipment's failing and not being readily feasibly replaced or its otherwise not being reasonably available; the individual's refusing to be recorded; or the statements' being made during a grand jury proceeding (this last example would likely not, however, fit *Miranda*'s definition of

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

"custodial interrogation."). But since these are non-exclusive examples of "good cause," the exception remains a broad catchall raising the same concerns noted above for the infeasibility exception. New Mexico also adds an exception for statements used solely for the purposes of impeachment at trial, an exception consistent with the long-prevailing evidentiary principle that a witness "opens the door" to otherwise inadmissible evidence if, without it, testimony that he has offered on a related subject would be incomplete in a way that makes it misleading. New Mexico's final "exception"—for interrogations occurring in a "correctional facility"—is better understood as a locational limitation.

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

Wisconsin's exceptions are likewise similar to Illinois's but add this exception: "Exigent public safety circumstances existed that prevented the making of an audio or audio and visual recording or rendered the making of such a recording infeasible." The wisdom of this exception depends upon the breadth of interpretation given to the term "exigent public safety circumstances." If the term contemplates power failures, hurricanes, earthquakes, and other natural or man-made disasters (man-made including, for example, terrorist attacks with a dirty bomb) that disable equipment or create an emergency drain on resources that make taping infeasible, that seems to make much sense. On the other hand, if the interrogation is for a very serious crime, perhaps finding the perpetrators of an act of terrorism, such crimes are among those where the risk of abusive interrogation techniques endangering the innocent, and the state's need to ensure its ability to prove the voluntariness of truthful confessions, is at its highest. The severity of the offense alone seems a poor justification for an exception. A more debatable instance arises where the investigation is for imminent (not simply planned) terrorist acts, for the need to act with dispatch then is great. Yet it still seems hard to understand why recording should be dispensed with for this reason alone. If the interrogation takes place where the equipment is readily available, using it should not delay matters. If the interrogation occurs where the equipment is not readily available and cannot feasibly be made so, that reason, not the feared harm, is what justifies an exception.

Consent and Covert versus Overt Recording

This Act does not require that police inform a suspect that his interrogation is being recorded, though they are free to do so. Even if police do not reveal to a suspect that he is being recorded, a suspect might nevertheless on his own agree to speak *only* if he is *not* recorded. As noted above, several jurisdictions simply recognize this situation as an exemption from the recording requirement. This Act follows these jurisdictions.

B. Equipment Failures

Section 4B 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. However, the breakdown must have occurred despite adequate maintenance efforts, thus providing an incentive for devising sensible maintenance protocols. Moreover, audio recording 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 at places of detention only where "delay to await repair is not feasible."

Section 4B applies whenever an officer relies on an exception in Section 3A or on an equipment breakdown in Section 4B for not recording any interrogation at all, recording only a portion of the custodial interrogation process, or recording by audio means when visual ones are also required. In such circumstances the officer must prepare a detailed written reporting justifying his departure from the audio and video recording norm as soon as is reasonably practicable after the interrogation. This reporting requirement applies even if the officer has made a contemporaneous electronic account of the justifications. The goal of such a written report is to encourage an officer clearly to consider his decision to depart from a norm, to permit ready review of that decision by his superiors to aid in training and enforcement, and to ensure officer accountability for his decision and his knowledge that he will be held so accountable.

C. Burden of Persuasion

Section 4C recites the burden of persuasion imposed on the state in relying on an exception to the recording mandate. Brackets offer jurisdictions a choice between a preponderance of evidence and clear and convincing evidence as the relevant burdens.

D. Notice and Hearing

Whenever the state plans to offer into evidence a statement subject to this Act but relying on an exception, Section 4D1 requires the state to notify the defendant of its intention so to rely. Section 4D2 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. Section 4D3 requires the prosecutor, upon written demand, to furnish the defendant's attorney with the name and address of the witnesses upon whom the state plans to rely to establish an exception or exceptions. Section 4D4 requires the trial court to hold a hearing to determine whether a claimed exception to the electronic recording mandate was justifiably invoked. The burden of persuasion placed on the state at that hearing is that recited in Section 4C.

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 existing 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 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 of the witnesses it will offer to prove that claim, 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 5. REMEDIES.

(A) The failure to electronically record a custodial interrogation in its entirety shall, absent application of one of the exceptions listed in section 4(A), be a factor for consideration by the trial court in determining the admissibility of a statement on the grounds that it was not voluntarily made or that it was not reliable or both.

(B) In the event the government offers a statement into evidence that does not comply with the requirements set forth in section 2 of this [Act] and the prosecutor has not established by [a preponderance of the evidence][clear and convincing evidence] that an exception listed in section 4 is applicable, the trial judge shall, upon request of the defendant, provide the jury with the following cautionary instructions, with changes that are necessary for consistency 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] was to be electronically recorded, from beginning to end. The purpose of this requirement is to ensure that you jurors will have before you a complete, unaltered, and precise record of the circumstances under which the interview was conducted, and what was said and done by each of the persons present.

In this case, the law enforcement agents 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.] No justification for not complying with the statute has been presented to the court. Instead of an electronic recording, you have been presented with testimony as to what took place, based upon the recollections of law enforcement personnel [and the defendant]. [Instead of a complete record of the entire process of interviewing the defendant, they have left you with only a partial record of 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 as to what was said and done by the participants. You cannot hear the exact words used by the participants, or the tone or inflection of their voices. [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 what was said and done has been accurately [and completely] reported by the participants, including testimony as to 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) [In the absence of electronic recording and of an exception to the electronic recording

mandate for custodial interrogations, the court shall, in an appropriate case, permit expert testimony at trial concerning the factors that may affect the voluntariness and reliability of a statement made during a custodial interrogation; the existence of the recording mandate; and how and why recording can raise the probabilities that a statement is both voluntary and reliable and can aid a jury in making its independent assessment of those matters.]

(D) Any law enforcement agency that has adopted, implemented, and enforced regulations reasonably designed to ensure compliance with the terms of this Act[, and any law enforcement officer of such an agency who has complied with those regulations,] shall have a complete defense to any civil suit for damages allegedly arising from violation of any provision of this Act. Such regulations shall provide for adequate equipment, training, internal discipline, and accountability to promote compliance with the provisions of this Act[, including by specifically addressing the matters identified in section 9 of this Act.]

(E) Each law enforcement agency within this state shall promulgate and enforce regulations providing for internal discipline of any officer found by a court or by a supervisory official of that agency to have violated any provision of this Act.[Such regulations shall provide a range of disciplinary sanctions, including [insert later]. One relevant consideration in determining the appropriate sanction shall be whether the officer's failure to comply with any provision of this act was done negligently, recklessly, knowingly, or purposely. The regulations may not impose internal discipline for any failure to comply with any provision of this Act that was not at least negligent.]

Comment

A. Pretrial Motions

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.

But softer versions of the exclusionary rule are available. Thus DC creates a rule of presumed inadmissibility that can be rebutted by clear and convincing prosecution evidence that the statement was nevertheless voluntary. Illinois also creates a rule of presumed inadmissibility that can be rebutted but differs from the DC rule in two ways: (1) the prosecution must prove not only that the statement was voluntarily given *but also* that it is reliable, given the totality of the circumstances; and (2) the prosecution's burden of proving these matters is only a preponderance of the evidence.

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

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 limits the remedy *solely* to a cautionary jury instruction or, in a bench trial, permits the judge to consider the weight of the recording requirement violation in judging the worth of the confession. Maine, Maryland, and New Mexico are simply silent about remedies, which may or may not preclude the courts from crafting their own.

Although not yet adopted by any state, there is still another 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.

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."[6] 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."[7] The Constitution Project's approach has the virtue of flexibility but the vice of complexity.

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[6] *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.

[7] *Id.*

This Act's Approach

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. This Act, on the other hand, never mandates the exclusionary remedy but makes violation of the Act one factor in the admissibility decision. In this respect, this Act's approach mirrors New Jersey's, which makes the failure to record but one factor in the admissibility decision. But, unlike New Jersey, but like Illinois, 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. 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. Because of the novelty of this approach in many states, further comment on the role of reliability in suppression motions is warranted.

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 voluntariness, 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 quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum." *Id.* at 167.

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)). Indeed, Brennan was particularly concerned about false or unreliable confessions because of their "decisive impact on the adversarial process." *Id.* at 182. Indeed, 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 ___-___ (33d 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. [Case cite]. 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. [Cites] 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 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 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.

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. Furthermore, legislative action 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. [Cite] 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) [insert parenthetical or description in test]; Mark A. Godsey, *Reliability Lost, False Confessions Discovered*, 10 CHAPMAN L. REV. 623 (2007) [insert parenthetical or description in text]. 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. [address Miranda too?]

B. Jury Instructions

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 [other states?] has followed just such an approach, declaring in its recording statute that, "in the

absence or 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."[8] 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."[9]

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 this reasoning and has accordingly included standard instructions as part of the uniform act. 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. 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, with modifications made to adjust the instruction to a uniform act for adoption at the state level.

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. 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 Committee knows of no studies specifically examining the effect of jury instructions concerning the failure to electronically record the entire interrogation process, ample studies show that juries routinely give confessions

[8] *Id*. at 7.

[9] *Id.*

enormous weight, even under circumstances where there is substantial reason to be concerned about the confessions' accuracy. More specifically, research has shown that jurors are not good at separating true from false confessions—in fact do no better than chance—but do improve their ability to judge confession accuracy when the entire interrogation process is videotaped and proper camera angles are used, that is, angles not focusing solely on the suspect. Jury instructions are thus highly unlikely to improve jurors' accuracy where they are denied recordings of the entire interrogation process. Moreover, where there is no excuse for the police failure to record, there seems little justification for ignoring this risk to the innocent.

Ample social science concerning wrongful convictions in other areas (albeit analogous ones) than custodial interrogations also supports the conclusion that jury instructions will do little to improve jurors' ability accurately to assess credibility and correctly to determine whether a confession was true or voluntary.[10] The effect of instructions on jurors varies with the subject matter of the instruction, yet, overall, instructions are largely either ineffective in changing jurors' reasoning or have unintended effects. Research examining jury instructions in the most thoroughly-examined cause of wrongful convictions, namely, unreliable eyewitness identification procedures, has particularly shown cautionary instructions to be of little, if any, help to jurors in making good judgments about whether the police had the right man.

This risk is indeed no minor matter, for innocence concerns were among the primary forces motivating the movement for electronic recording in the first place, and errors can result in an innocent person being sentenced to the death penalty or to life in prison—errors hard to correct where confessions rather than DNA are the primary evidence offered. These worries are important, therefore, even if it is correct that violations of recording mandates will be relatively rare. In other words, deterrence is not the only function to be served by an exclusionary rule in this context. Indeed, critics of the exclusionary rule, including those on the Court, have focused their ire on the rule's application to Fourth Amendment violations while embracing the rule's wisdom where the reliability of fact finding is at stake.[11]

The point of stressing the limitations of cautionary jury instructions as a remedy is not to deny that they may be likely to have some, perhaps substantial, deterrent value or that they may modestly improve jury reasoning. Logic suggests that cautionary instructions should help at least somewhat on both these scores. There is indeed a significant likelihood that they will do both. Furthermore, cautionary instructions are a modest and traditional judicial remedy. 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

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

[11] *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).

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.

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 remedy 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.[12] 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.[13]

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

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

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

independently of any recording requirement. But should this Committee reject an exclusionary remedy for violating recording mandates, expert testimony becomes all that much more important. Because jury instructions alone likely do little to help a jury evaluate a confession's voluntariness or accuracy where there is no recording of the interrogation process, expert testimony suggests itself as an important supplementary remedy.[14] Conceivably, this Committee could craft a rule urging the ready admissibility of expert testimony combined with jury instructions as a remedy for recording violations where such testimony has not otherwise been admitted. The testimony would still need at least to be consistent with supporting scientific data, but, so long as that modest requirement is met, the expert's testimony would readily be admissible. That approach has the virtue of aiding the jury in assessing the significant risks arising from the recording rule violation while likely adding deterrent value precisely because police and prosecutors will fear that the expert testimony would work, that is, that it will make jurors more skeptical about the weight of the unrecorded confession. This approach would, however, be justified by informed speculation based upon analogous empirical data rather than studies done precisely on point. For this and the other reasons noted above, some sort of suppression remedy still seems a better option.

D. Civil Remedies

This Uniform Act takes no position on whether civil remedies, including damage 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, officers individual officers who comply with those regulations should be entitled to rely on that regulatory guidance for assurance that the officer is doing what

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[14] 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.").

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 employee 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. Moreover, the availability of other potential remedies – not simply a defense against civil liability – provided for in this Act should provide a 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

[insert discussion]

SECTION 6. MONITORING REQUIREMENT. [[Compliance with the electronic recording requirement shall be monitored by the Judicial Council [or analogous [State] law enforcement practice committee]].

Comment

The discussion of the need for monitoring and concerns about the delegation doctrine are discussed in the Comment to Section 9 of this Act. Section 9 addresses, however, the procedures for law enforcement agencies supervisory personnel to monitor line officers. Section 6, 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. [further elaboration will be inserted should the Committee accept this provision]

SECTION 7. HANDLING AND PRESERVATION OF ELECTRONIC RECORDINGS.

(A) Every electronic recording of a custodial interrogation shall be clearly identified and catalogued by law enforcement personnel.

(B) If a criminal or juvenile delinquency proceeding is brought against a person who was the subject of an electronically recorded custodial interrogation, the electronic recording shall be preserved by law enforcement personnel until all appeals, post-conviction, and habeas corpus proceedings are final and concluded, or the time within which such proceedings must be brought has expired.

(C) Upon motion by the defendant, the court may order that a copy of the recording be preserved for any period beyond the expiration of all appeals.

(D) If no criminal or juvenile delinquency proceeding is brought against a person who has been the subject of an electronically recorded custodial interrogation, the related electronic recording shall be preserved by law enforcement personnel until all applicable state and federal statutes of limitations bar prosecution of the person. [Should we provide times for destruction of such recordings?]

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. Thus the recordings *must* be preserved until all appeals and postconviction proceedings are concluded our until the time for pursuing those remedies has expired and *may* be ordered preserved for a longer period upon application to the court. Should no charges be filed, the recording may be destroyed after expiration of the statute of limitations.

SECTION 8. TRAINING. Each law enforcement agency subject to the provisions of this Act shall initiate, administer, and conduct training programs for permanent police officers, part-time police officers, and recruits on the methods and technical aspects of conducting electronic recordings of custodial interrogations at places of detention consistent with the terms of this Act and of any internal police regulations on this subject.

Comment

In the comment to section 5 on remedies, specifically concerning defenses to civil damages actions, empirical evidence is cited from analogous areas of law suggesting that effective training by an entity of its employees may be the single most effective way for that entity to ensure compliance with its internal operating rules in a way most likely to achieve statutory mandates imposed on the entity. For similar reasons, training is addressed in this Act separately, in Section 8, to emphasize its importance. The requirement is a simple one: all law enforcement agencies must adequately train all law enforcement officers, even part-time ones, in the procedures mandated by this Act and by internal law enforcement regulations adopted pursuant to this Act, as well as adequately training the officers on the technical aspects – the mechanics – of properly operating recording equipment.

[SECTION 9. IMPLEMENTING REGULATIONS OR GENERAL ORDERS.

Each law enforcement agency subject to the provisions of this Act [alternatively, each state agency charged with statewide and local enforcement of this Act] shall promulgate and enforce a general order or implementing regulation [consistent with the terms of this Act] [that shall, at a minimum, include the following matters:

(1) mandates for detailed data collection within, and review by superiors within, each law enforcement agency;

(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 and defense counsel 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.]]

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 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.

SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Comment

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

SECTION 11. 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 12. REPEALS. The following acts and parts of acts are repealed: [insert title and section numbers].

Comment

Section 12 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 13. EFFECTIVE DATE. This Act takes effect on [date].

Comment

Section 13 simply requires the recitation of a specific date on which this Act shall take effect.