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High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statute on Videotaping Custodial Interrogations

Andrew E. Taslitz*

ABSTRACT

Much has been written about the need to videotape the entire process of police interrogation of suspects. Videotaping discourages abusive interrogation techniques, improves police training in proper techniques, reduces frivolous suppression motions, and improves jury decision making about the voluntariness and accuracy of a confession. Despite these benefits, only a small number of states have adopted legislation mandating electronic recording of the entire interrogation process. In the hope of accelerating legislative adoption of this procedure and of improving the quality of such legislation, the Uniform Law Commission (ULC) ratified a uniform recording statute for consideration by the states. I was the Reporter for this ULC effort. This Article focuses on the Act's most interesting and novel provisions: those affecting remedies for police failure to record when required. The Act creates two remedies: suppression of confessions rendered "unreliable" by the failure to record and a cautionary jury instruction. This Article explains and defends both options. In addition, it challenges ULC's choice to exclude expert testimony as another remedial option. Furthermore, this Article defends the Act's exemption of police departments from civil liability if they enforce well-drafted rules to promote the Act's purposes. Ultimately, this Article concludes that, though the Act is not perfect, from a policy perspective, it is an excellent step forward.

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I. INTRODUCTION

In the fall of 2010, the Uniform Law Commission (ULC) sent to the fifty state legislatures its proposed Uniform Electronic Recordation of Custodial Interrogations Act (the Act). The Act sets out a framework requiring police to record the entire process of interrogating suspects, from start to finish.¹ The prevailing practice has been to record only the confession itself, excluding the many hours of interrogation leading up to it, or to rely upon written or un-taped oral confessions.² Current practice has led to false confessions, escape of the guilty for years, violations of constitutional rights, and insufficient training in the most effective interrogation techniques—all this occurring despite the diligent efforts of the largely well-meaning and experienced cadre of police interrogators.³

Some police departments in the United States have voluntarily adopted interrogation-recording procedures; some states have mandated these procedures by statute or court decision. However, the vast majority of police departments still do not record all interrogations.⁴ The hope of the Act's drafters is that putting the prestige of the

¹ See UNIF. ELEC. RECORDATION OF CUSTODIAL INTERROGATIONS ACT (Unif. Law Comm'n, Draft 2010). A copy of the UERCIA is provided in the Appendix.

² See Thomas Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1128 (2005) (noting historical absence of recording the entire custodial interrogation process).

³ See RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* 296–305 (2008) (summarizing the benefits of recording).

⁴ See Sullivan, *supra* note 2, at 1131–36 (discussing state legislation and judicial decisions); Alan M. Gershel, *A Review of the Law Requiring the Recording of Custodial Interrogations*, 16 RICH. J. L. & TECH.

ULC—best known as the author of the Uniform Commercial Code⁵—behind the electronic recording process would accelerate its widespread national adoption, improve uniformity, and improve the quality and efficiency by which interrogation occurs.⁶ Whether the Act achieves these goals will not be known for many years, as it must wend its way through the cumbersome and highly political process of moving from proposal to legislation in each state in which it is considered.

I was the Reporter for the Act, and this Article stems from that experience. I plan to provide only the briefest summary of the Act's core provisions. Those provisions, mandating recording under specified circumstances, are unquestionably the main motivation behind the Act.⁷ But they are neither unusual, nor add much to the scholarly and political debate—with one exception: the sheer flexibility they give individual jurisdictions to determine the scope of the mandate. This flexibility, combined with the numerous exceptions to the mandate, should aid in overcoming political roadblocks to the legislation.⁸

My focus, instead, will be on the Act's remedial provisions and related rulemaking sections,⁹ which *do* advance the debate in important ways.¹⁰ Specifically, the remedies include an admittedly weak suppression option, but one that includes suppression not only because a confession is involuntary but also because it is *unreliable*.¹¹ Unreliability is not a federal constitutional ground for suppression of confessions and is rarely a statutory ground for doing so.¹² Moreover, the prohibition against unreliable evidence may provide a toehold for future development of a more general principle of the

9, 9–10 (2010) (“Over 500 jurisdictions [out of the tens of thousands of police departments] have now enacted policies and procedures requiring their officers to record confessions in certain circumstances. At present, seventeen states and the District of Columbia have enacted such requirements through the state legislature, court decision, amendment to the state’s rules of evidence, or by court rules.”); Thomas Sullivan, *Departments That Currently Record a Majority of Custodial Interrogations* (Apr. 4, 2011) (unpublished study) (on file with author) [hereinafter Sullivan, *Departments That Record*].

⁵ The ULC’s website summarizes its mission and accomplishments. See UNIFORM LAW COMMISSION, www.nccusl.org (last visited June 30, 2011). The ULC was previously known as the National Conference of Commissioners on Uniform State Laws. See *id.*

⁶ These were certainly the uppermost goals discussed in the drafting meetings that I attended. See also UNIF. ELEC. RECORDATION OF CUSTODIAL INTERROGATIONS ACT, Prefatory Note (Unif. Law Comm’n, Draft 2010) (discussing goals of the uniform legislation).

⁷ See UERICI ACT § 3.

⁸ See *infra* text accompanying notes 66–104. Much of this Article necessarily draws on the ideas in the Act’s commentary and expresses agreement with it because I drafted it. However, here, freed from my role as Reporter, I also express significant disagreement with some aspects of the Act as a policy matter, if not necessarily as a political matter. This Article also substantially expands upon the arguments made in the commentary and the authority supporting them, focusing particular attention on the uniqueness and importance of the remedial sections, which sections are far from the commentary’s primary concern.

⁹ See UERICI ACT §§ 13, 15–16.

¹⁰ Cf. THOMAS SULLIVAN, *POLICE DEPARTMENT REGULATIONS: CUSTODIAL INTERROGATION* (2010) (collecting similar regulations already implemented in a variety of police departments).

¹¹ See UERICI ACT § 13(a); *infra* text accompanying notes 89–102. The “unreliability” provision is bracketed, however, meaning that jurisdictions must consider whether to include it if they adopt the Act.

¹² “Unreliability” is one motivating factor for creation of the due process test excluding involuntary confessions. See *infra* text accompanying notes 175–192.

reliability of any evidence that might otherwise raise an unacceptable risk of wrongful conviction.¹³

The remedies also include a cautionary jury instruction where law enforcement has failed, without a statutory excuse, to comply with recording mandates.¹⁴ Additionally, the Act exempts from civil liability police departments that enforce properly drafted rules promoting the Act's purposes.¹⁵ I defend all of these remedial provisions and exemptions.

But, I also critique the Act's failure to include an expert-testimony remedy. Too many courts are highly skeptical of expert testimony on the factors affecting the voluntariness and accuracy of confessions.¹⁶ The Act's drafters considered but rejected encouraging expert testimony on these factors as a remedy for unjustified non-recording.¹⁷ That, I will argue, was a policy mistake, though perhaps an instance of political wisdom.

Although my focus is on the content of these remedial provisions, I comment at least briefly throughout this Article on the underlying politics. The drafting committee and its many interest group (stakeholder) liaisons constituted a diverse lot, including judges, defense attorneys, police officers, prosecutors, victims' rights advocates, and a host of other interested parties. Each group offered different perspectives—indeed, perspectives often varying *within* each group. This diversity was intended by the ULC for several reasons. First, it built political support by educating members that stereotypes about groups' views were often wrong. Skeptical officers, for example, gave more credence to arguments from advocates who were fellow officers than from advocates who were defense attorneys. Second, the diversity ensured, as much as is possible in a politically charged debate, that the drafting committee had wide support among and within many stakeholder groups. That support improves the chances for actual enactment of the proposed legislation.

But, not every provision is, in my view, necessarily the best policy choice in a theoretical, apolitical world. That reality disappointed some stakeholders, who may criticize the Act for not doing enough. Nevertheless, even though the high expectations that the proponents of change had for this Act have largely been met, the wounded hopes of the most zealous of those advocates also deserve their due.

¹³ See, e.g., AM. BAR ASS'N, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY: REPORT OF THE ABA CRIMINAL JUSTICE SECTION'S AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS 67–78 (2006) (discussing a wide range of tools, including corroboration requirements, broadened discovery, and improved jury instructions for correcting the risk of jailhouse snitch testimony from being unreliable).

¹⁴ See UERICI ACT § 13(b).

¹⁵ See *id.* at § 16(b).

¹⁶ See, e.g., *State v. Cobb*, 43 P.3d 855 (Kan. App. 2002) (concluding that expert testimony on false confessions invades the province of the jury); *State v. Davis*, 32 S.W.3d 603 (Mo. App. E.D. 2000) (similar, but also noting that cross-examination is a sufficient safeguard against error); *People v. Rivera*, 777 N.E. 2d 360 (Ill. App. 2 Dist. 2001) (concluding that expert testimony on false confessions concerned matters not yet “generally accepted”). *But see* Solomon Fulero, *Expert Psychological Testimony on the Psychology of Interrogations and Confessions*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 247, 247–62 (G. Daniel Lassiter ed., 2004) (discussing cases admitting such testimony, arguing that many more are unreported, and arguing that courts are likely in the future to become more receptive).

¹⁷ See *infra* text accompanying notes 268–286.

The next section of this Article, subpart IIA, briefly reviews why there is a need for recording the entire custodial interrogation process. Subpart IIB, even more briefly, summarizes the Act's provisions. Part III delves into the major remedies provided by the Act and those deleted from earlier drafts. Part IV elaborates further on the regulatory provisions. Part V, the conclusion, summarizes the Article's key points and offers suggestions for the future.

II. THE NEED FOR, AND CONTENT OF, THE ACT: AN OVERVIEW

A. *Need for the Legislation*

The need for recording custodial interrogations in their entirety has three broad justifications: promotion of truth-finding, efficiency, and constitutional values.¹⁸

1. Truth-finding

The truth-finding justification arises from the risk of convicting the innocent. In just the past two decades, lawyers have documented hundreds of cases of wrongful convictions that have been subsequently overturned.¹⁹ Most errors were proven by DNA evidence.²⁰ However, such evidence is not usually available.²¹ In some instances, the true perpetrator continued to commit serious crimes while an innocent person languished in prison.²² The cases have been sufficiently numerous and grave as to garner the attention of the media, prosecutors, defense counsel, police, legislators, and law reformers.²³ Some of this attention has been fostered by investigation into the causes of mistakes, causes that suggest that the proven cases of wrongful conviction are but the tip of the iceberg.²⁴

Social science studies of wrongful convictions have demonstrated that one of the most important contributors to error is the admissibility at trial of false confessions.²⁵ False confessions may often occur without police intending to do anything but convict the guilty.²⁶ Subtle flaws in interrogation techniques can elicit confessions by the innocent.²⁷ For example, lengthy interrogations; interrogations in which police "feed" facts to the suspect that only the perpetrator could know, especially suggesting answers to highly vulnerable suspects like the young or the mentally retarded; and, those in which the police purport to have evidence of guilt (such as an eyewitness's identification of the

¹⁸ See generally LEO, *supra* note 3, at 296–305 (elaborating on the justifications noted here).

¹⁹ See BRANDON GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 5 (2011).

²⁰ *Id.* at 6.

²¹ *Id.* at 11.

²² *Id.* at 3.

²³ *Id.* at 6.

²⁴ See generally BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE* (2001) (outlining what errors led to numerous wrongful convictions and leading others to research that same question with greater intensity).

²⁵ See LEO, *supra* note 3, at 291–96 (summarizing the history of the movement for electronic recording to reduce the risk of false confessions).

²⁶ See *id.* at 263–66 (explaining that tunnel vision can lead interrogators to believe in suspects' guilt while ignoring all other evidence).

²⁷ *Id.* at 73.

suspect at a staged lineup) all raise risks of the innocent confessing to crime.²⁸ Police also are poorly trained in how to spot liars, indeed relying on flawed indicators of lying, such as a suspect's averting his gaze or chewing on his fingernails.²⁹ Yet the officers' misplaced confidence in their lie-detecting abilities encourages them to use high-pressure interrogation techniques, such as suspect-isolation, time-limited leniency offers, repeated aggressive attacks on suspect guilt-denials, and aggressive confrontation.³⁰ The combination of these techniques with promises for leniency and other benefits upon confessing or, conversely, threatened harms if the suspect refuses to confess fosters the innocent to claim guilt.³¹ In some instances, police can even convince suspects that they "must have" committed the crime even though they no longer remember doing so.³²

Yet confessions are taken as such powerful evidence of guilt that prosecutors, jurors, and judges often fail to identify the false ones.³³ The resulting wrongful conviction means not only that an innocent person is incarcerated but that a dangerous offender continues threatening public safety.³⁴ Thus 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 great.

However, defense and police witnesses often tell very different tales about the degree of coercion involved in the interrogation process. This conflicting testimony may also result in unnecessary confusion among judges or jurors, leading them to believe the false confession rather than its later recantation.

Videotaping partly promotes truth-finding by reducing lying and deterring risky interrogation techniques because police and suspects both know they are being watched.³⁵ In addition, recording may allow detectives to focus their full attention on proper interrogation techniques, improving the overall quality of the interrogation because it frees them from the need to take notes.³⁶ Recording allows supervisors to give feedback on proper techniques, thereby improving training.³⁷ Likewise, police and prosecutors are able to review tapes to weed out suspect cases before they reach juries that may believe false tales rather than impugn honest officers.³⁸ Finally, fact finders are better able to do their job because the recording can refresh witness memories and provide a more complete and accurate picture of the full course of events.³⁹

²⁸ See *id.* at 140–48, 201–04, 210–11, 216–19, 229–35; WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PROCESSES AFTER DICKERSON* 182–83, 203–15 (2001).

²⁹ LEO, *supra* note 3, at 226–39.

³⁰ See *id.* at 236.

³¹ *Id.*

³² *Id.* at 216–17. Detectives explain to the suspects that blackouts or multiple personality disorders caused loss of memory of the heinous act. *Id.* at 218.

³³ See Saul M. Kassin, *False Confessions*, 73 ALB. L. REV. 1227, 1230–31 (2010).

³⁴ LEO, *supra* note 3, at 268.

³⁵ Sullivan, *supra* note 2, at 1129.

³⁶ LEO, *supra* note 3, at 297.

³⁷ *Id.* at 297.

³⁸ Lisa Lewis, *Rethinking Miranda: Truth, Lies, and Videotape*, 43 GONZ. L. REV. 199, 222 (2008) (discussing weeding out false confession cases); LEO, *supra* note 3, at 296–305 (discussing fact finder reluctance to impugn honest officers' ability to interrogate properly).

³⁹ Sullivan, *supra* note 2, at 1129.

2. Systemic Efficiency

Recording fosters systemic efficiency by reducing the number of frivolous suppression motions or aiding in quick motion resolution whenever a defendant's version of events is contradicted by the recording.⁴⁰ Although the interrogation process may be lengthy, showing selected portions of the video that are squarely contrary to the suspect's testimony takes little time and may discourage lengthier parades of witnesses called merely to challenge police officer credibility.⁴¹ In addition, prosecutor bargaining power may be enhanced for the same reason, thus likely promoting more guilty pleas.⁴² By resolving factual doubts, recording would also make hung juries less likely.⁴³ Police able to review a recording for the subtleties of body language and of suspect comments may also better pick up on avenues for investigation or reasons to confirm or dispute a defendant's story, thus quickening the time needed for investigation.⁴⁴ Video-recording the entire interrogation process is, admittedly, so new that no empirical studies have been done on whether these predicted benefits have actualized. But, the high levels of satisfaction among law enforcement in jurisdictions that have been recording are consistent with these predicted efficiencies.⁴⁵

3. Constitutional Values

The recording of interrogations protects U.S. constitutional values better by improving suppression motion resolution accuracy and police training.⁴⁶ The United States Constitution's due process and self-incrimination clauses embody a complex set of values relevant to custodial interrogations.⁴⁷ These values include avoiding coerced or compelled confessions, protecting the innocent, and barring certain harsh interrogation techniques as simply fundamentally unfair regardless of the suspect's guilt.⁴⁸ When fact finders make mistakes, such as believing that no conduct violative of constitutional

⁴⁰ LEO, *supra* note 3, at 297–98.

⁴¹ This option of selecting only portions of the video to use at trial or in suppression hearings was noted by some members of the drafting committee and its liaisons during internal discussions. *See also* Tracy Lamar Wright, *Let's Take Another Look at That: False Confession, Interrogation, and the Case for Electronic Recording in Idaho*, 44 IDAHO L. REV. 251, 276–77 (2007) (“When one considers the many time and cost saving advantages of recording, including fewer pretrial motions to suppress based on claims of coercion, ‘protection of officers against claims of abuse,’ stronger evidence resulting in more guilty pleas, and elimination of the need for extensive testimony, it becomes clear why overburdened police departments, prosecutors, and judges would embrace the technique.”).

⁴² Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, 88 JUDICATURE 132, 135 (2004).

⁴³ LEO, *supra* note 3, at 298.

⁴⁴ *Id.* at 298.

⁴⁵ *See* WILLIAM A. GELLAR, POLICE VIDEOTAPING OF SUSPECT INTERROGATIONS AND CONFESSIONS: A PRELIMINARY EXAMINATION OF ISSUES AND PRACTICE 115–19, 132–33, 141–42 (Nat'l Inst. of Justice 1992) (noting that all participants in a survey of departments voluntarily choosing to videotape the entire interrogation process found that videotaping saved total officer case time); Wright, *supra* note 41, at 276–77 (summarizing the recent surveys of police departments videotaping the entire interrogation process).

⁴⁶ *Id.* at 299.

⁴⁷ *See* ANDREW E. TASLITZ, MARGARET L. PARIS & LENESE A. HERBERT, CONSTITUTIONAL CRIMINAL PROCEDURE 660–62, 667–68, 670–81, 692–94 (4th ed. 2010) (summarizing and analyzing these values).

⁴⁸ *See id.*

mandates occurred when it did, these values are undermined.⁴⁹ Empirical data shows that jurors exhibit a heightened ability to differentiate true from false, coerced from voluntary, confessions where the entire custodial interrogation process has been taped.⁵⁰ Such values are also fostered because the wide availability of a largely indisputable record of what occurred in the interrogation room should act to deter governmental overreaching and to expose it when it occurs.⁵¹ Recording makes it easier for the state to preserve potential exculpatory evidence and to provide it to defense counsel, thus improving compliance with notions of the due process obligation to produce exculpatory evidence for the defense.⁵² A recording could reveal racial bias and encourage means for correcting it and can, given the above advantages, promote law enforcement legitimacy by improving its public accountability.⁵³ Indeed, there are empirical grounds for believing that police often

⁴⁹ See WHITE, *supra* note 28, at 190–95.

⁵⁰ See Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW. & HUM. BEHAV. 3, 27 (2000); G. Daniel Lassiter & Andrew L. Geers, *Bias and Accuracy in the Evaluation of Confession Evidence*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 197, 208–09 (G. Daniel Lassiter ed., 2005). My purpose here is not to offer a comprehensive defense of the benefits of recording or a complete review of the empirical literature. Rather, I am trying here to summarize the defenses and literature sufficiently to enable the reader to appreciate the importance of the remedial question to follow.

⁵¹ See LEO, *supra* note 3, at 299. Deterrence and improved accuracy are more generally thought to be among the benefits of more transparent policing. See, e.g., Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107 (2000); Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7, 64–65 (2010).

⁵² LEO, *supra* note 3, at 300. *Brady v. Maryland*, 373 U.S. 83 (1963), recognized the prosecutor’s due process obligation to produce material exculpatory evidence to the accused. That obligation extends to evidence whose only relevance is impeaching prosecution witnesses on material points. See *United States v. Bagley*, 473 U.S. 667, 676 (1985) (first so holding); *Giglio v. United States*, 405 U.S. 150, 155 (1972) (concluding that exculpatory evidence included evidence demonstrating witness’s pro-prosecution bias). Evidence is material if there is a “reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Bagley*, 473 U.S. at 682. The prosecutor also has a due process obligation affirmatively to learn of exculpatory evidence possessed by the police or civilian investigators. See *Kyles v. Whiteley*, 514 U.S. 419, 437 (1995). Ethical rules impose a similar, though not identical, obligation on prosecutors to produce exculpatory evidence to the defense. See A.B.A. MODEL R. PROF. CONDUCT 3.8(d) (2010) (requiring a prosecutor to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.”).

⁵³ See, e.g., Cynthia J. Nadjadowski, *Explaining Racial Disparities in False Confession Rates*, AM. PSYCHOL. L. SOC’Y NEWS, Summer 2011, at 6–11 (discussing the role of racial stereotype threat in leading to false confessions); Andrew E. Taslitz, *Wrongly Accused: Is Race a Risk Factor in Convicting the Innocent?*, 4 OHIO ST. CRIM. L. 121 (2006) [hereinafter Taslitz, *Wrongly Accused*] (discussing some data and the likely processes by which unconscious racial bias can contribute to false confessions); Andrew E. Taslitz, *Prosecuting the Informant Culture*, 109 MICH. L. REV. 1077, 1081–90 (2011) (discussing importance of police accountability and transparency and its connection to procedural justice and perceived law enforcement legitimacy). A recent study also raises the prospect that jurors viewing audio-visual electronic recordings of white officers interrogating black suspects will be biased against the suspect even if proper camera angles are used. See Jennifer J. Ratcliff et al., *The Hidden Consequences of Racial Salience in Videotaping Interrogations and Confessions*, 16 PSYCHOL. PUB. POL’Y & L. 200, 213–14 (2010). These authors recommend having interrogators and suspects matched by race to avoid this racial disparity effect. The research seems to me to be in too early a stage, however, to consider such a measure, especially given the cost of doing so in departments lacking racial diversity sufficient to permit routine racial-matching.

use harsher interrogation techniques with suspects belonging to racial minorities.⁵⁴ Although the evidence suggests that such racial disparities occur via subconscious processes—thus, not violating equal protection prohibitions against intentional discrimination⁵⁵—many commentators support a reading of the Fourteenth Amendment’s Equal Protection Clause that would reach such subconsciously motivated disparities.⁵⁶

B. A Growing Consensus, Recognizing Reform’s Necessity

For just these reasons, many academics have recommended,⁵⁷ and several states have statutorily mandated,⁵⁸ electronic recording of the entire custodial interrogation process. For example, Illinois, the District of Columbia, Maine, Maryland, Nebraska, New Mexico, North Carolina, and Wisconsin have adopted mandatory recording laws for a variety of felony investigations.⁵⁹ Alaska, Massachusetts, and Minnesota have recording requirements imposed by judicial decision.⁶⁰ The New Jersey and Indiana Supreme Courts have, likewise, required recording via court rule.⁶¹ A significant number of state courts have declared that recording would have powerful benefits for the justice system, but have declined to impose that obligation absent legislative action.⁶²

The military has also begun embracing the recording ideal. For example, the United States Naval Criminal Investigative Service (USNCIS) Manual now contains General Order 00-0012, which requires video or audio recording of suspect interrogations of crimes of violence where the interrogation takes place in a USNCIS facility.⁶³ Similarly, in October 2009, the Commission on Military Justice, known as the Cox Commission, released a report concluding that principles of justice, equity, and fairness require “military law enforcement agencies to videotape the entirety of custodial interrogations of crime suspects at law enforcement offices, detention centers, or other places where

⁵⁴ See Taslitz, *Wrongly Accused*, *supra* note 53, at 126–32.

⁵⁵ See *United States v. Armstrong*, 517 U.S. 456 (1996) (holding that plaintiffs may not even obtain discovery in a case claiming intentional selective racial prosecution in violation of the United States Constitution’s Equal Protection Clause without first independently proving that law enforcement failed to proceed against similarly situated white offenders).

⁵⁶ See Charles W. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

⁵⁷ See generally, Wright, *supra* note 41.

⁵⁸ See *infra* text accompanying notes 50–51.

⁵⁹ See Thomas P. Sullivan & Andrew W. Vail, *The Consequences of Law Enforcement Officials’ Failure to Record Custodial Interviews as Required by Law*, 99 J. CRIM. L. & CRIMINOLOGY 215, 216–17 (2009).

⁶⁰ See *id.*

⁶¹ See *id.* at 217; see Order Amending [Indiana] Rules of Evidence, [Rule 617], No. 94S00-0909-MS-4 (filed Sept. 15, 2009) (requiring, subject to seven narrow exceptions, audio and video recording of custodial interrogations in all felony prosecutions); Gershel, *supra* note 4, at 4 (referencing a complete list of states that have enacted recording laws, whether by statute, rule, or judicial decision, including New Jersey and Indiana, as of 2010).

⁶² See, e.g., Sullivan & Vail, *supra* note 59, at 216–17 n. 8; See generally Gershel, *supra* note 4 (summarizing case and other law implementing or rejecting a recording mandate); *State v. Hajtic*, 724 N.W. 2d 449, 456 (Iowa 2006) (encouraging but not requiring electronic recording); *People v. Geno*, 683 N.W. 2d 687, 690 (Mich. App. 2004) (rejecting purported state constitutional recording mandate and leaving the decision to the legislature).

⁶³ See U.S. Naval Criminal Investigative Service, General Order 00-0012, *Policy Change Regarding Recording of Interrogations*.

suspects are held for questioning, or, where videotaping is not practicable, to audiotape the entirety of such custodial interrogations.”⁶⁴ The Air Force Judge Advocate General’s Corps also declared that it would start recording all subject interviews as of October 2009, though there are limited exceptions, and recording of witness and victim interviews is optional.⁶⁵ Furthermore, the National Defense Authorization Act for Fiscal Year 2010, in § 1080, requires that “each strategic intelligence interrogation” (one conducted in a “theater-level detention facility”) of persons in the custody of, or under the control of, the Department of Defense (DOD) shall be “videotaped or otherwise electronically recorded.”⁶⁶ The section requires the Judge Advocate General to develop implementing guidelines.⁶⁷

A significant number of police departments have also voluntarily adopted the recording solution.⁶⁸ No comprehensive study has been done yet of why these departments have done so. Anecdotally, however, the reasons seem to vary from enlightened local police leadership convinced of the benefits of recording or seeking to preempt legislative or judicial action, to prestigious local figures embracing the cause, to the embarrassment created by infamous revelations of mistaken convictions.⁶⁹ Yet the vast majority of police departments still do not record.⁷⁰ There are wide variations among the voluntarily adopted programs.⁷¹ Departments vary in what crimes are recorded, whether recording is only audio or also visual, and at what locations recording must be made.⁷² Furthermore, some approaches—for example, those addressing proper camera angles, providing for internal police rulemaking, and clearly addressing appropriate sanctions—promise to be more effective in protecting the innocent, convicting the guilty, minimizing coercion, and avoiding frivolous suppression motions than others, for reasons to be explained shortly.⁷³ Additionally, the spread of the recording process throughout

⁶⁴ See REPORT OF THE COMMISSION ON MILITARY JUSTICE 3 (Oct. 2009) (also known as the “Cox Commission Report”).

⁶⁵ See Sullivan, *Departments That Record*, *supra* note 4, at 8 n. 25.; Maj. Lynn Schmidt, *USAF, AFOSI Begins Recording Subject Interviews*, THE REPORTER [OF THE JUDGE ADVOCATE GENERAL’S CORPS], Summer 2010, at 19 (summarizing the policy and its implementation, including potential exceptions).

⁶⁶ Sullivan, *Departments That Record*, *supra* note 4, at 8 n.26.

⁶⁷ See *id.*

⁶⁸ See Sullivan & Vail, *supra* note 59, at 228–234 (listing all such departments, a list encompassing departments in forty states who have voluntarily adopted recording; when the states that have mandated recording are added, all fifty states plus the District of Columbia have at least one police department engaged in recording in at least some cases).

⁶⁹ These anecdotes were shared among members of the drafting committee for the Act. See also Aviva Orenstein, *Facing The Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401 (2011) (offering structural and psychological reasons why some prosecutors resist admitting that they have convicted the innocent); DAVID A. HARRIS, *FAILED EVIDENCE: WHY LAW ENFORCEMENT RESISTS SCIENCE* ch. 6, 39–50, ch. 7 (NYU Press, forthcoming Fall 2012) (draft manuscript) (discussing specific cases in which innocence reforms came about and how they did so and stressing the importance of enlightened leadership).

⁷⁰ See Courtney A. Lawrence, *Criminal Law: Too Much of A Good Thing: Limiting the Scope of the Scales Recording Requirement to Custodial Interrogations Conducted in Minnesota-State v. Sanders*, 37 WM. MITCHELL L. REV. 325, 331 (2010) (elucidating the history of electronic recording).

⁷¹ Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1131 (2005).

⁷² See *id.* at 1133.

⁷³ See *infra* text accompanying notes 289–323.

states and localities has been slow when its promised benefits are great.⁷⁴ A uniform statute may help to speed up and standardize informed resolution of the recording issue. It was in recognition of these needs that the ULC, after a two-year-long drafting process, promulgated the Act that is the subject of this Article.⁷⁵

C. *The Act's Major Provisions Summarized*

The complete Act is attached to this Article as an Appendix. Here I provide only the most cursory summary of the Act that is necessary to understanding the discussion of its remedial principles that follows.

The Act leaves individual jurisdictions free to decide the crimes to which, and the locations at which, the recording requirement applies.⁷⁶ Jurisdictions are similarly free to decide whether recording must be by audio or also by video, including freedom to require audio only in some locations, audio and video in other locations.⁷⁷ Whatever choices jurisdictions make on these matters, however, the requirement kicks in only for “custodial” interrogations, as currently defined by *Miranda* and its progeny.⁷⁸ In its rulemaking provisions, the Act also includes a requirement of explaining why recording was done outside a specified location, if a jurisdiction chooses to limit the recording mandate only to certain spaces.⁷⁹ Even though the Act assumes that at least some custodial interrogations will be recorded and seeks to encourage expanding recording’s use wherever feasible, the scope of the mandate remains in the individual jurisdiction’s hands.

This degree of flexibility might seem to undermine the Act’s uniformity goals. However, the Act’s drafting committee believed that recording in some instances is better than recording in none⁸⁰ and that experiences with recording are likely to be so positive, and costs so likely to decline over time, that jurisdictions will choose to expand recording’s use widely, even if they initially choose to employ it stingily.⁸¹ This gradual expansion of the technique’s use would promote greater trans-jurisdictional uniformity

⁷⁴ See Sullivan, *supra* note 71, at 1140 (stating that there is much opposition to expansion, especially from those that who benefit the most from its creation—the police.)

⁷⁵ See UNIF. ELEC. RECORDATION OF CUSTODIAL INTERROGATIONS ACT (Unif. Law Comm’n, Draft 2010).

⁷⁶ See *id.* at § 3.

⁷⁷ See UERICI ACT.

⁷⁸ See, e.g., *Stansbury v. California*, 511 U.S. 318 (1994) (defining “custody”); *Berkemer v. McCarty*, 468 U.S. 420, 421 (1984) (concluding that an ordinary traffic stop does not place the driver in “custody”); *Rhode Island v. Innis*, 446 U.S. 291 (1980) (defining “interrogation”); Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519 (2008) (arguing that the Court’s recent interpretation of *Miranda* has gutted its protections and that police training manuals support this conclusion); Yale Kamisar, *On the “Fruits” of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 934 (1995) (arguing more than a decade ago that the Court was eviscerating *Miranda*).

⁷⁹ UERICI ACT § 3(d).

⁸⁰ Again, I am familiar with the thinking of many of the drafting committee members because of conversations in which I participated through my role as Reporter. I do not claim, however, that every committee member or liaison shared the same reasons for voting in favor of particular provisions.

⁸¹ This latter belief stemmed from the uniformly positive reviews of recording from law enforcement in jurisdictions using it. See Wright, *supra* note 41, at 276–77; Sullivan, *supra* note 42, at 133–135.

over time.⁸² Furthermore, the Act includes numerous exceptions to cover a wide range of potential complications.⁸³ On the political front, drafters considered the flexibility provided by the slow, incremental changes permitted by the Act likely to improve the chances of widespread adoption.⁸⁴ States fearing high costs, for example, could choose narrow application, while those persuaded by the argument that any minimal out-of-pocket costs would be far outweighed by long-term benefits could choose broader application.⁸⁵

III. REMEDIES

The more unusual and interesting provisions of the Act, however, are those involving remedies and regulations. The Act provides for two remedies if violated. First among these is a *very limited* suppression remedy⁸⁶ and second cautionary jury instructions.⁸⁷ In both instances, the Act again provides jurisdictions substantial freedom of choice.⁸⁸ The Act also protects against civil liability as a remedy if certain regulations are adopted and enforced.⁸⁹ This part of this Article discusses each of these remedies, as well as a remedy ultimately excluded from the Act, expert testimony on the factors contributing to false confessions and the benefits of videotaping the entire interrogation process. Details on the required regulations to avoid civil liability are left to a later section of this Article regarding the Act's provisions on rulemaking.

A. Pretrial Suppression Motions

The drafting committee engaged in its most heated discussion over the potential for suppressing evidence as a remedial measure. The theory behind a suppression remedy was that it would provide a strong incentive for compliance with the Act.⁹⁰ Moreover, it would help to avoid wrongful convictions by excluding evidence of doubtful

⁸² This belief of course remains an optimistic informed speculation until a variety of jurisdictions adopt the Act, permitting its effects to be observed over time.

⁸³ UERIC ACT §§ 5–10.

⁸⁴ Drafting committee liaison Thomas Sullivan was perhaps the strongest advocate of this position in drafting committee discussions. *See also* Sullivan & Vail, *supra* note 59, at 220–27 (dropping mandatory suppression as a remedy and proposing a model statute with many exceptions and other flexibility based on the theory that less flexibility would prompt political resistance to change and that law enforcement, once actually doing recording, will enthusiastically embrace the procedure's widespread use).

⁸⁵ The discussion here is of the drafting committee's perceptions of jurisdictions considering adopting the Act but that have not yet adopted any mandatory recording procedures. As discussed earlier, there is reason to believe that wider coverage of recording mandates will reduce overall costs to the justice system, an analysis that looks beyond initial out-of-pocket costs to start up a recording system. *See supra* text accompanying notes 48–53.

⁸⁶ UERIC ACT § 13(a).

⁸⁷ *Id.* at § 13(b).

⁸⁸ *Id.* at § 13(a)-(b).

⁸⁹ *Id.* at § 16(b).

⁹⁰ *Id.* at §13(a) (creating modest suppression remedy). I am reporting here on the internal debates held in the ULC drafting committee. *See also* Christopher Slobogin, *Transnational Law and Regulation of the Police*, 56 J. LEGAL EDUC. 451, 455 (2006) (arguing that a properly designed combination of civil penalties and administrative action aimed at individual officers would achieve far better deterrence than do exclusionary rules but conceding that we currently have no such system).

trustworthiness, or at least evidence whose trustworthiness could not fairly be evaluated by the fact finder.⁹¹ Additionally, the Act's exceptions were so numerous and covered every legitimate reason for not recording (even including a catchall "exigent circumstances" exception)⁹² that exclusion would be rare and, when it occurred, would likely involve either intentional wrongdoing or extreme negligence, making suppression fully justifiable.⁹³

Opponents of the suppression remedy, however, argued that there are already constitutional grounds for excluding involuntary confessions.⁹⁴ Furthermore, in their view, voluntary confessions are still trustworthy, meaning that they are unlikely to create an unacceptable risk of convicting the innocent.⁹⁵ To the extent that trustworthiness is in doubt, they saw cautionary jury instructions as an adequate corrective.⁹⁶ Opponents viewed exclusion as a harsh sanction, particularly where the police have done no "wrong," that is, not engaged in tactics sufficiently coercive to overcome the accused's will. Furthermore, the constitution provides other remedies for suppressing confessions that are not involuntary, including violation of the *Miranda* warnings and the right to counsel.⁹⁷ In their opinion, to add another independent ground for suppression seemed like overkill.

To address opponents' concerns, the Act does not create an independent ground for suppression stemming from the failure to comply with the Act's recording requirements. It does declare that its violation may be considered as a relevant factor in determining voluntariness.⁹⁸ The Act also suggests, in brackets,⁹⁹ that jurisdictions should adopt a provision permitting suppression based upon a confession's unreliability—that is, where there is serious reason to doubt its accuracy in its essential points—even if there is no

⁹¹ See *infra* text accompanying notes 167–232.

⁹² UERICI ACT §§ 5–10.

⁹³ The United States Supreme Court has also applied the suppression remedy stingily in another area of constitutional criminal procedure: the Fourth Amendment. See Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 671 (2011). The Court has held that suppression of evidence is wise for intentional or grossly negligent violations of law by individual officers or for systemic negligence. See *Herring v. United States*, 555 U.S. 135 (2009); Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483 (2006) (explaining the theory behind the Court's drift toward a deliberate action/gross negligence standard for suppression under the exclusionary rule); *Davis v. United States*, 131 S.Ct. 2419 (2011) U.S. LEXIS 4560, *19–20 (2011) (declaring that exclusionary rule applies under the Fourth Amendment only to deliberate or grossly negligent police conduct).

⁹⁴ See TASLITZ, PARIS, & HERBERT, *supra* note 47, at 657–62, 670–86 (summarizing the most important of these remedies).

⁹⁵ This is a debatable point. Much social science suggests that confessions can be unreliable even when obtained via methods not involving "coercion" or not "overcoming the will" as those terms are apparently defined by the Court under the due process clauses. See Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3 (2010).

⁹⁶ See *infra* text accompanying notes 233–236 (discussing the virtues and vices of the jury instruction as a remedy).

⁹⁷ See TASLITZ, PARIS, & HERBERT, *supra* note 47, at 694–732, 787–809 (summarizing the relevant case law).

⁹⁸ UERICI ACT § 13(a).

⁹⁹ Bracketing language is the ULC's mechanism for indicating that the language is suggested but optional. *Id.*

coercive police conduct.¹⁰⁰ Under that language, the inexcusable failure to record may tip the scale, when combined with other circumstances, to suppressing the confession because it was involuntarily given or unreliable but not simply because it was unrecorded or improperly recorded.

Among the virtues of this approach is its increased likelihood of gaining political support due to the opposing positions on suppression discussed above. It is, however, a remedy that still turns on a trial judge's weighing of numerous circumstances, allowing trial judges to retain enormous discretion.¹⁰¹ Where judges have such discretion, they rarely suppress, except in the most unusual or extreme of cases.¹⁰² Furthermore, as noted above, it is hard to violate the Act due to its many exceptions.¹⁰³ If this point is understood and accepted, that too should aid in convincing jurisdictions to adopt the Act. But the approach has vices too, arising precisely from the likely rarity of suppression in practice.¹⁰⁴ Ultimately, the approach is a wise compromise, not a perfect ideal.

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

Generally, exclusion is understood as a remedy turning on a cost-benefit analysis.¹⁰⁵ Among the primary social benefits of an exclusionary remedy for violation of this Act's electronic recording mandate are deterring future violations, protecting accuracy in fact-finding, protecting against false confessions occurring in the first place,¹⁰⁶ and adding a statutory layer of protection to other relevant constitutional rights, such as the due process right to be free from coercive interrogations¹⁰⁷ and the Fifth Amendment right to be free from compelled custodial interrogations, including the

¹⁰⁰ *See id.*

¹⁰¹ *See id.*

¹⁰² Michael D. Pepson & John N. Sharifi, *Lego v. Twomey: The Improbable Relationship Between an Obscure Supreme Court Decision and Wrongful Convictions*, 47 AM. CRIM. L. REV. 1185, 1191–92, 1242 (2010) (suggesting that judicial discretion, combined with a low preponderance of the evidence burden of proof, likely guarantees frequent denial of motions to suppress confessions).

¹⁰³ *See supra* text accompanying notes 81–87.

¹⁰⁴ *See* Pepson & Sharifi, *supra* note 102, at 1242; *infra* text accompanying notes 131–148.

¹⁰⁵ *See* *Hudson v. Michigan*, 547 U.S. 586 (2006) (subjecting availability of an exclusionary remedy under the Fourth Amendment to a cost-benefit analysis).

¹⁰⁶ Deterrence is always one justification for exclusionary rules. *See* TASLITZ, PARIS & HERBERT, *supra* note 47, at 616–17; Slobogin, *supra* note 90. Here, exclusion promotes fact-finding accuracy because it keeps confessions from the jury where we lack the best evidence of the confession's truthfulness, namely, the electronic recording, and under circumstances where the absence of recording is not excused and is, therefore, especially troubling. *See supra* text accompanying notes 81–92. The improved training that recording promotes is one among several reasons why recording helps to reduce false confessions in the first place. *See supra* text accompanying notes 36–38. Exclusion of inexcusably untaped confessions sends the message that sloppiness or negligent or intentional behavior insulating interrogators from review and accountability for their tactics will not be tolerated. *See supra* text accompanying notes 33–47; TASLITZ, PARIS & HERBERT, *supra* note 47, at 600–04 (discussing Court's recent focus on individual police officer culpability and departmental systemic negligence as justifications for applying the exclusionary rule); Erik Luna, *supra* note 51 (recounting the virtues of "transparency" in improving police accountability, something that, I note here, taping would do as well).

¹⁰⁷ *See* TASLITZ, PARIS & HERBERT, *supra* note 47, at 657–81.

Miranda prophylactic protection of that right.¹⁰⁸ But where violation of the Act has only minimally implicated these social interests, the cost of suppression may not be worth the benefits. Therefore, the Act merely requires the trial court to consider the relevance and weight of violation of the electronic recording mandate in pretrial suppression motion decisions.¹⁰⁹

Although the Act does *not*, therefore, mandate exclusion of evidence as a remedy, it does recognize, in subsection 13(a), that the failure to comply with the terms of the Act may be considered relevant in resolving a motion to suppress a confession on other grounds, including (but not limited to) doing so on the grounds of its involuntariness or unreliability.¹¹⁰ In doing so, this Act navigates among the inflexible rule of per se

¹⁰⁸ *Miranda* is said to be a “prophylactic” rule in that it provides protection for the core privilege against self-incrimination in circumstances in which, absent the *Miranda* rule, a violation of the privilege itself would not necessarily always be found. *See id.* at 712–17.

¹⁰⁹ Statutory mandates for decisionmakers to consider factors without requiring that they thereby decide a particular way are not impermissibly vague. For example, one well-known statute was unsuccessfully challenged as violating free speech rights in *NEA v. Finley*, 524 U.S. 569 (1998). There, the amended statute governing the National Endowment of the Arts (NEA) directed the NEA chairperson, in establishing procedures for determining the artistic merit of grant applications, to “take into consideration general standards of decency and respect for the diverse beliefs of the American public.” *Id.* Several grant-applicants denied funding sued the NEA on several First Amendment grounds, only one of which, undue vagueness (which is also a due process concept), is relevant here.

The United States Supreme Court concluded that the statute did indeed not mandate any particular outcome. But the Court rejected the claim that if the mandate to “consider” a factor does not require a particular result on the statute’s face, that renders the statute so impermissibly vague and subjective as to allow the agency to be thoroughly unconstrained, permitting invidious discrimination to occur below the radar. A mandate to “consider” a factor is no more vague, however, concluded the Court, than the ultimate question to which this consideration contributed to an answer: whether the grant application was for a project that was likely to exemplify “artistic excellence.” Only a case-by-case consideration of a wide array of information could lead to a decision on such a question in an individual case.

The Act discussed in this Article uses similar “consideration” language to that in *Finley*, creating no greater ambiguity than in that decision. The Act does direct its mandates to a court, rather than, as is in *Finley*, an administrative agency. But changing the recipient of the legislative directive does not alter the clarity or meaning of the statutory language. Legislative mandates for courts to “consider” certain factors in making case-specific judgments are indeed common. *See, e.g.*, Tracey Bateman, *Divorce and Separation: Consideration of Tax Consequences in Distribution of Marital Property*, 9 A.L.R. 5th 968, § 2(a) (1993) (some states have statutes requiring courts “to consider” tax consequences in determining the distribution of marital property in divorce proceedings); Christina A. Weatherford, *Judicial Sentencing Discretion Post-Booker: Are Judges Getting a Distorted View Through the Lens of Social Networking Sites?*, 27 GA. ST. L. REV. 673, 681–82 (2011); *cf.* 2 PUB. NAT. RESOURCES § 17:3 (George Cameron Coggins & Robert L. Glicksman eds., 2d ed. 2011) (explaining that certain federal statutes require agencies to consider alternatives to recommend courses of action without mandating that agencies necessarily adopt those alternatives); Richard J. Pierce, Jr., *What Factors Can an Agency Consider in Making a Decision?*, 2009 MICH. ST. L. REV. 67 (2009) (discussing when an agency must, may, and cannot consider certain factors in making a decision).

¹¹⁰ UNIF. ELEC. RECORDATION OF CUSTODIAL INTERROGATIONS ACT § 13(a) (Unif. Law Comm’n, Draft 2010). Stating that the unjustified lack of recording should be “considered”—the unbracketed language of the Act—leaves the precise weight to be given Act violations undefined. This imprecision might suggest that a trial judge should be free to give the lack of recording *decisive* weight. Some jurisdictions may trust the trial court to make precisely just such decisions as among those commonly made in pretrial motions. For jurisdictions seeking to make it clear, however, that nonrecording should never alone be sufficient to

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.¹¹¹

As mentioned above, the most likely grounds for suppression are that the accused gave his statement involuntarily,¹¹² that it was unreliable,¹¹³ or that it violated *Miranda*.¹¹⁴ The Act emphasizes the first two grounds as most relevant and important, where the need for recording is at its highest,¹¹⁵ but it uses the word “including” to acknowledge that other federal and state constitutional, and in states which have specified additional statutory, grounds may become relevant for suppression in a case where a police officer fails to record an interrogation.¹¹⁶ Where this occurs, however, unjustified non-recording would still need to be “considered” in the pretrial motion but would not necessarily result in exclusion of the evidence. Even the possibility of non-recording’s being a consideration in suppression motions generally arises only when *Miranda* warnings would also be required (the existence of a “custodial interrogation” being a necessary trigger for the Act’s provisions),¹¹⁷ the offense is one covered by this Act (in most states, this is likely initially to be a relatively small subset of all crimes), and one of the Act’s extensive set of exceptions does not apply. That is likely to be the unusual case, albeit an important situation in which the exclusionary possibility should be contemplated.¹¹⁸

justify exclusion, bracketed language declares that the trial judge may consider exclusion as only “a factor” in the suppression balancing analysis.

¹¹¹ See *infra* text accompanying notes 149–166 (summarizing these approaches).

¹¹² See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 318 (1985) (comparing *Miranda* and involuntariness suppression grounds); *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (explaining scope of involuntariness as a ground for suppression). Both involuntariness and *Miranda* are constitutional grounds for suppression.

¹¹³ Unreliability alone is a statutory, not a federal constitutional, ground for suppression. See *infra* text accompanying notes 175–232.

¹¹⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966); *Oregon*, 470 U.S. at 318 (applying *Miranda*).

¹¹⁵ The drafting committee’s thought was that *Miranda* can be violated under circumstances in which a confession is both voluntary (because the Fifth Amendment privilege that underlay *Miranda* requires only “compulsion,” which is something less than “coercion” creating involuntariness) and reliable. See also TASLITZ, PARIS & HERBERT, *supra* note 47 at 708–12 (comparing compulsion with voluntariness).

¹¹⁶ See, e.g., 1 CRIM. PRAC. MANUAL § 27:32 (2010) (explaining the federal “McNabb/Mallory” rule, codified and modified at 18 U.S.C. § 3501, permitting suppression of confession evidence for unreasonable delay in preliminary arraignment of more than six hours under certain circumstances); Steven A. Tomeo, *Suppression of Evidence*, 21 CONN. PRAC. § 18:22 (2009) (discussing state “corpus delicti” rule as a ground for suppressing a confession).

¹¹⁷ UNIF. ELEC. RECORDATION OF CUSTODIAL INTERROGATIONS ACT §§ 2–3 (Unif. Law Comm’n, Draft 2010).

¹¹⁸ Indeed, as is discussed in detail *infra* text accompanying notes 126–152, at least seven states and the District of Columbia have adopted, by statute, court rule, or judicial decision, some version of the exclusionary rule for non-recording of the entire custodial interrogation process. *Stephan v. State*, 711 P.2d 1156, 1165 (Alaska 1985); *State v. Hajic*, 724 N.W. 2d 449, 456 (Iowa 2006) (court order); *Commonwealth v. Diaz*, 661 N.E. 2d 1326, 1328 (Mass. 1996) (ordering possible jury instruction if not recorded but no clear rule); *State v. Barnett*, 789 A.2d 629, 630 (N.H. 2002) (excluding confessions if not taped in full); IL. STAT. CH. 725 § 5/103–2.1 (2012); NEB. REV. STAT. § 29–4501 (2008). For a full list, see Gershel, *supra* note 4, at 74. These states are in widely disparate areas of the country: Alaska (the Northwest); Minnesota, Indiana, and Illinois (the Midwest); New Hampshire, New Jersey, and D.C. (the Northeast); North Carolina (the South); and, arguably, Montana. *Id.*

Moreover, although a per se rule of inadmissibility might have the greatest deterrent effect and be easily administrable,¹¹⁹ such a rule's inflexibility is also why it is the version of the exclusionary rule most likely to face resistance. Such resistance stems from the sense by some lawmakers that exclusion is a harsh remedy to be deployed only where truly needed. Alaska, Indiana, and Minnesota (in Minnesota, for substantial violations only) have adopted just such a simple, rigid rule, showing that its adoption is nevertheless not beyond political reach in at least some states that apparently rejected the characterization of exclusion as "unduly harsh."¹²⁰

It might be argued, however, that a statute, including this Act, may not "mandate" that anything be considered in making a constitutional decision because constitutions trump statutes.¹²¹ This argument fails for several reasons. First, the constitutional question whether a confession is "voluntary" is to be made based upon the "totality of the circumstances."¹²² Among the recording mandate's purposes is to give the courts a fuller picture of the circumstances relevant to a confession's voluntariness (by recording the events fully and as they actually unfolded) and a stronger appreciation of the significance for the voluntariness determination of the absence of that fuller picture.¹²³ That absence occurs where recording that should have taken place did not. Violation of the Act's recording mandate logically entails its consideration in the "totality of the circumstances" test of voluntariness. For similar reasons, violation of the Act's recording mandate should be relevant in determining "reliability."

Furthermore, even were a court to disagree, the Act can and should be understood as creating a *statutory* ground for suppression of a confession on grounds of involuntariness (if bracketed language is adopted, also on grounds of unreliability). This ground is co-terminus with the constitutional due process involuntariness doctrine, with the sole exception that violation of the Act's recording mandates must be considered in the voluntariness determination even if such consideration is not otherwise constitutionally required. Indeed, to avoid any confusion on this ground, the Act spells out involuntariness (and, for jurisdictions adopting bracketed language, unreliability) as a specifically identified ground for suppression.¹²⁴

¹¹⁹ The theory behind this assertion is that a per se rule makes suppression foreseeable, indeed guaranteed, for violation of the Act, thus discouraging police interested in obtaining convictions that stick from disobeying the Act's dictates in the first place. *See also* Steven D. Clymer, *Are Police Free to Disregard Miranda?*, 112 *YALE L.J.* 447, 451 (2002) (discussing the importance of foreseeing the likelihood of suppression as a justification for the exclusionary rule).

¹²⁰ *See Stephan*, 711 P.2d at 1156 (unexcused failure electronically to record the entire interrogation process where feasible at a place of detention results in exclusion under specified circumstances); *State v. Scales*, 518 N.W.2d 587 (Minn. 2004) (mandating suppression for "substantial" violations of a court-imposed rule, via its supervisory power, electronically to record custodial interrogations, though "substantiality" does require a case-by-case analysis); IND. R. OF EVID. 617 (unexcused failure to record entire interrogation process electronically requires suppression). On the other hand, in all three of these states it was the courts, whether via decision or rule, that brought about the change in the law. The political dynamic in state legislatures may prove different.

¹²¹ *See generally* Ron Villanova, *LEGAL METHODS: A GUIDE FOR PARALEGAL AND LAW STUDENTS* (1999).

¹²² *See* Peter Henning et al., *MASTERING CRIMINAL PROCEDURE* 230–33 (2010).

¹²³ *See supra* text accompanying notes 21–47.

¹²⁴ UNIF. ELEC. RECORDATION OF CUSTODIAL INTERROGATIONS ACT § 13(a) (Unif. Law Comm'n, Draft 2010).

2. A Comparison to Other Jurisdictions in Greater Detail

As argued above, violation of the Act's mandates should be relevant to any pretrial motion in the sense that the court is deprived of the best evidence of the facts, including subtleties of tone, voice, and expression. Moreover, the mere fact of such unjustified non-recording may be relevant in resolving credibility disputes. The Act does spell out this logic and its consequences by mandating that courts consider the Act's violation in the voluntariness and other relevant inquiries.¹²⁵ But doing so does not require any outcome concerning whether the confession in the particular case was indeed constitutional or not. That decision *remains the judge's in the individual case*. There is thus no conflict between the statute and the Constitution. Several jurisdictions have indeed seen no such conflict.¹²⁶

Alaska and Minnesota have adopted a simple, rigid rule of per se exclusion for violation of their recording mandates.¹²⁷ Washington, D.C. created a softer rule of presumed inadmissibility that can be rebutted by clear and convincing prosecution evidence that the statement was nevertheless voluntary.¹²⁸ Illinois also created a rule of presumed inadmissibility that can be rebutted but differs from the D.C. 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.¹²⁹ Montana seems to follow a variant of the Illinois rule. Thus the Montana statute declares that a judge "shall admit statements or evidence of statements that do not conform to . . . [the recording mandate] if, at a hearing, the state proves by a preponderance of the evidence that . . . the statements have been voluntarily made and are reliable" or that certain exceptions apply.¹³⁰

The Illinois and Montana rules in particular permit trial use of statements inexcusably obtained in violation of the recording mandate *if* the reliability concerns arising from the recording's absence are allayed by other evidence.¹³¹ Accordingly, these states accept the idea that a remedy for violation of recording requirements must aim at fact-finding accuracy, not only at deterrence.¹³² Because the prosecution has the opportunity to prove that its noncompliance has created no harm, exclusion will be applied less frequently under this approach than under a per se rule of inadmissibility and

¹²⁵ *See id.*

¹²⁶ *See infra* text accompanying notes 149–165.

¹²⁷ *See State v. Schroeder*, 560 N.W.2d 739, 740 (Minn. Ct. App. 1997) (un-recorded statements lead to suppression under specified circumstances); *Stephan*, 711 P.2d at 1156 (Alaska law requires exclusion when confessions un-recorded under certain noted circumstances.).

¹²⁸ D.C. CODE § 5-115.01(2001).

¹²⁹ *Supra* note 118.

¹³⁰ MONT. CODE ANN. § 46-4-409 (2009).

¹³¹ *Supra* note 118; MONT. CODE ANN. § 46-4-409.

¹³² On the importance of fact-finding accuracy relative to other values, see generally GEORGE THOMAS, *THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS* (2008) (surveying systemic flaws tilting the U.S. criminal justice system against adjudicative accuracy); MIRJAN DAMASKA, *EVIDENCE LAW ADRIFT* (1997) (comparing the U.S. evidentiary rules to Continental European ones and finding the former wanting); BRIAN FORST, *ERRORS OF JUSTICE: NATURE, SOURCES, AND REMEDY* (2003) (discussing the hallmarks and definition of systemic adjudicative accuracy).

will kick in primarily where there is substantial reason to worry that we are in danger of convicting the wrong man.

Other states have created still softer versions of the exclusionary rule. New Jersey, for example, provides that an unexcused failure to record is a *factor* for the court to consider in deciding whether to admit a confession.¹³³ 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.¹³⁴ Yet the uncertainty—the remaining *possibility* of exclusion in a particular case—still provides an incentive for police compliance.¹³⁵

On the other hand, if the confession *is* admitted, New Jersey then requires that a cautionary jury instruction be given if the defendant so requests.¹³⁶ Exclusion and jury instructions can thus be seen, as they are in New Jersey, as complementary rather than alternative remedies.¹³⁷ 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 noncompliance in deciding whether a statement was voluntary and reliable.¹³⁸ Montana likewise provides for a cautionary instruction if a motion to suppress a noncompliant, unrecorded statement is denied.¹³⁹

Although not yet adopted by any state, there is still another approach to the exclusionary rule: that proposed by the Constitution Project, which itself adopted a variant of an early proposal by the American Law Institute.¹⁴⁰ 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.¹⁴¹ The Project's Death Penalty Initiative recommended electronic recording of the entire custodial interrogation process in capital cases and also recommended an exclusionary remedy for violations of that mandate.¹⁴² Both the Constitution Project and ALI versions of an exclusionary remedy, however, relied on a detailed, complex balancing process to guide judges, a process

¹³³ State v. Cook, 179 N.J. 533, 547 (2004) (appointing a committee to suggest electronic recording rules under the court's supervisory power); N.J. R. C.R. R. 3:17(d) (2011).

¹³⁴ See *infra* note 155.

¹³⁵ See TASLITZ, PARIS, & HERBERT, *supra* note 47, at 583 (discussing the role of foreseeability in suppression).

¹³⁶ N.J. R. C.R. R. 3:17(e) (2011).

¹³⁷ This point is discussed in more depth, *infra* subpart IIIB.

¹³⁸ N.C. GEN. STAT. § 15A-211(f)(3) (2011).

¹³⁹ MONT. CODE ANN. § 46-4-410 (2011). Indeed, of the states that have enacted recording statutes with remedies, apparently only Wisconsin (arguably) and Nebraska (definitely) explicitly limit the remedy *solely* to a cautionary jury instruction or, in a bench trial in Wisconsin, permits the judge to consider the weight of the recording requirement violation in judging the worth of the confession. WIS. STAT. ANN. § 972.115(2)(a)-(b) (2010); NEB. REV. STAT. ANN. §29-4504 (2008). Maine, Maryland, and New Mexico are simply silent about remedies, which may or may not preclude the courts from crafting their own. MD. CRIM. PROC. § 2-402 (2008); N.M. STAT. ANN. § 29-1-16 (1978); ME. REV. STAT. ANN. tit. 25, § 2803-B (2011).

¹⁴⁰ See THE CONSTITUTION PROJECT, MANDATORY JUSTICE: THE DEATH PENALTY REVISITED 83 (2006); MODEL CODE OF PRE-ARRAIGNMENT PROC. §§ 4.09(3), 130.4, 150.3(2)-(3) (1975).

¹⁴¹ See *Safeguarding Liberty, Justice, and the Rule of Law: Who We Are*, THE CONSTITUTION PROJECT, www.constitutionproject.org/whoweare.php (last visited Aug. 19, 2011).

¹⁴² See THE CONSTITUTION PROJECT, *supra* note 140, at 83–84.

unnecessarily complex and therefore not adopted in the Act.¹⁴³ Instead, the Act, while sharing balancing of interests with the Constitution Project and ALI approaches to exclusion, trusts judges to be capable of making this sort of judgment, one with which they are well familiar in other areas, without the need for greater specificity or undue limitation on their fact-finding and balancing discretion.

3. The Act's Approach to Suppression Redux: Unreliability as a Ground for Pretrial Motions

i. The Remedy's Relative Novelty

This Act does not, importantly, limit the grounds of exclusion of the confession to the well-recognized one of involuntariness.¹⁴⁴ Instead, the Act also recognizes the confession's unreliability as a separate, stand-alone suppression basis. Such a reliance on unreliability alone creates a statutory basis for confession-suppression unheard of in federal constitutional law.¹⁴⁵

In doing so, this Act fuses aspects of the Illinois and New Jersey approaches. Illinois requires that the prosecutor prove by a preponderance of the evidence *both* that an unrecorded statement was voluntary *and* that it was reliable—an approach seemingly adopted by Montana as well.¹⁴⁶ Absent such proof, exclusion of the confession is mandated.¹⁴⁷ North Carolina similarly recognizes both involuntariness and unreliability as grounds for suppressing a confession.¹⁴⁸ The ULC Act, unlike that in Illinois, never mandates the exclusionary remedy but makes violation of the Act one factor in the admissibility decision.¹⁴⁹ In this respect, this Act's approach mirrors New Jersey's, which also makes the failure to record but one factor in the admissibility decision.¹⁵⁰ But, unlike New Jersey, but like Illinois, Montana, and North Carolina, the ULC 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*.¹⁵¹

¹⁴³ Compare *id.* with MODEL CODE OF PRE-ARRAIGNMENT PROC. (1975). I was the Reporter for the Constitution Project's Death Penalty Initiative at the time it endorsed a variant of the ALI model. The Initiative's thinking was that, despite the ALI proposal's complexity, the ALI's prestige would help to overcome political barriers to the legislation. To the contrary, however, at least in the view of the ULC drafting committee, the ALI proposal's complexity, and that of the Constitution Project's variant, was a major barrier to adoption that prestige alone could not overcome. The ULC's suppression remedy is thus far more simply stated than the Constitution Project's.

¹⁴⁴ See UNIF. ELEC. RECORDATION OF CUSTODIAL INTERROGATIONS ACT § 13(a) (Unif. Law Comm'n, Draft 2010); *infra* text accompanying notes 146-210.

¹⁴⁵ See *supra* note 144.

¹⁴⁶ 725 ILL. COMP. STAT. 5/103-2.1(f) (2005) ; MONT. CODE ANN. § 46-4-409 (2011); N.J. Ct. R. 3:17(b) (2011).

¹⁴⁷ See *supra* note 146.

¹⁴⁸ N.C. GEN. STAT. § 15A-211.

¹⁴⁹ Compare UERICI ACT § 13a with 725 ILL. COMP. STAT. 5/103-2.1.

¹⁵⁰ Compare UERICI ACT § 13a with N.J. Ct. R. 3:17.

¹⁵¹ Compare UERICI ACT with 725 ILL. COMP. STAT. 5/103-2.1; MONT. CODE ANN. § 46-4-409; N.J. Ct. R. 3:17; N.C. GEN. STAT. § 15A-211.

Accordingly, in many states this Act might create a new basis for potential exclusion of a confession. Because of the novelty of this approach in many states, further comment on the role of reliability in suppression motions is warranted. Relative novelty is also why the language of reliability in this section is bracketed.

ii. Justifying Unreliability as a Stand-Alone Ground for Suppression

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.¹⁵² A confession is “involuntary” only if coercive police activity has overborne the suspect’s will.¹⁵³ This subpart explores the relationship between the involuntariness test under current law—which relies on concern about a confession’s unreliability only when it results from police wrongdoing—and the sounder constitutional and policy argument that unreliability worries should be the central justification for the involuntariness test period—even when not traceable to improper police action.

A complex of values underlies the constitutional due process involuntariness rule as currently crafted.¹⁵⁴ As noted above, in the high court’s view, a confession is “involuntary” only if coercive police activity overbears the suspect’s will.¹⁵⁵ 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.¹⁵⁶ Yet the rule aims in part *to deter the state* from being the cause of such involuntariness, so the rule applies only when the state has placed undue pressure upon a suspect to confess.¹⁵⁷

The seminal case of *Colorado v. Connelly* exemplifies this principle.¹⁵⁸ There, 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.”¹⁵⁹

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. But that impression would be misleading. In other cases the

¹⁵² See TASLITZ, PARIS, & HERBERT, *supra* note 47, at 657–58, 692–94, 708–16.

¹⁵³ See *id.* at 659–60, 670–77.

¹⁵⁴ See TASLITZ, PARIS, & HERBERT, *supra* note 47, at 659–68.

¹⁵⁵ See *id.* at 657–59.

¹⁵⁶ See *id.* at 667.

¹⁵⁷ See *id.* at 658.

¹⁵⁸ 479 U.S. 157 (1986).

¹⁵⁹ *Id.* at 167 (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)).

Court and commentators have recognized that one important function of the voluntariness test is to reduce the chances of convicting the innocent.¹⁶⁰ 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.¹⁶¹ 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.¹⁶² Yet the Court recognized that a fundamental purpose of a criminal trial is to admit "*truthful* and probative evidence before state juries."¹⁶³ The Court additionally recognized that, even where coercive police activity is lacking,

this sort of inquiry . . . [may] be resolved by state laws governing the admission of evidence . . . A statement rendered by one in the condition of respondent might be proved to be quite *unreliable*, but this is a matter to be governed by the evidentiary laws of the forum¹⁶⁴

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.¹⁶⁵ 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."¹⁶⁶

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.¹⁶⁷ Indeed, Brennan was particularly concerned about false or unreliable confessions because of their "decisive

¹⁶⁰ See generally *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973); WILLIAM E. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 24:2 (2010); TASLITZ, PARIS, & HERBERT, *supra* note 47, at 660–62.

¹⁶¹ See, e.g., *Spano v. New York*, 360 U.S. 315, 320–21 (1959) (noting that excluding coerced confessions under the due process involuntariness doctrine satisfies the "deep-rooted feeling that the police must obey the law while enforcing the law" and "that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."); TASLITZ, PARIS, & HERBERT, *supra* note 47, at 658.

¹⁶² See TASLITZ, PARIS, & HERBERT, *supra* note 47, at 658.

¹⁶³ *Connelly*, 479 U.S. at 166 (quoting *Lego v. Twomey*, 404 U.S. 477, 488–89 (1972)) (emphasis added).

¹⁶⁴ *Id.* at 167 (emphasis added).

¹⁶⁵ See *id.* at 181 (Brennan, J., dissenting).

¹⁶⁶ *Id.* at 181 (quoting in part *Rogers v. Richmond*, 365 U.S. 534, 541 (1961)).

¹⁶⁷ *Id.* at 181 (quoting *Escobedo v. Illinois*, 378 U.S. 478, 488–89 (1964)) (emphasis added).

impact on the adversarial process.”¹⁶⁸ 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.’”¹⁶⁹ 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.”¹⁷⁰

In other areas of due process the Court has reaffirmed that police overreaching, not merely private or perfectly proper police conduct, is indeed a requirement for a due process violation.¹⁷¹ Nevertheless, it has also made clear that it is simultaneously still concerned with the reliability of fact-finding under the due process clauses.¹⁷² A particularly apt example is the Court’s due process analysis of eyewitness identifications, such as lineups or photo-spreads.¹⁷³ The Court will not suppress an identification resulting from a suggestive identification procedure unless that suggestion was unnecessarily created by the police.¹⁷⁴ 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.¹⁷⁵ Indeed, says the Court, reliability is the “linchpin” of the analysis.¹⁷⁶ 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.¹⁷⁷ The reason for this is that the reliability of the in-court identification then itself becomes suspect.¹⁷⁸

Custodial interrogations, by definition, involve state action.¹⁷⁹ Similarly, motions to suppress confessions resulting from such interrogations necessarily involve claims of

¹⁶⁸ *Id.* at 182.

¹⁶⁹ *Id.* (quoting E. CLEARY, MCCORMICK ON EVIDENCE 316 (2d ed. 1972)). Social science supports this conclusion. *See infra* subpart III.C (summarizing, in the context of discussing the admissibility of expert testimony on confessions, research showing the tremendous persuasive power to juries of even false confessions).

¹⁷⁰ *Connelly*, 479 U.S. at 182.

¹⁷¹ *See Connelly*, 479 U.S. 157 (noting that police overreaching is a component of a due process violation); *Perry v. New Hampshire*, 132 S. Ct. 716 (2012) (requiring “improper state conduct” as a prerequisite for a due process violation justifying suppression of an allegedly suggestive identification procedure).

¹⁷² *Goldberg v. Kelly*, 397 U.S. 254 (1970) (emphasizing that fact-finding needs to be reliable and open to avoid due process violations); TASLITZ, PARIS, & HERBERT, *supra* note 47, at 659–67 (explaining that, and why, reducing the risk of unreliable confessions is one of the goals of the due process doctrine requiring the voluntariness of police-obtained confessions).

¹⁷³ *See* TASLITZ, PARIS, & HERBERT, *supra* note 47, at 910–912.

¹⁷⁴ *See id.* at 910–11. The Court had the opportunity this term, however, to address the argument that unreliable eyewitness identifications should be suppressed at trial where there is suggestion, even absent state action. *See Perry*, 132 S. Ct. 716. The Court nearly unanimously rejected this argument, affirming the requirement that a confession’s unreliability result specifically from “improper state conduct.” *See id.* at 728.

¹⁷⁵ *See* TASLITZ, PARIS, & HERBERT, *supra* note 47, at 912.

¹⁷⁶ *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977).

¹⁷⁷ *Id.* at 109–14 (reaffirming this test); *Neil v. Biggers*, 409 U.S. 188, 198 (1972) (first articulating the test).

¹⁷⁸ *See Manson*, 432 U.S. at 109–14; *Biggers*, 409 U.S. at 198.

¹⁷⁹ *See Berkemer v. McCarty*, 468 U.S. 420, 421 (1984) (emphasizing that *Miranda* turns on a suspect being interrogated incommunicado in a “police-dominated” atmosphere); UNIF. ELEC. RECORDATION OF CUSTODIAL INTERROGATIONS ACT § 2(a) (Unif. Law Comm’n, Draft 2010) (defining “custodial

police overreaching.¹⁸⁰ 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.¹⁸¹ 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.”¹⁸² Moreover, the Court's due process jurisprudence is rarely muscular, generally setting a very low floor of reliability.¹⁸³ Accordingly, it is wise to craft other mechanisms for making suppression on the grounds of unreliability *alone* a basis for suppression.

interrogation” in a similar manner); *cf. Connelly*, 479 U.S. at 167 (noting due process clause does not govern confessions resulting from command hallucinations rather than state conduct). Remember that the Fifth Amendment privilege originally applied only to the federal government and was “incorporated” against the states by the Fourteenth Amendment's Due Process Clause. *See Chavez v. Martinez*, 538 U.S. 760 (2003) (analyzing the distinction between freestanding due process violations and those violations of the Fifth Amendment privilege incorporated against the states by the Fourteenth Amendment's Due Process Clause); TASLITZ, PARIS, & HERBERT, *supra* note 47, at 677–81 (synthesizing the many *Chavez* opinions). Although doctrinally freestanding due process and incorporated-by-due-process Bill of Rights claims are different, the former obviously must inform the latter for incorporation to make any sense. *Cf. generally* ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868* (2006) (articulating an extended defense of this general point as illustrated by the Fourth Amendment).

¹⁸⁰ *See Miranda v. Arizona*, 384 U.S. 436 (1966) (expressing its entire thrust as preventing police domination of the accused in ways that may constitute compulsion under the Fifth Amendment privilege against self-incrimination).

¹⁸¹ *See* TASLITZ, PARIS, & HERBERT, *supra* note 47, at 660–67.

¹⁸² *See Connelly*, 479 U.S. at 167 (confession resulting from hallucinations—thus arguably unreliable—not excluded under the due process clauses because not the result of state actors overbearing the defendant's will).

¹⁸³ *See* Jerold H. Israel, *Freestanding Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS L.J. 303, 421 (2001) (“Accordingly, free-standing due process should be construed ‘very narrowly’ based on the recognition that, ‘[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.’”) (quoting in part *Medina v. California*, 505 U.S. 437 (1992)). Even when freestanding due process does apply to criminal cases, the Court, especially as it articulated its analysis in *Medina*, takes a cramped view of interest-balancing, cramped in the sense of not giving reliability and other defendant interests much weight, as Professor Israel explains:

In the course of applying the traditional fundamental fairness standard as prescribed by *Medina*, a court, in its analysis of the impact of the challenged state procedure upon the structural prerequisites of fairness, is likely to consider many of the same factors as it would in applying [the civil due process balancing test of] *Mathews*. [*v. Eldredge*, 424 U.S. 319 (1976)]. However, it will do so from a perspective that prohibits only a serious undermining of the structural prerequisite rather than one that considers whether the state has struck a reasonable balance in failing to produce a procedure that would better implement that structural prerequisite. It will do so from a perspective which states that “a state procedure ‘does not run afoul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection’” to the defendant, and that the states are entitled to substantial deference in their judgments as to what is an appropriate balance between liberty and order in light of their “considerable expertise in matters of criminal procedure” and usual grounding of the “criminal process . . . in centuries of common-law tradition.” In this sense, the *Medina* Court does appear to eschew balancing and to utilize an inquiry that is “narrower.”

Id. at 423–24; *see also* Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479 (2006) (explaining at length the failures of the Court's due process and common law doctrines adequately to protect the reliability of confessions, a

One such mechanism is the inherent supervisory power of the courts.¹⁸⁴ A state court case from Massachusetts, *Commonwealth v. DiGiambattista*,¹⁸⁵ illustrates the point:

The issue, however, 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.¹⁸⁶

The Massachusetts court’s primary reason for taking this action was this: where there are “grounds for [doubting the] reliability of certain types of evidence that the jury might misconstrue as particularly reliable,” curative action is required.¹⁸⁷

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*.¹⁸⁸ 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. According to 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.”¹⁸⁹ “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.”¹⁹⁰ Due process, the court added, is not a “static” concept but “must change to keep pace with new technological developments.”¹⁹¹ 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 accurate 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

goal supposedly justifying those doctrines in the first place); Ruth Yacona, *Manson v. Braithwaite: The Supreme Court’s Misunderstanding of Eyewitness Identification*, 39 J. MARSHALL L. REV. 539 (2006) (analyzing the weakness of the Court’s due process test for excluding suggestive eyewitness identifications in protecting evidentiary reliability).

¹⁸⁴ See, e.g., *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 521–35 (Mass. 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 and rejecting claims that this approach violated the separation of powers.)

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 531–32.

¹⁸⁷ *Id.* at 533.

¹⁸⁸ 711 P.2d 1156, 1159–63 (Alaska 1985).

¹⁸⁹ *Id.* at 1159.

¹⁹⁰ *Id.* at 1159–60.

¹⁹¹ *Id.* at 1161.

rights, by providing an objective means for him to corroborate his testimony concerning the circumstances of the confession.¹⁹²

Commentators have also argued that Federal Rule of Evidence (FRE) 403 and its state law equivalents already authorize suppression of evidence that is unreliable, including interrogations.¹⁹³ The argument is straightforward. Rule 403 gives the trial judge discretion to exclude even relevant evidence if its probative value is substantially outweighed by a variety of countervailing concerns, including the dangers of unfair prejudice and misleading the jury.¹⁹⁴ Given the psychological data showing the powerful tendency of even false confessions to induce juries to convict,¹⁹⁵ argue these commentators, a confession obtained under circumstances having strong indicia of unreliability will mislead the jury.¹⁹⁶ Accordingly, the trial court has the discretion to exclude such evidence.

These same commentators also point out that some courts have embraced a reliability rule on a variety of grounds but under the rubric of “trustworthiness.”¹⁹⁷ Law professor and social psychologist Richard Leo made the point thus:

Several state courts and the federal district courts have chosen to adopt a . . . rule of corroboration, most often termed the “trustworthiness standard” In marked contrast to the corpus delecti rule [requiring merely proof independent of the confession that some crime indeed occurred], the trustworthiness standard requires corroboration of the confession itself Under the trustworthiness standard, before the state may introduce a confession it “must introduce substantial independent evidence which would tend to establish the trustworthiness of the [confession] In effect, the trial court judge acts as a gatekeeper and must determine, as a matter of law, that a confession is trustworthy before it can be admitted. In making the trustworthiness determination, the judge is to consider “the totality of the circumstances” Only after a confession is deemed trustworthy by a preponderance of the evidence may it be admitted into evidence.¹⁹⁸

Leo outlines a variety of factors courts should consider, based upon the empirical evidence, in making this trustworthiness or reliability determination, while also offering his own variant on the reliability test.¹⁹⁹ What matters here are not the details of any particular approach but rather the recognition that the unreliability of a confession—one bearing hallmarks raising a risk of the confession’s falsity, or lacking any evidence suggesting the alleviation of such a risk—should be an independent ground for

¹⁹² *Id.* at 1161 (emphasis added).

¹⁹³ See FED. R. EVID. 403; LEO, *supra* note 3, at 288.

¹⁹⁴ See FED. R. EVID. 403.

¹⁹⁵ See *infra* text accompanying notes 232–233.

¹⁹⁶ See LEO, *supra* note 4, at 288.

¹⁹⁷ See *id.* at 281–85.

¹⁹⁸ See *id.* at 284.

¹⁹⁹ See *id.* at 283–91.

suppression from that of involuntariness. Several states, and a growing number of proposals, would indeed more broadly embrace the reliability standard as one governing a wide array of evidence raising the risk of wrongful convictions, including, for example, “snitch” testimony and that of questionable experts.²⁰⁰ In the interrogation context, Leo and others have recognized, furthermore, that electronic recording is essential to sound fact-finding concerning a confession’s reliability.²⁰¹ The ULC Act recognizes that violation of the Act’s recording mandates should be one factor in a motion to suppress a confession as unreliable but rejects the arguably draconian solution of per se exclusion under such circumstances.²⁰²

A Uniform Act promises sounder and more uniform approaches to the remedies question. 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.²⁰³ Reliance on state equivalents to FRE 403 as grounds for exclusion based upon unreliability is uncertain, given the dearth of court decisions on the point.²⁰⁴ Some courts articulate fuzzy grounds for their approach to reliability questions, and some approaches are too inflexible and harsh.²⁰⁵ Legislative action, by contrast, brings a democratic imprimatur and the significant investigative resources of the legislature to bear on designing appropriate remedies.²⁰⁶

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.²⁰⁷ 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.²⁰⁸ One of its primary goals

²⁰⁰ See Alexandra Natapoff, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 191, 194–95 (2009); STEVEN FRIEDLAND, PAUL BERGMAN & ANDREW E. TASLITZ, EVIDENCE LAW AND PRACTICE 376–79 (4th ed. 2010) (discussing the “reliability” test for admitting what is claimed to be questionable expert testimony).

²⁰¹ See LEO, *supra* note 4, at 291–305.

²⁰² See UNIF. ELEC. RECORDATION OF CUSTODIAL INTERROGATIONS ACT § 13(a) (Unif. Law Comm’n, Draft 2010).

²⁰³ See Thomas P. Sullivan, Andrew W. Vail & Howard W. Anderson, III, *The Case for Recording Police Interrogations*, LITIGATION, Spring 2008, at 30, 37 (noting that less than a handful of state courts have interpreted their state due process clauses or their inherent supervisory power to require electronic recording of custodial interrogations).

²⁰⁴ The New Jersey Supreme Court in a pathbreaking recent decision may, however, have given new life to this approach in innocence cases, finding that the state’s equivalent to Federal Rule of Evidence 403 could justify sometimes excluding unreliable eyewitness identifications where the state was not the source of suggestions. See *State v. Chen*, 208 N.J. 307 (2011) (creating an exclusionary rule for unreliable eyewitness identifications involving privately induced suggestion under New Jersey’s equivalent to Federal Rule of Evidence 403).

²⁰⁵ See, e.g., *Stephan v. State*, 711 P.2d 1156, 1162 (Alaska 1985); *State v. Scales*, 518 N.W.2d 587, 591 (Minn. 1994); *supra* text accompanying notes 149–150 (discussing per se rules of exclusion).

²⁰⁶ See Richard A. Posner, *Pragmatic Liberalism Versus Classical Liberalism*, 71 U. CHI. L. REV. 659, 667 (2004) (praising the importance of the democratic imprimatur achieved by legal change through legislation); Gavin Drewry, *Law-Making Systems—How To Compare*, 29 STATUTE L. REV. 100, 105 (2008) (conceding that formal legislative action is usually necessary to giving law democracy’s imprimatur).

²⁰⁷ See Sullivan & Vail, *supra* note 59.

²⁰⁸ See *supra* text accompanying notes 21–64.

is to prevent conviction of the innocent and to promote conviction of the guilty.²⁰⁹ 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.²¹⁰

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 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.

B. Jury Instructions and Their Relative Efficacy

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

The Act provides a second remedy for its violation: giving the jury cautionary instructions. The Act does not itself mandate, however, any particular cautionary language. In this subpart, I discuss some of the important attributes which should make their way into any jury instruction on violations of a recording statute.

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.²¹¹ 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.²¹² 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.²¹³ New Jersey has followed just such an approach, declaring in its recording rule that, “in the absence of electronic recordation required . . . [under this Rule], the court shall, upon request of the defendant, provide the jury with a cautionary instruction.”²¹⁴ Pursuant to that mandate, the New Jersey judiciary has prepared fairly lengthy model jury charges as a remedy for violation of the statute.²¹⁵ Instructions are already an available remedy in several other jurisdictions, including Montana, Nebraska, Wisconsin, and Massachusetts,²¹⁶ highlighting the urgency of getting the instructions right.

Sullivan and Vail’s proposed instruction would caution jurors that the officers in the case before them inexcusably failed to comply with a recording requirement—one

²⁰⁹ See *supra* text accompanying notes 21–64.

²¹⁰ See Richard Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 U. DENV. L. REV. 979, 1120–22 (1997); Mark A. Godsey, *Reliability Lost, False Confessions Discovered*, 10 CHAP. L. REV. 623 (2007).

²¹¹ See Sullivan & Vail, *supra* note 59.

²¹² See *id.* at 218–19.

²¹³ See *id.*

²¹⁴ N.J. Ct. R. 3:17 (2011).

²¹⁵ *Id.*

²¹⁶ MONT. CODE ANN. § 46-4-409 (2011); N.J. Ct. R. 3:17; see Sullivan & Vail, *supra* note 59, at 218–19.

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.”²¹⁷ 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.”²¹⁸

Sullivan and Vail at least implicitly argue that many jurisdictions might give cursory cautionary instructions without a fairly detailed model.²¹⁹ Specifically, many courts might give standard instructions about treating a confession with caution without adequately 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.²²⁰ There is also an argument to be made that more detailed instructions explaining precisely why caution is needed may more effectively improve the jury’s ability fairly to assess the evidence given the powerful impact that confessions have on juries.²²¹ Given such an impact, there may be a risk that brief jury instructions will be ignored or have little effect, particularly given the often weak or perverse effects of jury instructions in many contexts (see the more detailed discussion of this last point below).²²² That reason is likely why Sullivan and Vail counsel providing a fairly lengthy standard instruction in the recording statute itself. Sullivan has been more explicit on this point in drafting a model federal statute that includes standard jury instructions on the ill consequences of the unexcused failure to record.²²³

Here is a variant, with changes I have made to meet the needs of the ULC Act, of their complete instruction, which might serve as the basis for a model instruction:

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

²¹⁷ Sullivan & Vail, *supra* note 59, at 221.

²¹⁸ *Id.*

²¹⁹ Compare Thomas P. Sullivan, *Recording Federal Custodial Interviews*, 45 AM. CRIM. L. REV. 1297, 1319 (2008) (suggesting more detailed instructions than previously used by some federal courts), with Sullivan & Vail, *supra* note 59, at 217–26 (suggesting different instructions than are used in many states).

²²⁰ See Sullivan, *supra* note 219, at 1319; Sullivan & Vail, *supra* note 59, at 218–21, 225 (proposed specific statutorily mandated instructions rather than leaving it to judicial discretion).

²²¹ See Richard A. Leo & Steven Z. Drizin, *The Three Errors: Pathways to Wrongful Conviction*, in POLICE INTERROGATIONS AND FALSE CONFESSIONS 27 (G. Daniel Lassiter & Christian A. Meissner eds., 2010) (“People find detailed, vivid, and plausible confessions to be persuasive evidence of guilt, even when they turn out to be false.”).

²²² See *infra* subpart III.B.2.

²²³ Sullivan, *supra* note 219, at 1342.

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

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

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

Accordingly, as you go about determining what occurred during the interview, you should give special attention to whether you are satisfied that 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. 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.²²⁴

These proposed model instructions combine elements of Sullivan's proposed federal instructions and of his later-proposed and similar state-level instructions,²²⁵ with modifications made to adjust the instructions to a uniform act, like that of the ULC, recommended for state level adoption.

The length of this sample instruction is unusual in comparison to many sorts of common instructions, and some observers may fear that a lengthy instruction will lead jurors to give *undue* weight to the failure to record by over-emphasizing it.²²⁶ Alternatively, critics may worry that a lengthy instruction may backfire, either confusing jurors or further impressing in their mind the fact that a confession was made rather than

²²⁴ See Sullivan & Vail, *supra* note 59, at 225–26 (one source that was adapted to create the above instruction); Sullivan, *supra* note 219, at 1342–44 (2008) (proposing an analogous instruction for federal court).

²²⁵ See Sullivan & Vail, *supra* note 59; Sullivan, *supra* note 219.

²²⁶ This was, at least, a fear expressed by some members of the ULC drafting committee.

that it was inexcusably unrecorded, (if there were a recognized excuse, no jury instruction would be given).²²⁷

The Act, in subsection 13(b), leaves trial judges ample discretion in crafting instructions meeting the needs of each individual case.²²⁸ Consequently, the Act mandates only that remedial instructions be given, leaving the details and length of those instructions to the trial court.²²⁹ Nevertheless, the sample instructions provided here may help to inform trial judges' decisions on this question.

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

It is important to explain why such instructions will not suffice as a sole remedy. Notably, there is no empirical data on whether the availability of jury instructions will be an adequate deterrent to violations of recording mandates.²³⁰ Furthermore, jury instructions will also be unavailable in bench trials. More importantly, however, there is ample reason to question whether jury instructions alone will improve jurors' accuracy in assessing the weight to give confessions obtained in violation of recording requirements sufficiently to compensate for the absence of a complete recording. The ULC drafting committee knew of no completed studies specifically examining the effect of jury instructions concerning the failure to electronically record the entire interrogation process. (Such studies are, however, under way).²³¹ Moreover, ample studies show that juries routinely give confessions enormous weight, even under circumstances where there is substantial reason to be concerned about the confessions' accuracy.²³²

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

²²⁷ Cf. BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* 263 (1995) (concluding that improperly crafted instructions used by some courts actually decreased the jury's ability properly to assess the trustworthiness of suggestive eyewitness identifications).

²²⁸ See UNIF. ELEC. RECORDATION OF CUSTODIAL INTERROGATIONS ACT § 13(b) (Unif. Law Comm'n, Draft 2010).

²²⁹ See *id.*

²³⁰ Jury instruction research tends to focus on the impact of the instructions on jurors or on their ability to understand the instructions, not on the deterrent effect on police, prosecutors, or others of fearing a cautionary instruction. See Memorandum from Andrew E. Taslitz to Drafting Comm. on Elec. Recordation of Custodial Interrogations, Social Science Memorandum on the Impact of Cautionary Jury Instructions Concerning the Unexcused Failure to Record the Entire Custodial Interrogation Process (Oct. 8, 2008) available at www.law.upenn.edu/bll/archives/ulc/erci/ss_memo.pdf (hereinafter Taslitz, Jury Instruction Memorandum) (summarizing research).

²³¹ Social scientists Neil Vidmar, one of the leading experts on juries, and Richard A. Leo, perhaps the premier expert on interrogations research, and I are currently working on just such an empirical project.

²³² See Leo & Drizin, *supra* note 221, at 25 (“Once a suspect has confessed, the formal presumption of innocence is quickly transformed into an informal presumption of guilt that overrides their analysis of exculpatory evidence”; furthermore noting that juries, upon hearing evidence that the defendant confessed, “tend to selectively ignore and discount evidence of innocence.”); Lassiter & Geers, *supra* note 50, at 198–200 (summarizing the research showing that various forms of cautionary jury instructions concerning the risk of a confession's being involuntary or inaccurate have little impact on the high likelihood of guilty verdicts, concluding that “these studies unequivocally demonstrate that people do not necessarily evaluate and use confession evidence in the ways prescribed by law.”).

camera angles are used, that is, angles not focusing solely on the suspect.²³³ Jury instructions alone are thus unlikely to improve jurors' accuracy where they are denied recordings of the entire interrogation process. Moreover, where there is no excuse for the police failure to record, there seems little justification for ignoring this risk to the innocent.

Ample social science studies concerning wrongful convictions in other areas (albeit analogous ones) than custodial interrogations also support the conclusion that jury instructions will do too little to improve jurors' ability accurately to assess credibility and correctly to determine whether a confession was true or voluntary.²³⁴ The effect of instructions on jurors varies with the subject matter of the instruction, and some can be modestly effective.²³⁵ Yet, overall, instructions are frequently either ineffective in changing jurors' reasoning or have unintended effects.²³⁶ 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.²³⁷ This similar potential risk in the area of false confessions is indeed no minor matter, for innocence concerns were among the primary forces motivating the movement for electronic recording in the first place.²³⁸ 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. Furthermore, cautionary instructions are a modest

²³³ See Leo & Drizin, *supra* note 221, at 25 (“[F]alse confessors whose cases are not dismissed pretrial will be convicted (by plea bargain or jury trial) 78% to 85% of the time, even though they are completely innocent.”); G. Daniel Lassiter, Lezlee J. Ware, Matthew J. Goldberg & Jennifer J. Ratcliff, *Videotaping Custodial Interrogations: Toward a Scientifically Based Policy*, in POLICE INTERROGATIONS AND FALSE CONFESSIONS, 143–57 (G. Daniel Lassiter & Christian A. Meissner eds., 2010) (collecting research and concluding that jurors are best at differentiating true from false confessions when the camera focuses solely on the interrogator, second best when it focuses equally on the interrogator and the suspect, but suspect-focus camera angles alone “appear[] to actually diminish the capability of decision makers to arrive at objectively correct assessments.”).

²³⁴ The social science supporting the arguments made in this paragraph is concisely summarized at Taslitz, Jury Instruction Memorandum, *supra* note 230.

²³⁵ See *id.*

²³⁶ See *id.*

²³⁷ See *id.* at 6–7.

²³⁸ See *supra* text accompanying notes 21–34.; *False Confessions*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/False-Confessions.php> (last visited August 28, 2011) (collecting cases of innocent persons wrongly sentenced to death or life based in part upon a false confession); GARRETT, *supra* note 19, at 14–44 (analyzing these cases). These errors are hard to correct because, given the powerful impact of confessions on juries and others (see *supra* text accompanying notes 232–233) it is unlikely that the system will accept having convicted the wrong man absent DNA evidence proving his innocence. See Orenstein, *supra* note 69 (discussing the psychological forces that make it hard for police and prosecutors trying to do the right thing to admit that they have made mistakes resulting in conviction of the innocent or that changing their procedures can prevent future error). Critics of the exclusionary rule, including those on the Court, have indeed focused their ire on the rule's application to Fourth Amendment violations while generally embracing the rule's wisdom where the reliability of the fact-finding process is at stake. See Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: The Sluggish Life of Political Factfinding*, 94 GEO. L.J. 1589 (2006).

and traditional judicial remedy. A court may conclude that, though suppression is not justified, some remedy is needed to reduce the risk of error—of convicting an innocent man—given the absence of the best evidence of the confession’s voluntariness and reliability, namely, the absence of electronic recording. The availability of jury instructions would allay concerns that suppression may prove to be too “draconian” because suppression will not be the only remedial option available to the trial judge. But the limitations of cautionary instructions counsel against relying on them too heavily as the sole judicial remedy.²³⁹

C. Expert Testimony

One novel remedy for violation of recording requirements that is not included in the Act 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 videotaping.²⁴⁰ Although a substantial minority of the Act’s drafting committee’s members supported including this remedy in the Act, a majority did not. Yet, in addition to promoting more reliable fact-finding, the expert testimony provision adds deterrent value because police and prosecutors will fear that the expert testimony will make jurors more skeptical than they otherwise would be about the weight of the unrecorded confession. The systemic goal, of course, is that jurors be no more or less skeptical than the evidence warrants, but

²³⁹ See *supra* text accompanying notes 230–238. Analogous data suggests that jury instructions’ impact can be weak or perverse, at least if not given in conjunction with other remedies, such as expert testimony alerting jurors to the reliability problems with certain evidence and to jurors’ own reasoning problems that may interfere with their ability to give evidence its appropriate weight. Cf. ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* 131–33 (1999) (defending the use of such experts concerning rape victim behavior and jury reasoning processes in rape cases); Jennifer Devenport, Christopher D. Kimbrough & Brian L. Cutler, *Effectiveness of Traditional Safeguards Against Erroneous Conviction Arising from Mistaken Eyewitness Identification*, in *EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION* 61–64 (Brian L. Cutler ed., 2009) (concluding that jury instructions currently relied upon by the courts concerning eyewitness identification accuracy “either have no effect or enhance juror skepticism rather than juror sensitization to eyewitnessing and identification conditions,” leading the authors to suggest that “the courts may benefit from a set of cautionary instructions that more closely resemble expert psychological testimony,” though the authors concede that expert testimony in the eyewitness area might, in the view of some commentators, itself raise different problems). The case for the admissibility of expert testimony in the area of custodial interrogations is even stronger, however, than the case for using social science experts in these analogous areas. See *infra* note 240–255. 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. See GARRETT, *supra* note 19, at 14–45 (giving examples of extraordinarily unreliable confessions convincing juries to convict men who were later proved innocent). *But cf.* David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, (forthcoming 2012) (arguing that jury instructions need not be perfect to be useful in certain circumstances).

²⁴⁰ See LEO, *supra* note 3, at 314–16 (arguing that a “substantial and widely accepted body of scientific research” supports using experts on the factors affecting confession accuracy at trial and that such social scientist testimony is needed because traditional safeguards, including cautionary jury instructions, “are not sufficient to safeguard individuals against the likelihood of wrongful convictions based on unreliable confession evidence”); Solomon M. Fulero, *Tales from the Front Expert Testimony and the Psychology of Interrogations and Confessions Revisited*, in *POLICE INTERROGATIONS AND FALSE CONFESSIONS* 211–22 (G. Daniel Lassiter & Christian A. Meissner eds., 2010) (arguing that such expert testimony is scientifically valid and reliable, useful to juries, and admissible under existing evidence rules governing experts).

trial adversaries fear contrary outcomes and are thus motivated to avoid the risk of such outcomes in the first place. The value of this remedy has not been studied empirically. There is growing recognition, however, of the need for expert testimony whenever the risk of wrongful convictions looms.²⁴¹ Indeed 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.²⁴² Empirical research in the area of eyewitness identifications reflects positively on the usefulness of expert testimony for recording evidence as well. 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.²⁴³

Moreover, critics' fears that such testimony would unduly increase acquittals of the guilty have proven unwarranted.²⁴⁴ 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.²⁴⁵

²⁴¹ See LEO, *supra* note 3, at 314–16 (recommending use of such expert testimony where there is a risk of a false or involuntary confession); Roy S. Malpass et al., *The Need for Expert Psychological Testimony on Eyewitness Identification*, in EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 3 (Brian L. Cutler ed., 2009) (arguing for the importance of expert testimony on eyewitness identification to avoid wrongful convictions).

²⁴² See AM. BAR ASS'N, *supra* note 13, at 41–42.

²⁴³ See CUTLER & PENROD, *supra* note 227, at 239–40 (summarizing the research).

²⁴⁴ See NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 195 (2007) (“Some judges have objected to psychologist experts on the ground that they have too much influence on the jurors, causing them to undervalue, as opposed to overvalue, the eyewitness); Neil Vidmar & Regina Schuller, *Juries and Expert Evidence: Social Framework Testimony*, 52 LAW & CONTEMP. PROBS. 133 (1989) (providing an extended response to the claim that juries will overvalue psychological background testimony); Michael R. Lieppe & Donna Eisenstadt, *The Influence of Eyewitness Expert Testimony on Jurors' Beliefs and Judgments*, in EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 188–89 (Brian L. Cutler ed., 2009) (arguing that experimental data shows that, under certain conditions, eyewitness experts can appropriately increase juror skepticism about eyewitness identification evidence but do not increase skepticism more than the data allows).

²⁴⁵ See VIDMAR & HANS, *supra* note 244.

The consistency of the eyewitness research with other research on experts suggests that similar results might obtain with experts on interrogations.²⁴⁶ Because jury instructions alone are likely do too little to help a jury evaluate a confession's voluntariness or accuracy where there is no recording of the interrogation process, expert testimony suggests itself as an important supplementary remedy.²⁴⁷

The ULC drafting committee originally saw the wisdom of such an approach. A draft section of the Act included a rule urging the admissibility of expert testimony in appropriate cases as a remedy for recording violations where such testimony had not otherwise been admitted.²⁴⁸ The testimony would still need at least to be consistent with supporting scientific data, that is, with state expert evidence rules analogous to those in FRE 702 through 706.²⁴⁹ Moreover, the "appropriateness" decision need not even be considered unless "the defendant first offers evidence sufficient to permit a finding by a preponderance of the evidence of facts relevant to the weight of the statement the full significance of which may not be readily apparent to a layperson."²⁵⁰ Furthermore, the Act provided guidance to the trial court in making its decision about whether a case is an "appropriate" one for admitting expert testimony by listing a set of common but non-exclusive circumstances that the empirical research suggests may affect a confession's reliability, a point that might not be readily apparent to layperson jurors.²⁵¹ Such a listing of illustrative but not exclusive situations or factors to consider in applying an evidentiary standard is common, most familiarly in FRE 404(b).²⁵² The factors listed to guide the appropriateness decision in the proposed section of the Act included these:

the vulnerability to suggestion of the individual who made the statement; the individual's youth, low intelligence, poor memory, or mental retardation; use by a law enforcement officer of sleep deprivation, fatigue, or drug or alcohol withdrawal as an interrogation technique; the failure of the statement to lead to the discovery of evidence previously unknown to a law enforcement agency or to include unusual elements of a crime that

²⁴⁶ See, e.g., Vidmar & Schuller, *supra* note 244 (arguing for the admissibility generally, on a wide range of issues, of "social framework" expert evidence—evidence about the general background psychological principles relevant to a jurors' task).

²⁴⁷ 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. 1 (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 3, 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.").

²⁴⁸ See UNIF. ELEC. RECORDATION OF CUSTODIAL INTERROGATIONS ACT § 13(c) (Unif. Law Comm'n, Draft July 1, 2008).

²⁴⁹ The courts of a variety of jurisdictions are divided on the *Frye/Daubert* question. See Kyle C. Reeves, *Prosecution Function: False Confessions and Expert Testimony*, in THE STATE OF CRIMINAL JUSTICE, 123, 123–29 (Am. Bar Ass'n 2009).

²⁵⁰ See UERICI ACT § 13(c) (2008).

²⁵¹ See *id.*

²⁵² See FED. R. EVID. 404(b).

have not been made public previously or details of the crime not easily guessed and not made public previously; inconsistency between the statement and the facts of the crime; whether an officer conducting the interrogation educated the individual about the facts of the crime rather than eliciting them or suggested to the individual that the individual had no choice except to confess; promises of leniency; and the absence of corroboration of the statement by objective evidence.²⁵³

This approach did not mandate admissibility of expert testimony as a remedy in every case and put the initial burden of demonstrating the potential value of such testimony on the defendant. Even once that demonstration was made, however, the trial court would have been required to determine that the case was an appropriate one for expert testimony. The admissibility of such testimony would have been an individualized determination but with substantial guidance given trial courts concerning how to make that determination. Supporters endorsed the expert testimony provision because some courts have expressed undue reluctance to admit such testimony.²⁵⁴ To promote fairness and accuracy, the draft version of the Act also expressly provided that the prosecution may offer its own expert evidence in rebuttal.²⁵⁵

Unfortunately, in my view, the drafting committee ultimately abandoned this provision after a first reading of the Act to the entire ULC. Members of the judiciary particularly opposed the provision as encroaching on their necessary exercise of judicial discretion in evidentiary matters. It is unclear how providing guidance to courts and urging them to be more receptive to a category of expert testimony than they have been in the past—testimony needed by jurors and supported by sound science yet inexplicably resisted²⁵⁶—acts as an undue limitation on judicial discretion. Nevertheless, judicial opposition was intense. For that reason, dropping the provision was the right thing to do to create an enactable statute. As a policy matter, however, it might have been a mistake.

IV. RULEMAKING

A. *Monitoring and Guiding Police Performance*

1. The Need for Rules Designed to Implement the Act

The Act authorizes various bodies (jurisdictions may choose to which of these bodies responsibility should be assigned) to make internal law enforcement rules to

²⁵³ See UERICI ACT § 13(c) (2008). These factors are those articulated by leading social science authors in the field. See, e.g., LEO, *supra* note 3, at 216–35, 253–54, 263–66, 286–91.

²⁵⁴ See GARRETT, *supra* note 19, at 40 (“However, judges often deny indigent defendants the funds to hire such [interrogation] experts or they refuse to allow such testimony). *But see* LEO, *supra* note 3, at 314 (It was argued that looking at cases without written opinions reveals frequent judicial willingness to admit such testimony, a very different conclusion than that reached by looking only at reported cases. Supporters of an expert testimony remedy in the Act argued that such testimony is especially necessary where no electronic recording of the entire custodial interrogation process was made because the jury is then especially handicapped in identifying flaws in the process).

²⁵⁵ See UERICI ACT § 13(c) (2008).

²⁵⁶ See *id.*

accomplish the Act's mandate.²⁵⁷ Building into a statute some means of monitoring police performance is highly desirable. Ample empirical literature demonstrates that transparency and accountability improve police performance.²⁵⁸ 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.²⁵⁹ 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.²⁶⁰ Regulations also provide clear guidance to officers charged with implementing the provisions of this Act, anticipating potentially problematic situations, reducing transition costs, and improving police efficacy and efficiency.²⁶¹ It is for similar reasons that subsection 14(a) requires adoption and enforcement of rules designed to implement this Act.²⁶²

The Washington, D.C. statute, which allows police to adopt an implementing general order,²⁶³ and the general order adopted pursuant to it, provide an outstanding example of what well-designed rules should be.²⁶⁴ The D.C. order, though more detailed than a model statute, 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;

²⁵⁷ See *id.* at § 15.

²⁵⁸ See generally DAVID A. HARRIS, *GOOD COPS: THE CASE FOR PREVENTATIVE POLICING* (2005); Taslitz, *supra* note 51.

²⁵⁹ Cf. Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO J. PUB. L., POL'Y, & ETHICS 271 (2006) (explaining the importance of internal/external review processes, albeit in another context).

²⁶⁰ See Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 LAW & CONTEMP. PROBS 221, 244–48 (2003).

²⁶¹ See HARRIS, *supra* note 258; Samuel L. Walker, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950–1990* 18–23, 30–40 (1993); Samuel L. Walker, *THE NEW WORLD OF POLICE ACCOUNTABILITY* (2005).

²⁶² UNIF. ELEC. RECORDATION OF CUSTODIAL INTERROGATIONS ACT § 14(a) (Unif. Law Comm'n, Draft 2010).

²⁶³ D.C. CODE § 5-116.02 (2001).

²⁶⁴ The D.C. general order requires 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. See General Order from D.C. Metro. Police, *Electronic Recording of Custodial Interrogations* (effective Feb. 2, 2006), available at https://go.mpdonline.com/GO/GO_304_16.pdf. 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. See *id.* 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. *Id.*

2. clear, explicit 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.²⁶⁵

More generally, D.C.'s approach suggests a statutory mandate for police to draft detailed internal regulations for implementing general statutory requirements.²⁶⁶

Section 14 of the ULC Act accordingly outlines the minimum important subjects to be included in police regulations, but leaves the details to other entities.²⁶⁷ The Act offers states three bracketed options concerning who should draft those details: “[e]ach law enforcement agency in [the] state”; an “appropriate state authority” to be identified by name in the state’s version of this Act; or the “state agency charged with monitoring law enforcement’s compliance with this Act.”²⁶⁸ There are scores of existing model regulations from police departments already mandated to, or voluntarily choosing to, record upon which drafting entities may draw for models.²⁶⁹

Some states, such as Maine, have already instituted much more detailed approaches than those which the ULC Act would require. Maine’s example may be useful in generating ideas about what details and mechanisms for creating and implementing regulations a particular state might choose to follow. Maine’s statute *requires* all law enforcement agencies to adopt written policies concerning electronic recording procedures and for the preservation of investigative notes and records for all serious crimes.²⁷⁰ The statute also requires this same Board of the Trustees of the Maine Criminal Justice Academy of the State Department of Public Safety, by a specified date, to establish minimum standards for each law enforcement policy.²⁷¹ The chief administrative officer for each law enforcement agency must, likewise, certify to the Board that the agency has adopted written policies consistent with the Board’s standards

²⁶⁵ See *id.*; see also SULLIVAN, *supra* note 10 (containing 2006 version of Washington, D.C. regulations on electronically recording custodial interrogations, regulations already containing the core elements of a sound administrative system as summarized here).

²⁶⁶ See D.C. CODE § 5-116.02 (2001).

²⁶⁷ See UNIF. ELEC. RECORDATION OF CUSTODIAL INTERROGATIONS ACT § 14 (Unif. Law Comm’n, Draft 2010).

²⁶⁸ See *id.* at § 15(a).

²⁶⁹ See SULLIVAN, *supra* note 10.

²⁷⁰ ME. REV. STAT. ANN. tit. 25, § 2803-B (2012). Furthermore, the chief administrative officer of each agency must certify to the Board that attempts were made to obtain public comment during the formulation of these policies. *Id.*

²⁷¹ *Id.*

and later certify that the agency has provided orientation and training for its members concerning these policies.²⁷² The Board must also review the minimum standards annually to determine whether changes are necessary; they identify needs by critiquing actual events or reviewing new enforcement practices demonstrated to reduce crime, increase officer safety, or increase public safety.²⁷³ The chief administrative officer of a municipal, county, or state law enforcement agency must further certify to the Board that the agency has adopted a written policy regarding procedures for dealing with requests for freedom of access to recordings of interrogation or to the various documents and data that the statute requires be created or gathered; this same officer must designate a person trained to respond to such requests. This system must help to balance privacy concerns of interviewees facing potential trials with the need for public access and evaluation.²⁷⁴

Maine's Board, pursuant to this statute, drafted a requirement of a written policy, including at least certain minimum subject matters.²⁷⁵ 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.²⁷⁶

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.²⁷⁷ That model policy included a statement apparently

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ Me. Criminal Justice Acad., Bd. of Trustees Minimum Standards, at 20–21 (Jan. 13, 2012), *available at* www.maine.gov/dps/mcja/links/documents/MandatoryMinimumStandardsasof1-13-2012.doc (outlining the Academy's policy on "Recording of Law Enforcement Interviews of Suspects in Serious Crimes and the Preservation of Investigative Notes and Records in Such Cases").

²⁷⁶ *Id.*

²⁷⁷ *See* General Order from Me. Chiefs of Police Ass'n, Recording of Suspects in Serious Crimes (Feb. 11, 2005), *available at* <http://www.ccfaj.org/documents/reports/false/federal/MaineChiefsPolicy.pdf> (stating that the policy does not create a higher legal standard of care than would otherwise be imposed by preexisting law and that administrative remedies are the only ones available for the policy's violation). The

seeking to reject any civil tort claims arising from the policy, the policy declaring that it provides the basis only for administrative sanctions—not court imposed ones—by the individual agency or the Board.²⁷⁸

2. Delegation of Rulemaking Power Concerns: A Brief Note

Many state courts will invalidate statutes that delegate rule-making power without “adequate” guidance to regulatory agencies.²⁷⁹ But, it is unlikely that this provision will prove troublesome in this regard. Illinois’ requirements are representative of those in many states.²⁸⁰ 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.²⁸¹ 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.²⁸²

wisdom of limiting civil remedies under the Act is discussed later. *See also infra* text accompanying note 310.

²⁷⁸ *See* General Order, *supra* note 277, at 2-23A-6.

²⁷⁹ Norman J. Singer & J.D. Shambie Singer, *Legislative Power, The Delegation of Powers*, in 1 SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION 137, at 192–205 (2008) (providing a fifty-state survey of state-level delegation rules). The nondelegation (sometimes called the “delegation”) doctrine is rooted in separation of powers principles, as Professor Ira Robbins explains:

Although the Constitution does not explicitly state that Congress may not delegate its powers to others, the Supreme Court has asserted the principle that Congress may not delegate its powers to other branches of the government or to private parties. Roots of the doctrine are found both in article I of the Constitution, which states that “all legislative Powers herein granted shall be vested in a Congress of the United States,” and the due process clauses of the fifth and fourteenth amendments. As Justice Brandeis pointed out, the two concepts are related: “The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power.” The constitutional limits on executive power serve to prevent arbitrary executive action under the conviction that the people must look to representative bodies and courts to protect their liberties. Protection of the individual from the arbitrary and capricious exercise of power, by an official body or a private party acting under delegated authority, is an essential element of free government. Thus, the underlying purpose of the delegation doctrine should be to provide needed protection against uncontrolled discretionary power.

Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911, 915–16 (1988). Note that the doctrine prohibits only delegation against “uncontrolled discretionary power,” *id.*, that is, the failure to provide adequate guidance to, for example, administrative agencies so that they do not, in effect, replace the legislature. *See* Victor B. Flatt, *The “Benefits” of Non-Delegation: Using the Non-Delegation Doctrine to Bring More Rigor to Benefit-Cost Analysis*, 15 WM. & MARY BILL RTS. J. 1087, 1092–95 (2007). The doctrine has rarely been invoked by the United States Supreme Court to invalidate administrative agency action. *Id.* at 1094. States apply a similar delegation doctrine analysis under their state constitutions. *See* Singer & Singer, *supra* 279, at 192.

²⁸⁰ *See* Singer & Singer, *supra* note 279, at 194–95 (summarizing delegation doctrine in various states, including Illinois).

²⁸¹ *See* *Stofer v. Motor Vehicle Cas. Co.*, 369 N.E.2d 875, 879 (Ill. 1977).

²⁸² *Forest Pres. Dist. of DuPage Cnty. v. Brown Family Trust*, 323 Ill. App. 3d 686, 692 (2d Dist. 2001).

The ULC 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, which is defined in *Miranda*, and is a definition with which law enforcement have been familiar for over four decades.²⁸³ 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.²⁸⁴ 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 fact finder’s ability to identify involuntary, false, or unreliable confessions.²⁸⁵ Moreover, the means for law enforcement agencies to carry out their responsibilities are identified in numerous provisions: those describing when recording is necessary and when it is not (i.e., the various exceptions), those identifying what paperwork must be prepared and when, and those addressing remedies that include internal discipline; these are just a few of the provisions offering detailed guidance.²⁸⁶ Finally, the Act provides easily intelligible standards to guide the law enforcement agency, so that it will know with some specificity when, where, and how it must tell officers to record.²⁸⁷ The Act’s guidance is sufficiently specific to offer law enforcement agencies guidance but not so detailed as to straightjacket their choice of specifics.²⁸⁸ For these reasons, the ULC drafting committee concluded that the delegation doctrine should not be a cause for concern, and it is not addressed in any greater detail here.

B. Numbers of Cameras and Angle

A special comment must be made about § 15(c). Section 15(c) requires rules to be made governing the manner of recording, including the proper camera angle. I address camera angles again here, though I did so briefly earlier, because § 15(c) focuses on *rulemaking* relevant to such camera angles, requiring a bit more in-depth explanation of why such a specific rulemaking subject is expressly mentioned in the Act.²⁸⁹ Section 15(c) is bracketed because it applies only in jurisdictions that require both audio and video recording.²⁹⁰ Requiring rules specifying the number of cameras to use and their angle may seem like a small, unimportant detail. It is not. Indeed, ample research demonstrates that jurors are best at differentiating true from false confessions when the camera focuses solely on the interrogator, and only second best when it focuses equally

²⁸³ See UNIF. ELEC. RECORDATION OF CUSTODIAL INTERROGATIONS ACT §§ 2(3)–3 (Unif. Law Comm’n, Draft 2010); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

²⁸⁴ See UERICI ACT § 3.

²⁸⁵ See *supra* text accompanying notes 5–8.

²⁸⁶ See UERICI ACT §§ 3–13.

²⁸⁷ See *id.* at § 15(b)–(c).

²⁸⁸ See *infra* text accompanying notes 297–310 (comparing the Act’s specificity with the greater detail found in the District of Columbia and Maine’s statutes and policies).

²⁸⁹ See *supra* text accompanying notes 53 and 233. Proper camera angles are so important to aiding jurors’ judgment accuracy that an initial draft of the Act that I proposed expressly specified what those camera angles should be. However, the drafting committee ultimately concluded that there may sometimes be legitimate technical, cost, and interrogation-effectiveness reasons that make those camera angles difficult to achieve. Accordingly, the final version of the Act mandates that law enforcement adopt rules concerning proper camera angles, and addressing what those angles should be in commentary.

²⁹⁰ See UERICI ACT § 15(a), (c).

on the interrogator and the suspect.²⁹¹ Yet, a suspect-focus camera angle alone “appears to actually diminish the capability of decision makers to arrive at objectively correct assessments.”²⁹² This last point is particularly important because it is counterintuitive: audio recording may be superior to audio and video combined if the video focuses solely on the suspect.²⁹³ The combination of audio and video, it must be stressed, is the best way to improve accuracy, but *only* if the camera focus is equally and simultaneously on both the suspect and the interrogator, or even on the interrogator alone.²⁹⁴

Most statutes and regulations ignore these details. One exception is North Carolina, which 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.”²⁹⁵ 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.”²⁹⁶ The Innocence Project of Cardozo University Law School, in its proposed model statute, makes a similar recommendation.²⁹⁷

C. Civil and Administrative Remedies and Their Linkage to Sound Rules

1. Internal Police Department Discipline of Its Officers

Violations of recording mandates that do not produce confessions or that produce confessions not offered as evidence at a criminal trial cannot be remedied by the criminal justice system. Often civil liability will, likewise, be unavailable under such

²⁹¹ See Lassiter et al., *supra* note 233, at 143–57.

²⁹² *Id.* at 153.

²⁹³ *Id.* at 152 (describing data supporting the conclusion that “confession presentation formats that provide access to suspects’ facial cues seem to hinder rather than help observers accuracy with regard to differentiating true from false confessions,” and this is particularly true where the sole focus of the camera is on the suspect); see also *id.* at 155 (“[T]ime and time again the research demonstrates that this [suspect-focus] perspective leads to biased and inaccurate assessments of videotaped interrogations, which could increase the possibility of an innocent person being wrongfully prosecuted and ultimately wrongfully convicted.”).

²⁹⁴ See *id.* at 154–55 (recommending, ideally, an audio-video presentation that focuses solely on the interrogator, secondarily, one that focuses equally on both the interrogator and suspect, but arguing for suppression of the video—and use only of the audio portion and of the transcript—where the video was made to focus solely on the suspect); see also *id.* at 155 (discouraging a split-screen presentation of face-on views of both suspect and interrogator as increasing the risks of error, thereby favoring a camera angle that simultaneously and equally focuses on the suspect and interrogator, or on the interrogator alone). For additional summaries of relevant empirical studies supporting these conclusions, see Lassiter & Geers, *supra* note 50, at 198–208; LEO, *supra* note 3, at 250–51; Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions*, 15 LAW & HUM. BEHAV. 231, 235 (1991); Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the “Harmless Error” Rule*, 21 LAW & HUM. BEHAV. 27, 27–46 (1996).

²⁹⁵ N.C. GEN. STAT. ANN. § 15A–211 (West 2012).

²⁹⁶ Sullivan & Vail, *supra* note 59, 224.

²⁹⁷ INNOCENCE PROJECT, *Model Legislation, 2011 State Legislative Sessions: An Act Directing the Electronic Recording of Custodial Interrogations* (Nov. 2011), http://www.innocenceproject.org/docs/2011/modelbills/Recording_of_Custodial_Interrogations_Model_Bil1_2011.pdf.

circumstances.²⁹⁸ In such cases, the only effective deterrent, if any, to an individual officer's future mistakes will be administrative discipline. While court remedies may be uncertain, administrative sanctions are relatively certain, if vigorous enforcement is statutorily mandated, as this Act requires.²⁹⁹ Administrative sanctions likely help in deterring future error, as analogous empirical evidence and psychological and economic theory suggest.³⁰⁰ The knowledge that such sanctions will be available if the Act is violated can lead officers to act with great care and deliberation concerning recording procedures.³⁰¹ For these reasons, § 15(d) mandates that law enforcement agencies adopt rules imposing graded systems of sanctions on individual officers, sanctions reasonably designed to promote compliance with this Act.³⁰² If well-designed, that graded system

²⁹⁸ See *infra* text accompanying notes 306–310 (discussing limitations placed on civil suits).

²⁹⁹ See UNIF. ELEC. RECORDATION OF CUSTODIAL INTERROGATIONS ACT § 15(d) (Unif. Law Comm'n, Draft 2010).

³⁰⁰ Cf. Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 364–68 (1999) (discussing the importance of administratively sanctioning individual officers through liquidated damages to achieve deterrence). Slobogin suggests that liquidated damages would constitute a percentage of the field officer's salary, and he would be personally liable unless he acted in good faith, in which case the department would be strictly liable. *Id.* Slobogin justifies his argument primarily on two grounds, both related to improved deterrence. First, he argues that behavioral theory states that a punishment will be an effective deterrent only if the punishment is relatively certain, intense, and quickly and consistently imposed without creating incidental counter-incentives to engage in the prohibited conduct. *Id.* at 373–81. Second, he argues that procedural justice research shows that those punished are less likely to re-offend if they feel that they have been treated fairly. *Id.* at 381–84. He argues that Fourth Amendment doctrine is so riddled with exceptions to privacy invasion or use of the exclusionary rule, and likely to cause officer resentment if the guilty person goes free, as to undermine both these deterrent forces. *Id.* at 384–90. He dismisses ordinary damages actions as so unlikely to succeed and difficult to prove that they also fail as a deterrent. *Id.* at 384–85. But, he favors administrative imposition of liquidated financial sanctions on individual officers as the primary means of administrative sanctioning. He argues such on the theory that other kinds of administrative sanctions will not work because “police superiors have a hard time punishing hard-working cops for mistakes made at the margin, at least when there is no external pressure to do so.” *Id.* at 384.

There are several reasons why this concern should not apply under the Act. Notably, the Act contains so many exceptions to the recording mandate that it is hard to imagine how a hardworking, even minimally well-trained, officer could make a mistake by not recording where it is required in a “marginal,” or ambiguous, situation. The inapplicability of any exception should be clear in the vast majority of cases. Thus, the prospect of sanctions is most likely to arise among officers who act in bad faith. As for those officers who are ignorant, perhaps harsh sanctions are not wise for an initial violation, but could be useful for educational purposes. Moreover, the Act's separate provision protecting departments from tort liability should apply only if they have adopted and properly implemented rules designed to educate officers and to monitor officer performance. See UERICI ACT § 16(c). This can create incentives for departments to properly train their officers and to give them appropriate feedback. Finally, the law specified in the Act is far more simple than Fourth Amendment law with respect to policing.

³⁰¹ Cf. Slobogin, *supra* note 300, at 373–79 (explaining the psychological processes by which individual sanctions, particularly in terms of liquidated damages and penalty schedules, make it more likely to achieve deterrence).

³⁰² See UERICI ACT § 15(d); Slobogin, *supra* note 300, at 373–81 (reciting the general nature of these principles and applying them to search and seizure law violations). Such reasonable design should require attention to the principles of certainty and fairness of punishment that Slobogin summarizes. Sanctions could include administratively imposed monetary penalties, even liquidated ones. I do not dispute that a system like the one Slobogin proposes may provide an especially effective deterrent. But the diversity of departmental cultures and needs coupled with the political obstacles to mandating a single uniform set of

should give officers proper notice of the likelihood of particular sanctions and its severity. The subsection is bracketed, however, because in collective bargaining states, the subject matter of subsection (d) would be controlled by collective bargaining agreements.³⁰³

2. Limitation of Actions for Violation of the Act

Section 16 of the Act addresses civil liability. Section 16(b) unequivocally states that this Act does not, by its terms, create a civil cause of action against an individual law enforcement officer.³⁰⁴ Subsection (b) adds further clarity by declaring that the only sanction that may be imposed upon an individual officer who violates this Act is administrative discipline, though it does not mandate such discipline.³⁰⁵ However, the Act does not preclude state courts or legislatures from finding, under legal principles other than those stated in the Act, a civil cause of action against a law enforcement agency for violations of the Act.³⁰⁶ Subsection (a) gives law enforcement agencies a safe harbor against such liability if they adopt *and enforce* rules reasonably designed to ensure compliance with this Act.³⁰⁷ Section 16(a) is, thus, closely linked with § 15: a law enforcement agency adopting and enforcing the rules provided for in § 15 will be protected from civil liability, should individual officers violate the Act despite the reasonable efforts of the law enforcement agency.³⁰⁸

The major justification for § 16(a) is that it will provide an incentive to law enforcement agencies to vigorously implement the mandates of this Act, including providing adequate resources (e.g., electronic recording equipment, officer training, maintenance staff training) to get the job done.³⁰⁹ If a law enforcement agency creates and enforces procedures well-designed 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. In addition, since the primary responsibility and power to ensure compliance with this Act rests with the law enforcement agencies, little is gained in terms of fairness or deterrence by exposing individual officers to civil liability.³¹⁰

penalties gives police some flexibility to craft internal sanctions consistent with these principles and is the best that could reasonably be expected given the circumstances. Moreover, local experimentation might reveal new ideas on the sanctions question and could provide best practices models in the future.

³⁰³ See UERICI ACT § 15(d); 16A MCQUILLIN MUN. CORP. § 45:37 (3d ed., updated 2011) (explaining that police collective bargaining, or union bargaining, agreements, in states adopting collective bargaining procedures for the police generally include grievance procedures to address when certain sanctions may appropriately be imposed against individual officers).

³⁰⁴ See UERICI ACT § 16(b).

³⁰⁵ *Id.*

³⁰⁶ See *id.* at § 16(a) (“A law enforcement agency that is a governmental entity in this state which has implemented procedures reasonably designed to enforce the rules adopted pursuant to Section 15 and ensure compliance with this [act] is not subject to civil liability for damages arising from a violation of this [act].”).

³⁰⁷ *Id.*

³⁰⁸ See *id.* at §§ 15, 16(a).

³⁰⁹ See Taslitz, *supra* note 93, at 502–04, 566–73 (making similar point in the context of search and seizure policy).

³¹⁰ This assertion, I admit, is subject to serious dispute. See Slobogin, *supra* note 300, at 364–68 (arguing for the importance of individual officer civil liability). But if these criticisms are correct, I note only this:

One helpful analogy—and one that the drafting committee found persuasive—occurs in the federal law concerning Title VII hostile environment sexual harassment cases.³¹¹ An employer is vicariously liable for its supervisory employees' actions in such cases but can raise, as an affirmative defense, that the employer both exercised reasonable care to prevent and correct any sexually harassing behavior, and that the plaintiff employee failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.³¹² The result of this defense has been for many employers to adopt and implement anti-harassment policies.³¹³

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.³¹⁴ Furthermore, there is significant evidence that effective training programs are the most valuable mechanism for improving compliance, and these policies have sometimes promoted such programs.³¹⁵ These programs are likely to be most effective when they also contain an individualized component addressing the training

no adequate system of officer individual liability has occurred in the Fourth Amendment search and seizure area because the political obstacles to such a system are so fierce. *See generally id.* at 384–85 (arguing that administratively imposed liquidated damages would be a superior remedy to the current tort remedies, where success is rare and damages usually minimal); Morgan Cloud, *Rights Without Remedies: The Court that Cried “Wolf,”* 77 MISS. L. J. 467, 503–05 (2007) (arguing that leaving remedies for Fourth Amendment violations to the political branches alone would effectively mean no real remedies at all); Donald Dripps, *The Fourth Amendment, the Exclusionary Rule, and the Roberts Court: Normative and Empirical Dimensions*, 85 CHI.-KENT L. REV. 209, 213–14 (2010) (“The practically relevant rules for damage actions against the police thus have not changed for more than thirty years.”). Slobogin actually makes a powerful intellectual case for change in the area of Fourth Amendment violations with respect to political branches. However, none of these changes have occurred. There is no reason to believe that the politics will be any different in the area of custodial interrogation. Entity liability is probably more politically feasible, particularly where entities have an option to escape liability entirely, as the Act provides. *See id.* at 219–20 (noting that even when tort suits succeed, police departments routinely indemnify individual officers, thus shifting all liability to entities such as the police department and municipality).

³¹¹ *See* *Wathen v. Gen. Elec. Co.*, 115 F.3d 400, 403 (6th Cir. 1997) (explaining that individuals are not liable under Title VII claims); Franita Tolson, *The Boundaries of Litigating Unconscious Discrimination: Firm-Based Remedies in Response to a Hostile Judiciary*, 33 DEL. J. CORP. 347, 408–09 (2008) (same). There was no sufficiently analogous legal provision specifically applicable to the police of which the drafting committee was aware. However, police officers are, indeed, employees, and the logic of motivating employees and their employers to achieve desired social goals that are embodied in the Title VII statute and case law, thus, made sense to the drafting committee members in internal discussions, any differences specific to the police appearing irrelevant to the committee.

³¹² E. Jacob Lindstrom, *All Carrots and No Sticks: Moving Beyond the Misapplication of Burlington Industries, Inc. v. Ellerth*, 21 HASTINGS WOMEN'S L. J. 111, 111–12 (2010) (summarizing the law, though criticizing lower courts for giving it an overly expansive application).

³¹³ *See* Jonathan D. Hoag, *Textual Harassment Trends Particularly Troubling for Illinois Employees*, J. OF THE DUPAGE CNTY. BAR ASS'N. (2010), <http://www.dcbabrief.org/vol220610art2.html>.

³¹⁴ *See* Lindstrom, *supra* note 312, at 117–19, 123–24. Many critics agree, however, that helpful policies can be, and have been, designed by employers eager to take advantage of the reasonable care defense. *See* Joanna Grossman, *Sexual Harassment in the Workplace: Do Employers Efforts Truly Prevent Harassment, or Just Prevent Liability?*, FINDLAW (May 7, 2002), <http://writ.news.findlaw.com/grossman/20020507.html> (praising Mitsubishi's recent policies for managing to “change its workplace culture to stem the proliferation of harassment.”).

³¹⁵ *See* Grossman, *supra* note 314 (citing social science research that demonstrates the effectiveness of certain anti-sexual-harassment training programs in actually reducing sexual harassment).

needs of particular employees.³¹⁶ At the same time, critics emphasize the need for employers to track their programs and tinker with them to improve their actual effectiveness, based upon performance, in reducing sexual harassment.³¹⁷ Such tracking is needed to avoid prevention programs from becoming mere publicity stunts rather than serious efforts to resolve the harassment problem.³¹⁸

These are reasons enough to provide a similar defense to law enforcement agencies under this Act. Indeed, there is substantial evidence that properly designed rules, including training programs, detailed guidance on procedures, and effective internal sanctioning measures are significantly effective in improving police performance in a range of areas.³¹⁹ Proper program design is key; that is why § 14 of this Act—which the drafting committee saw as reflecting in part lessons from the experience under Title VII—stresses that rules address training and education.³²⁰ It is also why the rules mandated by that section require a process for explaining noncompliance.³²¹ Ample social science research demonstrates that the mere knowledge that one must explain his or her actions improves performance, including that of the police.³²² Moreover, the availability of other potential remedies—not simply a defense against civil liability—provided for in this Act should present an even greater incentive for creating sound regulatory policies and zealously enforcing them than is true in the case of sexual harassment.

Some commentators have indeed argued that the United States Supreme Court has, in its constitutional criminal procedure jurisprudence, been moving toward recognizing a “reasonable care” defense to suppression motions based on constitutional violations, perhaps doing so as well in civil actions for such violations.³²³ 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.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ See HARRIS, *supra* note 258, at 155–71 (articulating an extended defense of this point); WALKER, POLICE ACCOUNTABILITY, *supra* note 261, at 4–5 (same).

³²⁰ See UNIF. ELEC. RECORDATION OF CUSTODIAL INTERROGATIONS ACT § 14 (Unif. Law Comm’n, Draft 2010).

³²¹ See *id.* at § 15.

³²² See Taslitz, *supra* note 51, at 52–54, 65–66 (making this point and summarizing the relevant literature); MICHAEL KAPLAN & ELLEN KAPLAN, BOZO SAPIENS: WHY TO ERR IS HUMAN 138–39 (2009) (same); Stephen A. Myers & Norbert Gleicher, *A Successful Program to Lower Cesarean-Section Rates*, 319 NEW ENG. J. MED. 1511 (1988) (noting that a hospital’s asking its pediatricians voluntarily to explain why they chose to perform each Cesarean section—with no sanction being imposed for whatever answer they gave—alone resulted in Cesarean rates dropping dramatically from 17.5% to 11.5%); George Loewenstein, *Out of Control: Visceral Influences on Behavior*, 65 ORGANIZATIONAL BEH. & HUM. DECISION PROCESSES 272, 286–87 (1996) (finding that asking gay men to record why they had unprotected sex alone greatly reduced its occurrence.).

³²³ See Taslitz, *supra* note 93, at 483–90 (the Court has adopted a culpability-based analysis of the exclusionary rule and other remedies, at least in the area of constitutional regulation of the police under the Fourth Amendment, and departments making all reasonable efforts to avoid individual officer errors would not be culpable and, thus, would not be deserving of “punishment,” but would find a “safe harbor” from it).

V. CONCLUSION

The Uniform Electronic Recordation of Custodial Interrogations Act is, from a policy perspective, not perfect. It would benefit from provisions addressing the use of expert testimony where law enforcement has, without excuse, failed to record a custodial interrogation in its entirety. It might also benefit from a stronger suppression remedy. But these policy weaknesses are few and highlight the Act's real strength: it resulted from compromise and deliberative debate among a wide range of parties. The Act is far more likely to receive widespread support from all stakeholders than many more purist proposals. It also is an important effort by a prestigious organization to foster reducing convictions of the innocent while improving our ability to catch and punish the guilty. It provides states great flexibility in crafting a statute that meets their needs. Yet, it does require recording at least some custodial interrogations in their entirety. Experience teaches that using a recording, in some instances, will prove so fruitful for law enforcement that they will, over time, seek expansion of the numbers of instances in which a recording is required. Moreover, the Act contains provisions to promote efficiency and accountability, modeling its commentary on jury instructions and other matters, and offering incentives for police to record. The Act is, therefore, a huge step forward.

APPENDIX

Uniform Electronic Recordation of Custodial Interrogations Act
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General Provisions

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

SECTION 2. DEFINITIONS. In this [act]:

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

(2) “Electronic recording” means an audio recording or audio and video recording that accurately records a custodial interrogation. “Record electronically” and “recorded electronically” have a corresponding meaning.

(3) “Law enforcement agency” means a governmental entity or person authorized by a governmental entity or state law to enforce criminal laws or investigate suspected criminal activity. The term includes a nongovernmental entity that has been delegated the authority to enforce criminal laws or investigate suspected criminal activity. The term does not include a law enforcement officer.

(4) “Law enforcement officer” means:

(A) an individual employed by a law enforcement agency whose responsibilities include enforcing criminal laws or investigating suspected criminal activity; or

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

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

(6) “Place of detention” means a fixed location under the control of a law enforcement agency where individuals are questioned about alleged crimes or [insert the state’s term for delinquent acts]. The term includes a jail, police or sheriff’s station, holding cell, and correctional or detention facility.

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

(8) “Statement” means a communication whether oral, written, electronic, or nonverbal.

SECTION 3. ELECTRONIC RECORDING REQUIREMENT.

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

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

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

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

[(e)] This section does not apply to a spontaneous statement made outside the course of a custodial interrogation or a statement made in response to a question asked routinely during the processing of the arrest of an individual.

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

SECTION 4. NOTICE AND CONSENT NOT REQUIRED. Notwithstanding [cite statutes], a law enforcement officer conducting a custodial interrogation is not required to obtain consent to electronic recording from the individual being interrogated or to inform the individual that an electronic recording is being made of the interrogation. This [act] does not permit a law enforcement officer or a law enforcement agency to record a private communication between an individual and the individual's lawyer.

Legislative Note: The bracketed language refers to any state statute requiring that an individual be informed of, or consent to, the recording of the individual's conversations. The "notwithstanding" clause makes clear that the electronic recording of a custodial interrogation is exempt from all the requirements of any such notice and consent statutes.

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

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

(a) A custodial interrogation to which Section 3 otherwise applies need not be recorded electronically if the individual to be interrogated indicates that the individual will not participate in the interrogation if it is recorded electronically. If feasible, the agreement to participate without recording must be recorded electronically.

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

(c) A law enforcement officer, with intent to avoid the requirement of electronic recording in Section 3, may not encourage an individual to request that a recording not be made.

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

SECTION 8. EXCEPTION BASED ON BELIEF RECORDING NOT REQUIRED

(a) A custodial interrogation to which Section 3 otherwise applies need not be recorded electronically if the interrogation occurs when no law enforcement officer

conducting the interrogation has knowledge of facts and circumstances that would lead an officer reasonably to believe that the individual being interrogated may have committed an act for which Section 3 requires that a custodial interrogation be recorded electronically.

(b) If, during a custodial interrogation under subsection (a), the individual being interrogated reveals facts and circumstances giving a law enforcement officer conducting the interrogation reason to believe that an act has been committed for which Section 3 requires that a custodial interrogation be recorded electronically, continued custodial interrogation concerning that act must be recorded electronically, if feasible.

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

SECTION 10. EXCEPTION FOR EQUIPMENT MALFUNCTION.

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

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

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

Legislative Note: Subsections (b) or (c), or both, need to be considered only in a state that chooses to mandate both audio and video recording in Section 3.

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

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

Legislative Note: State statutes or rules of criminal procedure often specify a time by which motions must be filed or notice given by the prosecution concerning the production of certain evidence to the defense in advance of trial. Some of these statutes or rules require prosecution notice even without defense action, as may be true for a broad mandate to produce material exculpatory evidence or to identify prior act witnesses. It is this class of rule or statute that Section 12 contemplates. Section 12 leaves it to each state to identify the precise controlling statute or rule, rather than specifying a single time period to control in every state.

SECTION 13. PROCEDURAL REMEDIES.

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

(b) If the court admits into evidence a statement made during a custodial interrogation that was not recorded electronically in compliance with Section 3, the court, on request of the defendant, shall give a cautionary instruction to the jury.

SECTION 14. HANDLING AND PRESERVING ELECTRONIC RECORDING. Each law enforcement agency in this state shall establish and enforce procedures to ensure that the electronic recording of all or part of a custodial interrogation is identified, accessible, and preserved as required by [cites statutes, court rules, or other state authority generally governing the method of preserving evidence in criminal cases].

SECTION 15. RULES relating to ELECTRONIC RECORDING.

Alternative A

(a) Each law enforcement agency that is a governmental entity of this state shall adopt and enforce rules to implement this [act].

Alternative B

(a) [insert name of the appropriate state authority] shall adopt rules to implement this [act] which each law enforcement agency that is a governmental entity of this state shall enforce.

Alternative C

(a) [insert name of the state agency charged with monitoring law enforcement's compliance with this act] shall adopt rules to implement this [act] and monitor enforcement of the rules by each law enforcement agency that is a governmental entity of this state.

End of Alternatives

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

- (1) how an electronic recording of a custodial interrogation must be made;
- (2) the collection and review of electronic recordings, or the absence thereof, by supervisors in [the] [each] law enforcement agency;
- (3) the assignment of supervisory responsibilities and a chain of command to promote internal accountability;
- (4) a process for explaining noncompliance with procedures and imposing administrative sanctions for a failure to comply that is not justified;
- (5) a supervisory system expressly imposing on individuals in specific positions a duty to ensure adequate staffing, education, training, and material resources to implement this [act]; [and]
- (6) a process for monitoring the chain of custody of an electronic recording;
and
- (7) [insert other topic].

[(c) The rules adopted under subsection (b)(1) for video recording must contain standards for the angle, focus, and field of vision of a recording device which reasonably promote accurate recording of a custodial interrogation [at a place of detention] and reliable assessment of its accuracy and completeness.]

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

***Legislative Note:** Subsection (a) offers three alternatives. The first alternative requires each local and state law enforcement agency to draft its own rules. The second alternative leaves it to a single state authority to draft rules to govern all state and local law enforcement agencies, though that single state authority is assigned no obligations relevant to this act other than drafting the rules. The third alternative assigns the rule-drafting task to a new or existing agency that is assigned an additional responsibility, that is, monitoring all state and local law enforcement agencies' compliance with the terms of this Act. The third alternative thus differs from the second in that the specified*

agency would have both rule-drafting and act-implementation monitoring responsibilities, but the intention would still be that that agency would draft rules meant to govern all state and local law enforcement. Subsection (b)(7) is bracketed, applying if a jurisdiction chooses to add to the topics that the rules discussed in subsection (b) must address. Subsection (c) is necessary only in a jurisdiction that requires both audio and video recording under subsection 3 (a). In collective bargaining states, subsection (d) would not apply. Instead, the matter would be controlled by collective bargaining agreements. Thus subsection (d) is bracketed.

SECTION 16. LIMITATION OF LIABILITY.

(a) A law enforcement agency that is a governmental entity in this state which has implemented procedures reasonably designed to enforce the rules adopted pursuant to Section 15 and ensure compliance with this [act] is not subject to civil liability for damages arising from a violation of this [act].

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

SECTION 17. SELF-AUTHENTICATION.

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

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

SECTION 18. NO RIGHT TO ELECTRONIC RECORDING OR TRANSCRIPT.

(a) This [act] does not create a right of an individual to require a custodial interrogation to be recorded electronically.

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

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

SECTION 20. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the 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).

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

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

SECTION 22. REPEALS. The following are repealed:

(1).....

(2).....

(3).....