

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

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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**

## **Synopsis**

Much has been written about the need to videotape the entire process of police interrogating suspects. Videotaping discourages abusive interrogation techniques, improves police training in proper techniques, reduces frivolous suppression motions because facts are no longer in dispute, and improves jury decision making about the voluntariness and accuracy of a confession. Despite these benefits, only a small, albeit growing, 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), formerly the National Conference of Commissioners on Uniform State Laws, ratified a uniform recording statute for consideration by the states. I was the Reporter for this ULC effort. This article, after briefly summarizing the need for the uniform Act and its major provisions, focuses on its most interesting and novel provisions: those affecting remedies if police fail to record when required.

The Act creates a suppression remedy if the failure to record renders the confession “unreliable,” that is, involving too great a risk of its falsity for a jury to rely upon it. Although this remedy is not unheard of, it is unusual, and this article explains and defends this remedial choice. Suppression is, however, not automatic but is subject to a balancing process. The Act also provides for a cautionary jury instruction. This article discusses the strengths and weaknesses of that model, including the unlikelihood that a jury instruction alone can adequately protect the innocent. This article argues for the importance of the availability of the suppression remedy – an option most of the small pool of state legislation has generally rejected – and for the importance of admitting expert testimony on the risks of error inherent in custodial interrogation, especially when it is not recorded. A draft of the Act included such a provision, and this article challenges the policy wisdom of the final Act’s not addressing expert testimony. The Act also mandates police preparation of regulations that must address certain specified subjects and provides mechanisms for police transparency and accountability in the recording process. The Act contains a novel provision protecting police departments from civil liability in this area if they promulgate and adequately enforce reasonable regulations designed to implement the Act but an individual officer nevertheless strays from those mandates. This article defends that choice.

Ultimately, this article concludes that, though the Act is not perfect from a policy perspective, it is an excellent step forward. Moreover, it was drafted via a process involving many stakeholders, paying particular attention to the concerns of law enforcement. The focus here on remedies when police fail to comply with the Act may wrongly create the impression that the Act embodies distrust of law enforcement. To the contrary, the Act is designed to improve law enforcement’s ability to catch the guilty while acquitting the innocent, and many of its novel provisions stem from law enforcement suggestions. Though the Act may be flawed, it

offers the best opportunity thus far for promoting continued and wider reform efforts in the states.

## **Table of Contents**

### *I. Introduction*

### *II. The Need for, and Content of, the Act: An Overview*

#### *A. Need for the Legislation*

#### *B. The Act's Major Provisions Summarized*

### *III. Remedies*

#### *A. Pretrial Suppression Motions*

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

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

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

#### *B. Jury Instructions and Their Relative Efficacy*

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

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

#### *C. Expert Testimony*

### *IV. Rulemaking*

#### *A. Monitoring and Guiding Police Performance*

##### *1. The Need for Rules Designed to Implement The Act*

##### *2. Delegation Concerns: A Brief Note*

#### *B. Numbers of Cameras and Angle*

#### *C. Internal Discipline*

#### *D. Limitation of Actions*

### *V. Conclusion*

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

Andrew E. Taslitz\*

## 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. That Act sets out a framework for requiring police to record the entire process of interrogating suspects, start to finish.<sup>1</sup> The prevailing practice has instead been to record only the confession itself, which may result from many hours of interrogation, or to rely upon written or untaped oral confessions.<sup>2</sup> Current practice has led to false confessions, escape of the guilty for years, violations of constitutional rights, and insufficient training in the most effective techniques – all this occurring despite the diligent efforts of the largely well-meaning and experienced cadre of police interrogators.<sup>3</sup>

Although hundreds of the tens of thousands of police departments in the United States have voluntarily adopted interrogation-recording procedures, and perhaps two handfuls of states have mandated these procedures by statute or court decision, the vast majority of police departments still do not record.<sup>4</sup> The hope of the Act's drafters is that putting the prestige of the ULC – best

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<sup>1</sup> See UNIFORM ELECTRONIC RECORDATION OF CUSTODIAL INTERROGATIONS ACT (2010) (UERCIA).

<sup>2</sup> 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).

<sup>3</sup> See RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 296-305 (2008) (summarizing the benefits of recording).

<sup>4</sup> 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. 9, 9-10 (2010) (“Over 500 jurisdictions 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*, 4/4/11 (unpublished study) (on file with author).

known as the author of the Uniform Commercial Code<sup>5</sup> – behind the electronic recording process will accelerate its widespread national adoption, improve uniformity, and improve the quality and efficiency by which interrogation occurs.<sup>6</sup> 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. Here 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.<sup>7</sup> 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, combined with the numerous exceptions to the mandate, should aid in overcoming political roadblocks to the legislation.<sup>8</sup>

My focus instead will be on the Act's remedial provisions – and related rule making sections – which *do* advance the debate in important ways.<sup>9</sup> 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*.<sup>10</sup> Unreliability is not a federal constitutional ground for suppression of confessions and is rarely a statutory ground for doing

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<sup>5</sup> The ULC's website summarizes its mission and accomplishments. See [www.nccusl.org](http://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.*

<sup>6</sup> These were certainly the uppermost goals discussed in the drafting meetings that I attended. See also *Commentary, Section 2, UERCIA* (discussing goals of the uniform legislation).

<sup>7</sup> See UERCIA §.3.

<sup>8</sup> See *infra* text accompanying notes 66-104.

<sup>9</sup> See UERCIA . §§13, 15-16.

<sup>10</sup> See *id.* §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 UAERCIA. See UERCIA§13(a).

so.<sup>11</sup> Moreover, the prohibition against unreliable evidence may provide a toe-hold for future development of a more general principle of the reliability of any evidence that might otherwise raise an unacceptable risk of wrongful conviction.<sup>12</sup>

The remedies also include a cautionary jury instruction where law enforcement has failed, without a statutory excuse, to comply with recording mandates.<sup>13</sup> Law enforcement embraced this remedy as the most important one available, eliminating the need for muscular alternatives. I agree that the remedy *may* have value but disagree that that value is so great as to render other stronger remedies pointless, particularly given a dearth of completed relevant experimental research.<sup>14</sup> I partially lost this debate, however, in the drafting committee, and I lay out my case here. That I lost is not necessarily a bad thing – my favored alternatives may have been politically unpalatable. But there is value in understanding the rejected options versus the accepted ones, and perhaps some jurisdictions’ political climate will accept my original proposal.

One remedy related to jury instructions but that did not make it into the Act also deserves mention. Too many courts are highly skeptical of expert testimony on the factors affecting the voluntariness and accuracy of confessions.<sup>15</sup> Yet the need for such testimony may be at its greatest when police fail to videotape the entire interrogation process. Part of the point of such

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<sup>11</sup> “Unreliability” is one motivating factor for creation of the due process test excluding involuntary confessions. *See infra* text accompanying notes 175-92.

<sup>12</sup> *See, e.g.*, AMERICAN 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 – corroboration requirements, broadened discovery, improved jury instructions – for correcting the risk of jailhouse snitch testimony being unreliable).

<sup>13</sup> *See* UERCIA §13(b).

<sup>14</sup> *See infra* text accompanying notes 23-67.

<sup>15</sup> *See, e.g.*, *State v. Cobb*, 43 P.2d 855 (Kan. Ct. App. 2002) (concluding that expert testimony on false confession’s invades the province of the jury); *State v. Davis*, 32 S.W.2d 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. Ct. 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).

recording is to allow the jury to be fully informed of what occurred so that it may assess the risks of error or undue law enforcement pressure. Where such recording is unavailable, and particularly where there is no excuse for such unavailability, the jury is deprived of the best evidence of what occurred. They are thus particularly in need of schooling on the factors raising risks of inaccurate or coerced confessions because they are handicapped in making their own judgments.<sup>16</sup> An early draft of the Act thus provided expert testimony as one remedy for the Act's violation. But drafting a provision that did not open the door to speculative or baseless expert testimony and that did not trench upon traditional judicial evidentiary prerogatives proved difficult in the view of some drafting committee members. Moreover, judicial opposition proved so fierce that efforts to improve upon the drafting product were simply abandoned. But that result does not eliminate the need for expert advice. It is thus worth capturing a snapshot of where that provision lay when abandoned to prompt debate on whether a workable alternative is feasible and worth some jurisdiction's pursuing.

The Act also assumed that some wily lawyers will figure out a way to create a civil cause of action for the Act's violation. The Act squarely prohibits civil suits on these grounds against individual officers.<sup>17</sup> But the Act prohibits suits against governmental entities, such as police departments, only if they have adopted and implemented regulations reasonably designed to accomplish the purposes of the Act.<sup>18</sup> The Act specifies broad substantive and procedural matters that such regulations must address, while leaving details to states or localities.<sup>19</sup> This immunity from civil suit provision was meant to be a carrot to encourage regulations that promote accountability, efficiency, accuracy, and updating of interrogation matters covered by the Act. A

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<sup>16</sup> See *infra* text accompanying notes 268-86.

<sup>17</sup> See UERCIA §16(b).

<sup>18</sup> See *id.* §16(a).

<sup>19</sup> See *id.* §15(b).

variety of law enforcement organizations have voluntarily adopted such regulations, and a few statutes contain proto-regulatory provisions.<sup>20</sup> This article addresses the logic behind this approach and the reasons for choosing the particular minimum set of topics that regulations must address. The initial idea for this incentives-based regulatory approach, if not necessarily its precise form, it is worth noting, came from law enforcement.

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. Judges, defense attorneys, police officers, prosecutors, victims' rights advocates, and a host of other interested parties were involved. Moreover, no group's views were monolithic. The strongest advocate for detailed, muscular requirements and remedies was a well-respected senior law enforcement officer. Other officers were more skeptical. Some prosecutors opposed any codification of recording requirements, preferring to leave it entirely to individual local choice. But other prosecutors embraced statutory regulation as the only sure way to promote prompt professionalization in this area, thereby improving law enforcement's accuracy, efficiency, effectiveness, and legitimacy. Some defense attorneys wanted to record everything said by everyone in every situation, heedless of financial cost or potential loss of truthful, uncoerced confessions. But other defense attorneys recognized that incremental change is better than none and that law enforcement cannot be expected to ignore its role in guarding public safety as part of the drafting equation.

This diversity was intentional. 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

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<sup>20</sup> See Thomas Sullivan, *Police Department Regulations: Custodial Interrogation* (2010) (collecting such regulations).

defense attorneys. Second, the diversity ensured, as much as is possible in a politically-charged debate, that what left the drafting committee had wide support among and within many stakeholder groups. That support improves the chances for actual enactment of the proposed legislation. From the perspective of *realpolitik*, the Act is thus likely the best that can be expected, and I applaud the ULC's efforts and heartily endorse the Act.

But not every provision is, in my view, necessarily the best policy choice in a theoretical, apolitical world. Indeed, the Act allows so much flexibility to localities, contains so many exceptions, and has so few remedies --and ones that are of debatable effectiveness -- that some of the most fervent supporters of this type of legislation were deeply disappointed. I think they are wrong to be disappointed. The Act is a good one, and the ULC had to take into consideration political obstacles that might arise in fifty states. Nevertheless, understanding why the fervent activists' were disappointed clarifies the policy issues at stake, helps to lay the ground work for future statutory improvements, and may focus arguments for more robust change should some jurisdictions prove receptive to it. On the other hand, these critics also miss some of the Act's conceptual breakthroughs and important strengths, and I want the opportunity to defend those accomplishments. It is for these reasons that I have started this article's title with the phrase, "High Expectations and *Some Wounded Hopes*." The high expectations that the proponents of change had for this Act have largely been met, but the wounded hopes of the most zealous of those advocates also deserve their due.

The next section of this article, Part IIA, briefly reviews why there is a need for recording the entire custodial interrogation process. Part 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*

In just the past two decades, lawyers have documented numerous cases of wrongful convictions.<sup>21</sup> In some instances, the true perpetrator continued to commit serious crime while an innocent person languished in prison.<sup>22</sup> The cases have been sufficiently numerous as to garner the attention of the media, prosecutors, defense counsel, police, legislators, and law reformers.<sup>23</sup> 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.<sup>24</sup> Most errors were proven by DNA evidence.<sup>25</sup> But such evidence is not usually available, again raising the worry that large numbers of mistaken convictions will simply go undetected.<sup>26</sup>

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.<sup>27</sup> False confessions may often occur no matter how well-meaning the interrogating officer or how strong his or her belief in the suspect's guilt.<sup>28</sup> Subtle flaws in interrogation techniques can elicit confessions by the innocent.<sup>29</sup> Yet confessions are taken as such powerful evidence of guilt that

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<sup>21</sup> See BRANDON GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 5 (2011).

<sup>22</sup> *Id.* at 3.

<sup>23</sup> *Id.* at 6.

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

<sup>25</sup> GARRETT, *supra* note 21, at 6.

<sup>26</sup> *Id.* at 11

<sup>27</sup> See RICHARD LEO, *POLICE INTERROGATIONS AND AMERICAN JUSTICE* 291-96 (2010) (summarizing the history of the movement for electronic recording).

<sup>28</sup> See *id.* at 263-266 ( tunnel vision can lead interrogators to believe in suspect's guilt while ignoring all other evidence).

<sup>29</sup> *Id.* at 73..

prosecutors, jurors, and judges often fail to identify the false ones.<sup>30</sup> The resulting wrongful conviction means not only that an innocent person is incarcerated but that a dangerous offender continues threatening public safety.<sup>31</sup>

The need for improving police training in interrogation techniques that will reduce the risk of error and for improving prosecutor, jury, and judicial effectiveness in spotting mistakes based upon false confessions is thus great. Moreover, constitutional principles require exclusion of involuntary confessions and those taken without properly administering *Miranda* warnings, yet defense and police witnesses often tell very different tales about the degree of coercion involved in the interrogation process. This conflicting testimony sometimes results in judges or jurors believing the wrong tale, other times allowing for frivolous suppression motions wasting the court's time and impugning careful, professional, and honest police officers.<sup>32</sup>

The need for recording thus has three broad justifications: promoting truth-finding, efficiency, and constitutional values.<sup>33</sup> Truth-finding is partly promoted by reducing lying and deterring risky interrogation techniques because police and suspects both know they are being watched.<sup>34</sup> Detectives may also focus on their interrogation's quality because they are freed from the need to take notes.<sup>35</sup> Recording allows supervisors to give feedback on proper techniques, thereby improving training.<sup>36</sup> Police and prosecutors are likewise able to review tapes to weed out suspect cases early.<sup>37</sup> Factfinders 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

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<sup>30</sup> See Saul M. Kassin, *False Confessions*, 73 ALB. L. REV. 1227, 1230-31 (2010)..

<sup>31</sup> LEO, *supra* note 27, at 268.

<sup>32</sup> See *id.* at 296-305.

<sup>33</sup> See generally LEO, *supra* note 271, at 296-305 (elaborating on the justifications noted here).

<sup>34</sup> Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1129 (2005) .

<sup>35</sup> LEO, *supra* note 27, at 297.

<sup>36</sup> *Id.* at 297.

<sup>37</sup> Lisa Lewis, *Rethinking Miranda: Truth, Lies, and Videotape*, 43 GONZ. L. REV. 199, 222 (2008).

events.<sup>38</sup>

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.<sup>39</sup> Prosecutor bargaining power is also enhanced for the same reason, thus likely promoting more guilty pleas.<sup>40</sup> By resolving factual doubts, recording makes hung juries less likely.<sup>41</sup> Police able to review a recording for the subtleties of body language and of quick 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.<sup>42</sup>

Constitutional values are protected by improving suppression motion resolution accuracy and police training.<sup>43</sup> Such values are also fostered because the wide availability of a largely indisputable record of what occurred in the interrogation room both acts to deter governmental overreaching and to expose it when it occurs.<sup>44</sup> Recording makes it easier for the state to preserve potential exculpatory evidence and to provide it to defense counsel, thus improving compliance with generous notions of the *Brady* obligation to produce exculpatory evidence for the defense.<sup>45</sup> A recording can also reveal subtle, unconscious racial bias and encourage means for correcting it and can, given the above advantages, promote law enforcement legitimacy by improving its public accountability.<sup>46</sup>

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<sup>38</sup> Sullivan, *supra* note 35, at 1129.

<sup>39</sup> LEO, *supra* note 27, at 297-298.

<sup>40</sup> Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, 88 JUDICATURE 132, 135 (2004)..

<sup>41</sup> LEO, *supra* note 27, at 298.

<sup>42</sup> *Id.* at 298.

<sup>43</sup> *Id.* at 299.

<sup>44</sup> *Id.* at 299

<sup>45</sup> *Id.* at 300.-

<sup>46</sup> See, e.g., Cynthia J. Nadjadowski, *Explaining Racial Disparities in False Confession Rates*, 31 AM. PSYCH.-L. SOC'Y NEWS 6-11 (Summer 2011) (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. J. CRIM. L. 121 (2006) (discussing some data and the likely processes by which unconscious racial bias can

For just these reasons, many academics have recommended,<sup>47</sup> and several states have statutorily-mandated,<sup>48</sup> electronic recording of the entire custodial interrogation process, from the start of questioning to the end of the suspect's confessing, as a way to solve these and related problems. For example, Illinois, the District of Columbia, Maine, Maryland, Nebraska, New Mexico, North Carolina, and Wisconsin have adopted mandatory recording laws for a variety of felony investigations.<sup>49</sup> Alaska, Massachusetts, and Minnesota have recording requirements imposed by judicial decision.<sup>50</sup> The New Jersey Supreme Court has likewise required recording, doing so via court rule, as has the Indiana Supreme Court just recently.<sup>51</sup> A significant number of state reviewing courts have declared that recording would have powerful benefits for the justice system but have declined to impose that obligation absent legislative action.<sup>52</sup>

The military has also begun embracing the recording ideal. For example, the United States Naval Criminal Investigative Service (USNCIS) Manual now contains General Order 00-0012, which requires video or audio recording of suspect interrogations of crimes of violence where the interrogation takes place in a Naval Criminal Investigative Service facility.<sup>53</sup>

Similarly, in October 2009, the Commission on Military Justice, known as the Cox Commission,

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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).

<sup>47</sup> See generally; Tracy Lamar Wright, *Let's Take Another Look at That: False Confession, Interrogation, and the Case for Electronic Recording*, 44 IDAHO L. REV. 251 (2007).

<sup>48</sup> See *infra* text accompanying notes 50-51..

<sup>49</sup> See Thomas P. Sullivan and Andrew W. Vail, *The Consequences of Law Enforcement Officials' Failure to Record Custodial Interviews as Required by Law*, 99 NW. U. L. REV. 215, 216-7 (2009).

<sup>50</sup> See *id.* at 216-17.

<sup>51</sup> See *id.* at 217; see *Order Amending [Indiana] Rules of Evidence, [Rule 617]*, No. 94S00-0909-MS-4 (filed September 15, 2009) (requiring, subject to seven narrow exceptions, audio and video recording of custodial interrogations in all felony prosecutions). See Alan M. Gershel, *A Review of the Law in Jurisdictions Requiring Electronic Recording of Custodial Interrogations*, 16 RICH. J.L. & TECH. 9, 4 (2010) (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).

<sup>52</sup> See Sullivan and Vail, *supra* note 50, at 216-17 n.8.

<sup>53</sup> See U.S. Naval Criminal Investigative Service, General Order 00-0012, *Policy Change Regarding Recording of Interrogations*.

released a report concluding that principles of justice, equity, and fairness require “military law enforcement agencies to videotape the entirety of custodial interrogations of crime suspects at law enforcement offices, detention centers, or other places where suspects are held for questioning, or, where videotaping is not practicable, to audiotape the entirety of such custodial interrogations.”<sup>54</sup> The Air Force Judge Advocate General also declared that it would start recording all subject interviews as of October 2009, though there are limited exceptions, and recording of witness and victim interviews is optional.<sup>55</sup> Furthermore, the National Defense Authorization Act for Fiscal Year 2010, in Section 1080, requires that “each strategic intelligence interrogation” (one conducted in a “theater-level detention facility”) of persons in the custody of, or under the control of, the Department of Defense (DOD) shall be “videotaped or otherwise electronically recorded.”<sup>56</sup> The Section requires the Judge Advocate General to develop implementing guidelines.<sup>57</sup>

A significant number of police departments have also voluntarily adopted the recording solution.<sup>58</sup> Yet the vast majority of police departments still do not record.<sup>59</sup> Moreover, there are wide variations among the state provisions and the voluntarily-adopted programs.<sup>60</sup>

Furthermore, some approaches promise to be more effective in protecting the innocent,

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<sup>54</sup> See Thomas P. Sullivan, *Departments that Currently Record a Majority of Custodial Interrogations* 8 n.25 (December 2009) [hereinafter Sullivan, *Departments that Record*]; see also [http://www.nacdl.org/sl\\_docs.nsf/freeform/MERI\\_resources/\\$FILE/Deptsthatcurrentlyrecord\(asof11210\).pdf](http://www.nacdl.org/sl_docs.nsf/freeform/MERI_resources/$FILE/Deptsthatcurrentlyrecord(asof11210).pdf) (last visited August 11, 2011 (compiling a list the most up-to-date list of departments that currently record interrogations.))

<sup>55</sup> See Sullivan, *Departments That Record*, *supra* note 55, . at 8 n. 25.; Judge Advocate General On-line News Service, August 26, 2009.

<sup>56</sup> Sullivan, *Departments That Record*, *supra*, note 55, at 8 n.26.

<sup>57</sup> See *id.*

<sup>58</sup> See Sullivan and Vail, *supra* note 50, at 228-34 (listing all such departments, a list encompassing departments in forty states who have voluntarily adopted recording; when the states having mandated recording are added, all fifty states plus the District of Columbia have at least one police department engaged in recording in at least some cases).

<sup>59</sup> 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).

<sup>60</sup> Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1131 (2005).

convicting the guilty, minimizing coercion, and avoiding frivolous suppression motions than others.<sup>61</sup> Additionally, the further spread of the recording process throughout states and localities has been slow when its promised benefits are great.<sup>62</sup> A uniform statute may help to speed informed resolution of the recording issue. It was in recognition of these needs that the ULC, after a two-year-long drafting process, thus promulgated the Uniform Act for the Electronic Recording of Custodial Interrogations (the Act) that is the subject of this article.<sup>63</sup>

### *B. The Act's Major Provisions Summarized*

The Act is organized into twenty-three sections. Section one merely contains the Act's title.<sup>64</sup> Section two contains definitions.<sup>65</sup> Section three mandates the electronic recording of the entire custodial interrogation process by law enforcement, leaving it to individual states to decide where and for what types of wrongs this mandate applies, as well as the means by which recording must be done.<sup>66</sup>

Concerning the “where,” states must choose among no locational limitation, limiting the mandate to places of detention, or covering both places of detention and all other locations but varying the means by which recording must be done (audio and video at places of detention, only audio at other locations).<sup>67</sup> Concerning the means – the how – states may choose to mandate only audio, audio and video, or, as just noted, audio and video at a place of detention, only audio elsewhere.<sup>68</sup> As for the type of legal violation to which the electronic recording mandate applies,

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<sup>61</sup>*Id.* at 1133.

<sup>62</sup>*Id.* at 1140 (stating that there is much opposition to expansion, especially from those that would benefit the most from its creation; the police.)

<sup>63</sup>See UERCIA, available as adopted at <http://webcache.googleusercontent.com/search?q=cache:Moa5uoEb1-MJ:www.law.upenn.edu/bll/archives/ulc/erci/2010final.htm+UAERCI+legal&cd=2&hl=en&ct=clnk&source=www.google.com> (last visited August 11, 2011).

<sup>64</sup>See UERCIA §1.

<sup>65</sup>*Id.* § 2.

<sup>66</sup>*Id.* § 3.

<sup>67</sup>*Id.* §.3

<sup>68</sup>*Id.* §.3

jurisdictions must choose among felonies, crimes, delinquent acts, offenses, or some combination.<sup>69</sup> Moreover, each state must identify by section numbers to which specific violations within each chosen category the mandate applies.<sup>70</sup>

The Act thus permits states to vary the scope of the mandate based upon local variations in cost, perceived degree of need for different categories of criminal or delinquent wrongdoing, or other pressing local considerations. Nevertheless, combined audio and video recording remains the ideal, and the advantages of recording exist wherever custodial interrogation occurs and for whatever criminal or delinquent wrong is involved. Therefore, states choosing less than the maximum scope permitted by the options offered in Section 3 remain free over time to expand that scope as transitional and other costs decline.

These mandates are further limited by Section two's definition of "custodial interrogation" as "questioning or other conduct by a law enforcement officer which is reasonably likely to elicit an incriminating response from an individual and occur[ring] when reasonable individuals in the same circumstances would consider themselves in custody."<sup>71</sup> This definition largely matches that in *Miranda v. Arizona*,<sup>72</sup> as that decision's meaning was understood by the United States Supreme Court at the time of this Act's drafting.<sup>73</sup> However, the definition is still a statutory one, not expressly linked in its text to *Miranda*, because it is possible that *Miranda* will in the future be abandoned, or its meaning substantially altered, by future Court interpretation.<sup>74</sup>

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<sup>69</sup> *Id.* .§.3

<sup>70</sup> *Id.*§.3.. See also D.C. Code § 5-116.01. (making it mandatory in Washinton, D.C. to tape interrogations only of crimes of violence as defined by D.C. Code § 23-1331).

<sup>71</sup> UAERCI .§.3

<sup>72</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>73</sup> 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").

<sup>74</sup> See 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

Nevertheless, the close tracking to current understandings of the *Miranda* rule narrows the Act's scope while triggering the electronic mandate under circumstances that have been familiar to law enforcement for over four decades. Additionally, for clarity, Section three also expressly declares that it does not require the recording of spontaneous statements made outside the course of a custodial interrogation or in response to questions routinely asked during the processing of the arrest of an individual,<sup>75</sup> though those situations do not constitute custodial interrogations under *current post-Miranda* case law.<sup>76</sup>

Section four does not, however, require informing the individual being interrogated that the interrogation is being recorded.<sup>77</sup> Section four exempts electronic recording of custodial interrogations from state statutory requirements, if any, that an individual consent to the recording of the individual's conversations.<sup>78</sup> The last sentence in section four emphasizes, however, that no law enforcement officer or agency may record a private communication between an individual and the individual's lawyer.<sup>79</sup>

Sections five through ten outline a variety of exceptions from the recording mandate. Section five creates an exception for exigent circumstances. Section six creates an exception where the individual interrogated refuses to participate if the interrogation is electronically recorded, though Section six does, if feasible, require the electronic recording of the interrogatee's refusal to speak if his statements will be electronically recorded.<sup>80</sup> Section seven

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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*).

<sup>75</sup> See UERCIA §.3.

<sup>76</sup> See *Pennsylvania v. Muniz*, 496 U.S. 582 (1990) (routine booking exception); [Beatty v. Stewart, 303 F.3d 975, 991 \(9th Cir. 2002\)](#) (*Miranda* warnings not required because defendant spontaneously blurted out statements to psychiatrist).

<sup>77</sup> See UERCIA §.4.

<sup>78</sup> *Id.* §.4. *see also* WIS. STAT. ANN. § 968.073 (West).

<sup>79</sup> See UERCIA §.4.; *cf.* *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (discussing the function of the attorney client privilege).

<sup>80</sup> *Id.* §.6

excepts custodial interrogations conducted in other jurisdictions in compliance with their law.<sup>81</sup> Section eight excepts custodial interrogations conducted when the interrogator reasonably believes that the offense involved is not one that the statute mandates must be recorded.<sup>82</sup> Section nine excepts custodial interrogations from electronic recording where the law enforcement officer or his superior reasonably believes that electronic recording would reveal a confidential informant's identity or jeopardize the safety of the officer, the person interrogated, or another individual.<sup>83</sup> Section ten creates an exception for equipment malfunctions occurring despite the existence of reasonable maintenance efforts and where timely repair or replacement is not feasible.<sup>84</sup> Although a few of these "exceptions" outline circumstances that would likely not fit the definitions of "custody" or "interrogation," thus not requiring electronic recording in the first place,<sup>85</sup> those exceptions are nevertheless included to resolve any ambiguity and to offer quick-and-easy guidance to specific situations that will aid law enforcement in readily complying with the Act.

Section eleven places the burden of persuasion as to the application of an exception on the prosecution by a preponderance of the evidence.<sup>86</sup> Section twelve requires the state to notify the defense of an intention to rely on an exception if the state intends to do so in its case-in-chief.<sup>87</sup>

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<sup>81</sup> *Id.* §.7.

<sup>82</sup> *Id.* § 8.

<sup>83</sup> See UERCIA §.9.; *cf.* Thomas P. Sullivan, *Recording Federal Custodial Interviews*, 45 AM. CRIM. L. REV. 1297, 1343 (2008).(explaining why a confidential informant should not have to be electronically recorded).

<sup>84</sup> *Id.* §.10.

<sup>85</sup> See generally ANDREW E. TASLITZ, MARGARET L. PARIS, & LENESE HERBERT, CONSTITUTIONAL CRIMINAL PROCEDURE 726-40 (4<sup>th</sup> ed. 2010) (summarizing and analyzing cases and scholarship defining "custody" and "interrogation" under Miranda)..

<sup>86</sup> See UERCIA §.11.; *cf.* Colorado v. Connelly, 497 U.S. 157, 168 (1986) (holding that the state's "heavy burden" under Miranda is a preponderance of the evidence).

<sup>87</sup> *Id.* §.12.

Section 13 outlines procedural remedies for violation of the Act’s requirement that the entire custodial interrogation process be electronically recorded – remedies that come into play, of course, only if no exceptions apply. Section 13(a) declares that the court shall consider failure to comply with the Act in ruling on a motion to suppress a confession as involuntary.<sup>88</sup> This subsection does not mandate suppression for violation of the Act but merely mandates consideration of the relevance and weight of the failure to record by the trial judge in deciding whether to suppress on grounds of the involuntariness of the statement.<sup>89</sup> Bracketed language extends this same approach to confessions that are “not reliable,” even though they may be voluntary.<sup>90</sup> If the judge admits the Act-violative confession, Section 13(b) mandates that the trial judge give a cautionary instruction to the jury.<sup>91</sup>

Section 14 mandates that electronic recordings of custodial interrogations be identified, accessible, and preserved.<sup>92</sup> Preservation must be done in the manner prescribed by local statutes or rules governing the preservation of evidence in criminal cases generally.<sup>93</sup>

Section 15 requires each law enforcement agency (alternatively, in brackets, the “state agency charged with monitoring law enforcement’s compliance with this act” or the “appropriate state authority”) to adopt and enforce rules to implement this Act.<sup>94</sup> Subsection (b) specifies a small number of matters that these rules must address, including (1) the manner in which an electronic recording of a custodial interrogations must be made; (2) the collection and review of electronic recording data, or the absence thereof, by superiors within the law enforcement

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<sup>88</sup> *Id.* §13.

<sup>89</sup> *Id.* §13.

<sup>90</sup> *See id.* §13.

<sup>91</sup> *Id.* .§13(b).

<sup>92</sup> *Id.* .§14.

<sup>93</sup> *Id.*; see also Roberto Iraola, *The Electronic Recording of Criminal Interrogations*, 40 U. RICH. L. REV. 463, 473 (2006) (explaining that each state mandates its own preservation-of-evidence rules) .

<sup>94</sup> UERCIA .§15.

agency; (3) the assignment of supervisory responsibilities and a chain of command to promote internal accountability; (4) a process for explaining noncompliance with procedures and imposing administrative sanctions for failures to comply that are not justified; (5) a supervisory system expressly imposing on specific individuals a duty to ensure adequate staffing, education, training, and material resources to implement this [act]; and (6) a process for monitoring the chain of custody of electronic recordings of custodial interrogations.<sup>95</sup> Bracketed subsection (c) further requires that the rules adopted for video recording under subsection (a) must contain standards for the angle, focus, and field of vision of a recording device that reasonably promote accurate recording of a custodial interrogation at a place of detention and reliable assessment of its accuracy and completeness.<sup>96</sup> This subsection is bracketed because it is required only in jurisdictions that require both audio and video recording at a place of detention. Section 16 concerns limitation of liability. Subsection (a) declares that a law enforcement agency in the state that has implemented procedures reasonably designed to enforce the rules adopted pursuant to section 15(a) is not subject to civil liability for damages arising from a violation of the Act.<sup>97</sup> Subsection 16(a) is thus linked to the rule-writing and implementation provisions of Section 15.<sup>98</sup> Subsection 16(b) declares that the Act does not create a right of action against an individual law enforcement officer.<sup>99</sup>

Section 17 makes electronic recordings of custodial interrogations presumptively self-authenticating in any pretrial or post-trial proceeding if accompanied by a certificate of authenticity by an appropriate law enforcement officer sworn under oath.<sup>100</sup> However,

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<sup>95</sup> *Id.* §15(b).

<sup>96</sup> *Id.* §15(c).

<sup>97</sup> *Id.* §16.

<sup>98</sup> *Id.* §§15, 16(a).

<sup>99</sup> *Id.* §. 16(b). Restated, individual officers can never be sued under the Act. But governmental entities can be sued unless they have adopted and reasonably implemented certain procedures.

<sup>100</sup> *See id.* §17.

authenticity may otherwise be challenged in whatever way the law of a particular state provides.<sup>101</sup>

Sections 18 through 23 address technical matters. These technical matters, for example, address severability should any one provision of the Act be held unconstitutional and declare that the Act does not create a defense right to recording.<sup>102</sup>

In sum, the Act leaves individual jurisdictions free to decide the crimes to which, and the locations at which, the recording requirement applies. 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. Whatever choices jurisdictions make on these matters, however, the requirement kicks in only for “custodial” interrogations, as currently defined by *Miranda* and its progeny. 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.<sup>103</sup> The Act thus assumes that at least some custodial interrogations will be recorded and seeks to encourage expanding recording’s use wherever feasible. But the scope of the mandate remains in individual jurisdiction’s hands in the hope that recording in some instances is better than none 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. Furthermore, the Act includes numerous exceptions to cover a wide range of

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<sup>101</sup> *Id.* §17. ; *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2538-39 (2009) (noting that there is an exception to the usual Confrontation Clause protections for a clerk’s certificate merely authenticating an official record rather than reporting or vouching for its contents or their interpretation)..

<sup>102</sup> UAERCI , §§18-23. The concern within the Committee was that recognizing a defense “right” to be recorded would endanger the exceptions in the act, would require that the defendant always know when he is being recorded, and would *ensure* a civil right of action were he not taped absent his knowing waiver. The drafting committee conceived of the right as one of the People to reliable evidence where recording best furthers the People’s interests, not something done to benefit the defendant, though the defendant has standing to assert the right on behalf of the People in the circumstances described in the Act.

<sup>103</sup> *Id.* §3(d) (bracketed language).

potential complications. On the political front, the flexibility provided by the Act and its permitting slow, incremental changes as individual jurisdictions see fit was thought likely to improve the chances of widespread adoption. 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.

The more unusual and interesting provisions of the Act, however, are those involving remedies and regulations. It is thus to remedies that the next section of this article turns.

### III. Remedies

The Act provides for several remedies. First among these is a *very limited* suppression remedy, second cautionary jury instructions. In both instances, the Act once again provides jurisdictions substantial freedom of choice. The Act also protects against civil liability as a remedy if certain regulations are adopted and enforced. This part of this article discusses each of these remedies, plus the fate of one remedy – expert testimony – ultimately excluded from the Act. Details on the required regulations to avoid civil liability are left to a later section on rulemaking.

#### A. Pretrial Suppression Motions

The remedy that initiated the most heated discussion was the potential for suppressing evidence based upon violating the Act. The theory behind a suppression remedy was that it would provide a strong incentive for compliance with the Act.<sup>104</sup> Moreover, as is discussed shortly, it would help to avoid wrongful convictions by excluding evidence of doubtful trustworthiness, or at least evidence whose trustworthiness could not fairly be evaluated by the

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<sup>104</sup> *Id.* §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).

fact finder.<sup>105</sup> Additionally, the Act’s exceptions were so numerous and covered every legitimate reason for not recording (indeed including a catchall “exigent circumstances” exception)<sup>106</sup> that exclusion would be rare and, when it occurred, would likely involve either intentional wrongdoing or extreme negligence, thus making suppression fully justifiable.<sup>107</sup>

Opponents of the suppression remedy, however, argued that there are already constitutional grounds for excluding involuntary confessions.<sup>108</sup> Furthermore, in their view, voluntary confessions are still trustworthy, that is, unlikely to create an unacceptable risk of convicting the innocent.<sup>109</sup> Moreover, to the extent that trustworthiness is in doubt, they saw cautionary jury instructions as an adequate corrective.<sup>110</sup> Additionally, 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 rule and the right to counsel.<sup>111</sup> To add yet another independent ground for suppression seemed like overkill.

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<sup>105</sup> See *infra* text accompanying notes 167-232.

<sup>106</sup> See UERCIA .§. 5-10.

<sup>107</sup> Because the exceptions cover nearly all conceivable accidental or unavoidable circumstances where recording might not occur, such as equipment failure, the suspect’s refusal to be recorded, exigent circumstances, the posing of danger to informants, and the reasonable belief that an individual case fell outside the Act’s scope, *see id.*, any failure to record where these exceptions do not apply is likely to be intentional or, at best, grossly negligent. Moreover, whether for good or ill, this approach seems consistent with the Court’s recent treatment of the exclusionary rule in a related-but-different area of constitutional law: violation of the Fourth Amendment. See 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*, 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).

<sup>108</sup> See TASLITZ, PARIS, & HERBERT, *supra* note 86, at 657-52, 670-86. (summarizing the most important of these remedies).

<sup>109</sup> 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).

<sup>110</sup> See *infra* text accompanying notes 233-36 (discussing the virtues and vices of the jury instruction as a remedy).

<sup>111</sup> See TASLITZ, PARIS, & HERBERT, *supra* note 86, at 694-32, 787-809 (summarizing the relevant case law).

To address opponent's concerns, the Act does not create an independent ground for suppression because of the failure to comply with the Act's recording requirements. But the Act does declare that its violation may be considered as a factor in the voluntariness determination.<sup>112</sup> The Act also suggests in brackets that jurisdictions 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 coercive police conduct.<sup>113</sup> These provisions thus prevent suppression merely because recording has not taken place as the Act requires. Rather, suppression is permitted only on other grounds, with the failure to record a relevant factor. If that failure tips the scale under the totality of the circumstances, then the confession might be suppressed 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. It is also better than making violation of the Act entirely irrelevant to suppression on any ground given the limitations of the only other criminal case remedy – jury instructions – to be discussed below. It is, however, a remedy that still turns on a trial judge's weighing of numerous circumstances, giving trial judges enormous discretion.<sup>114</sup> Where judges have such discretion, they rarely suppress, except in the most unusual or extreme of cases.<sup>115</sup> Furthermore, as noted above, it is hard to violate the Act in the first place because of its many exceptions.<sup>116</sup> If this point is understood and accepted, that too should aid in enactability. But the approach has vices too, arising precisely from the likely rarity of suppression in practice, as this article soon

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<sup>112</sup> See UERCIA .§.13(a)..\_.

<sup>113</sup> *Id.*.

<sup>114</sup> See *id.*

<sup>115</sup> 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 the judicial discretion, combined with a low preponderance of the evidence burden of proof, likely guarantees frequent denial of motions to suppress confessions).

<sup>116</sup> See *supra* text accompanying notes 81-87.

explains.<sup>117</sup> Ultimately, the approach is a wise one, but it is a wise *compromise*, not a perfect ideal.

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

Remember that the Act does *not* mandate exclusion of evidence as a remedy. But 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, including (but not limited to) doing so on the grounds of its involuntariness or unreliability.<sup>118</sup> In doing so, this Act navigates among the inflexible rule of *per se* exclusion in some states, the presumed inadmissibility in other states, the overly-complex balancing approaches recommended by some law reformers, and the complete abandonment of even the possibility of an exclusionary remedy in one state.<sup>119</sup>

The most likely grounds for suppression are that the accused gave his statement involuntarily,<sup>120</sup> that it was unreliable,<sup>121</sup> or that it violated *Miranda*.<sup>122</sup> The Act emphasizes the first two grounds as most relevant and important, where the need for recording is at its highest,<sup>123</sup> but it uses the word “including” to acknowledge that non-recording may further be relevant to pretrial suppression on other grounds, including other federal constitutional ones, but also various state grounds, particularly in states that have exercised their authority (either on statutory or state constitutional grounds) to specify additional grounds for suppression of statements

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<sup>117</sup> See *See Pepson and Sharifi*, *supra* note 116, at 1242; *infra* text accompanying notes 131-48.

<sup>118</sup> See UAERCI .§13 (a).

<sup>119</sup> See *infra* text accompanying notes 149-66 (summarizing these approaches).

<sup>120</sup> See *e.g.*, *Oregon v. Elstad*, 470 U.S. 298, 318, 105 S. Ct. 1285, 1298, 84 L. Ed. 2d 222 (1985) (comparing *Miranda* and involuntariness suppression grounds); *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). (explaining scope of involuntariness as a ground fo suppression).

<sup>121</sup> Unreliability alone is a statutory, not a federal constitutional, ground for suppression. See *infra* text accompanying notes 175-232.

<sup>122</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966); *Oregon v. Elstad*, 470 U.S. 298, 318 (1985) (applying *Miranda*).

<sup>123</sup> 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 TASILITZ, PARIS, & HERBERT, *supra* note 86, at 708-12 (comparing compulsion with voluntariness).

generally.<sup>124</sup> 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, of course, generally arises only when *Miranda* warnings would also be required (the existence of a “custodial interrogation” being a necessary trigger for the Act’s provisions),<sup>125</sup> the offense is one covered by this Act (in most states, this is likely initially to be a relatively small subset of all crimes), *and* one of the Act’s extensive set of exceptions does not apply. That is likely to be the unusual case, albeit an important situation in which the exclusionary possibility should be contemplated.

Indeed, at least seven states and the District of Columbia have adopted, by statute, court rule, or judicial decision, some version of the exclusionary rule for non-recording of the entire custodial interrogation process.<sup>126</sup> These states are in widely disparate areas of the country: Alaska (the Northwest); Minnesota, Indiana, and Illinois (the Midwest); New Hampshire, New Jersey, and DC (the Northeast); North Carolina (the South), and arguably Montana – there is some statutory ambiguity for this state (the West).<sup>127</sup>

Moreover, although a per se rule of inadmissibility might have the greatest deterrent

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<sup>124</sup> See, e.g., 1 CRIM. PRAC. MANUAL §27:32 (2010) (explaining the federal “McNabb/Mallory” rule, codified and modified at 18U.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*, in 21 CONN. PRAC. §18:22 (2009) (discussing state “corpus delicti” rule as a ground for suppressing a confession).

<sup>125</sup> See UERCIA .§§2-3.

<sup>126</sup> NEB. REV. STAT. § 29-4501; Stephan v. State, 711 P.2d 1156, 1165 (Alaska 1985) (Alaska court decision); IL ST CH 725 § 5/103-2.1 ; State v. Hajtic, 724 N.W.2d 449, 456 (Iowa 2006). (court order); Commonwealth v. Diaz, 661 N.E. 2d 1326, 1328 (Mass. 1996). (court order, possible jury instruction if not recorded but no clear rule); State v. Barnett, 789 A.2d 629, 630 (N.H. 2002). (if not taped in full, then exclusion). For full list, see Alan M. Gershel, *A Review of the Law in Jurisdictions Requiring Electronic Recording of Custodial Interrogations*, 16 RICH. J.L. & TECH. 9, 74 (2010) .

<sup>127</sup> See Gershel, *supra* note 127; *supra* note 105 and accompanying text.

effect and be easily administrable,<sup>128</sup> 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."<sup>129</sup>

Nevertheless, exclusion is generally understood as a remedy turning on a cost-benefit analysis.<sup>130</sup> 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,<sup>131</sup> and adding a statutory layer of protection to other relevant constitutional rights, such as the due process right to be free

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<sup>128</sup> 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).

<sup>129</sup> *See* *Stephan v. State*, 711 P.2d 1156 (Ala. 1985) (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 (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); Indiana Rules of Evid., Rule 617, 34 Appendix, Court Rules, Indiana Ann. Code (West 2011) (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.

<sup>130</sup> *See* *Hudson v. Michigan*, 547 U.S. 586, (2006). (subjecting availability of an exclusionary remedy under the Fourth Amendment to a cost/benefit analysis).

<sup>131</sup> Deterrence is always one justification for exclusionary rules. *See* TASLITZ, PARIS, & HERBERT, *supra* note 86, at 616-17; Slobogin, *supra* note 105. 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 86, 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, *Transparent Policing*, 85 IOWA L. REV. 1107 (2000) (recounting the virtues of "transparency" in improving police accountability, something that, I note here, taping would do as well).

from coercive interrogations<sup>132</sup> and the Fifth Amendment right to be free from compelled custodial interrogations, including the *Miranda* prophylactic protection of that right.<sup>133</sup> But where violation of the Act has only minimally implicated these social interests, the cost of suppression may not be worth the benefits. Therefore, the Act merely requires the trial court to consider the relevance and weight of violation of the electronic recording mandate in pretrial suppression motion decisions.

Merely stating that the unjustified lack of recording should be “considered” simply leaves its weight undefined, however, perhaps suggesting that a trial judge should be free to give the lack of recording *decisive* weight. Some jurisdictions may trust the trial court to make precisely just such decisions as among those commonly made in pretrial motions. For jurisdictions seeking to make it clear, however, that nonrecording should never alone be sufficient to justify exclusion, bracketed language declares that the trial judge may consider exclusion as only “a factor” in the suppression balancing analysis.<sup>134</sup> On the other hand, rendering violation of the Act irrelevant to pre-trial suppression motions would not adequately serve the Act’s goals in cases where the interests the Act serves are substantially implicated, a point explained more fully below.

Statutory mandates for decision-makers to consider factors without requiring that they thereby decide a particular way are common. In the area of constitutional law, one well-known such statute was unsuccessfully challenged as violating free speech rights in *NEA v. Finley*.<sup>135</sup> There, Congress amended the statute governing National Endowment of the Arts (NEA)

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<sup>132</sup> See TASLITZ, PARIS, & HERBERT, *supra* note 86, at 657-81.

<sup>133</sup> *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.

<sup>134</sup> See UERCIA §. .13(a).

<sup>135</sup> *NEA v. Finley*, 524 U.S. 569 (1998).

procedures for awarding grants to encourage proposed artistic endeavors. The amended statute directed the NEA chairperson, in establishing procedures for determining the artistic merit of grant applications, to “take into consideration general standards of decency and respect for the diverse beliefs of the American public.” Several grant-applicants denied funding sued the NEA, claiming that the statute as applied had violated their First Amendment right to free speech by directing funding-denial for projects espousing a particular viewpoint.

The United States Supreme Court, however, rejected this reading of the statute. First, explained the Court, mandating that an agency “consider” a matter in its deliberations decidedly does not categorically require funding denial. Second, the legislative history expressly revealed that Congress rejected any categorical consequences of such consideration, noting, for example, that an independent Commission advising Congress on the matter declared in its report that new grant-selection criteria “should be incorporated as part of the selection process ... rather than isolated and treated as exogenous considerations.”<sup>136</sup> The Court therefore viewed the statutory provision in *Finley* as “aimed at reforming procedures rather than precluding speech,”<sup>137</sup> thereby undermining “respondents’ argument that the provision inevitably will be utilized as a tool for invidious viewpoint discrimination.”<sup>138</sup>

Relatedly, the Court rejected the claim that if the mandate to “consider” a factor does not require a particular result on the statute’s face, it will render the statute so impermissibly vague and subjective as to allow the agency to be thoroughly unconstrained, again permitting invidious discrimination to occur below the radar. A mandate to “consider” a factor is no more vague, however, concluded the Court, than the ultimate question to which this consideration contributes to an answer: whether the grant application is for a project that is likely to exemplify “artistic

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<sup>136</sup> *Id.* at 581-82.

<sup>137</sup> *Id.* at 582 .

<sup>138</sup> *Id.*

excellence.”<sup>139</sup> Only a case-by-case consideration of a wide array of information can lead to a decision on such a question in an individual case.

Here, as in *Finley*, this Act imposes a procedural, not substantive, requirement that breach of the Act’s recording mandate be considered in deciding suppression motions on other grounds. The word “consider,” again as in *Finley*, thus does not imply or require a result in a particular case. The “legislative history” in states that adopt the Act can further emphasize this point, as was also true in *Finley*. Furthermore, the word “consider” is no more vague than, for example, the word “involuntariness,” one ultimate ground for suppression to which consideration of these Act’s mandates applies, and a test that has long survived judicial scrutiny.<sup>140</sup> Granted, *Finley* involved an agency rather than a court. This is a distinction without a difference, for legislative mandates for courts to “consider” certain factors in making case-specific judgments are likewise common,<sup>141</sup> and, in any event, nothing in the *Finley* Court’s reading of text or the rest of its rationale sensibly limits it to the agency context.

It also might be argued that a statute may not “mandate” that anything be considered in making a constitutional decision because constitutions trump statutes.<sup>142</sup> 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.”<sup>143</sup> Among the recording mandate’s

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<sup>139</sup> *Id.* at 585.

<sup>140</sup> See TASLITZ, PARIS, & HERBERT, *supra* note 86, at 657-83.

<sup>141</sup> See, e.g., Tracey Bateman, *Divorce and Separation: Consideration of Tax Consequences in Distribution of Marital Property*, 9 A.L.R. 5<sup>th</sup> 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 R. Weatherford, *Judicial Sentencing Discretion Post-Booker: Are Judges Getting a Distorted View through the Lens of Social Networking Sites?*, 27 GA. ST. U. L. REV. 673, 681-82 (2011); cf. 2 PUB. NAT. RESOURCES §17:3 (George Cameron Coggins and Robert L. Glicksman eds 2d ed. 2011) (explaining that certain federal environmental statutes require agencies to consider alternatives to recommended 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 (discussing when an agency must, may, and cannot consider certain factors in making a decision).

<sup>142</sup> See generally RON VILLANOVA., *LEGAL METHODS: A GUIDE FOR PARALEGALS AND LAW STUDENTS* (1999).

<sup>143</sup> See PETER HENNING, ET AL., *MASTERING CRIMINAL PROCEDURE* 230-33 (2010).

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.<sup>144</sup> That absence occurs where recording that should have taken place did not. Violation of the Act's recording mandate thus logically entails its consideration in the "totality of the circumstances" test of voluntariness. For similar reasons, violation of the Act's recording mandate should be relevant in determining "reliability."

Violation of the Act's mandates should, of course, always be relevant to any pretrial motion in the sense that the court is deprived of the best evidence of just what the facts were, including subtleties of tone, voice, and expression. Moreover, the mere fact of such unjustified 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.<sup>145</sup> 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 statute and constitution. Several jurisdictions, to be discussed shortly, have indeed seen no such conflict.<sup>146</sup>

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), albeit a ground that is coterminous 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

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<sup>144</sup> See *supra* text accompanying notes 21-47.

<sup>145</sup> See UERCIA §13(a).

<sup>146</sup> See *infra* text accompanying notes 149-65.

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.<sup>147</sup>

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

Remember that Alaska and Minnesota have adopted a simple, rigid rule of per se exclusion for violation of their recording mandates.<sup>148</sup> Washington, DC creates a softer rule of presumed inadmissibility that can be rebutted by clear and convincing prosecution evidence that the statement was nevertheless voluntary.<sup>149</sup> Illinois also creates a rule of presumed inadmissibility that can be rebutted but differs from the DC rule in two ways: (1) the prosecution must prove not only that the statement was voluntarily given *but also* that it is reliable, given the totality of the circumstances; and (2) the prosecution's burden of proving these matters is only a preponderance of the evidence.<sup>150</sup> 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.<sup>151</sup>

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.<sup>152</sup> Accordingly, these states accept the idea that a remedy for violation of recording requirements must aim at fact finding accuracy, not only

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<sup>147</sup> See UERCIA §13(a).

<sup>148</sup> 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 1156 (Alaska law requires exclusion when confessions un-recorded under certain noted circumstances.).

<sup>149</sup> D.C. Code § 5-115.01.

<sup>150</sup> IL ST CH 725 § 5/103-2.1

<sup>151</sup> MONT. CODE ANN. § 46-4-409

<sup>152</sup> IL ST CH 725 § 5/103-2.1; MONT. CODE ANN. § 46-4-409

at deterrence.<sup>153</sup> Because the prosecution has the opportunity to prove that its non-compliance has created no harm, exclusion will be applied less frequently under this approach than under a per se rule of inadmissibility and will kick in primarily where there is substantial reason to worry that we are in danger of convicting the wrong man.

Other states have created still softer versions of the exclusionary rule. New Jersey, for example, provides that an unexcused failure to record is a *factor* for the court to consider in deciding whether to admit a confession.<sup>154</sup> 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.<sup>155</sup> Yet the uncertainty—the remaining *possibility* of exclusion in a particular case—still provides an incentive for police compliance.<sup>156</sup>

On the other hand, if the confession *is* admitted, New Jersey then requires that a cautionary jury instruction be given.<sup>157</sup> Exclusion and jury instructions can thus be seen, as they are in New Jersey, as complementary rather than alternative remedies. North Carolina follows a similar approach, making an unexcused failure to record admissible to prove that a statement was involuntary *or* unreliable but, if the confession is nevertheless admitted, requiring a jury instruction warning that the jury may consider evidence of non-compliance in deciding whether a statement was voluntary and reliable.<sup>158</sup> Montana likewise provides for a cautionary instruction

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<sup>153</sup> On the importance of fact finding accuracy relative to other values, *see* GEORGE THOMAS, THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS (2008); MIRJAN DAMASKA, EVIDENCE LAW ADRIPT (1997); BRIAN FORST, ERRORS OF JUSTICE: NATURE, SOURCES, AND REMEDY (2003).

<sup>154</sup> NJR CR R 3:17 (2011); *State v. Cook*, 179 N.J. 533, 552, 847 A.2d 530, 541 (2004) (appointing a committee to suggest electronic recording rules under the courts' supervisory power).

<sup>155</sup> *See* sources cited *supra* note 155.

<sup>156</sup> *See* TASLITZ, PARIS, & HERBERT, *supra* note 86, at 583 (discussing the role of foreseeability in suppression).

<sup>157</sup> NJ R CR R. 3:17.

<sup>158</sup> N.C. STAT. §15A-211(as amended 2011).

if a motion to suppress a non-compliant, unrecorded statement is denied.<sup>159</sup>

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.<sup>160</sup> Maine, Maryland, and New Mexico are simply silent about remedies, which may or may not preclude the courts from crafting their own.<sup>161</sup>

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.<sup>162</sup> 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.<sup>163</sup> The Project's Death Penalty Initiative recommended electronic recording of the entire custodial interrogation process in capital cases and also recommended a unique exclusionary remedy for violations of that mandate.<sup>164</sup> Both the Constitution Project and ALI versions of an exclusionary remedy, however, relied on a detailed, complex balancing process to guide judges, a process unnecessarily complex and therefore not adopted in the Act.<sup>165</sup> 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

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<sup>159</sup> MONT. CODE ANN. § 46-4-410..

<sup>160</sup> WIS. PRAC., CRIMINAL PRACTICE & PROCEDURE § 20:63 (2<sup>nd</sup> ed. 2010) ; NEB. REV. STAT. § 29-4505.

<sup>161</sup> MD CRIM PROC § 2-402; N.M. Stat. Ann. § 29-1-16; ME. REV. STAT. ANN. tit. 25, § 2803-B.

<sup>162</sup> See THE CONSTITUTION PROJECT, MANDATORY JUSTICE: THE DEATH PENALTY REVISITED 50 (2006); AMERICAN LAW INSTITUTE, MODEL CODE OF PREARRAIGMENT PROCEDURE (1980), available at [www.ali.org](http://www.ali.org) [hereinafter ALI MODEL CODE (last visited June 8, 2011)].

<sup>163</sup> See *The Constitution Project: Safeguarding Liberty, Justice, and the Rule of Law: Who We Are*, [www.constitutionproject.org/whoweare](http://www.constitutionproject.org/whoweare) (last visited August 19, 2011).

<sup>164</sup> See THE CONSTITUTION PROJECT, *supra* note 163, at 50.

<sup>165</sup> Compare *id.* with ALI MODEL CODE, *supra* note 163.

limitation on their fact finding and balancing discretion.

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

The approach of this Act is to fuse aspects of the Illinois and New Jersey approaches. Illinois requires that the prosecutor prove by a preponderance of the evidence *both* that an unrecorded statement was voluntary *and* that it was reliable – an approach seemingly adopted by Montana as well.<sup>166</sup> Absent such proof, exclusion of the confession is mandated.<sup>167</sup> North Carolina similarly recognizes both involuntariness and unreliability as grounds for suppressing a confession.<sup>168</sup> The ULC Act, unlike that in Illinois, never mandates the exclusionary remedy but makes violation of the Act one factor in the admissibility decision.<sup>169</sup> 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.<sup>170</sup> 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*.<sup>171</sup>

The latter ground for suppression is not one routinely recognized in constitutional law or in most state statutory law as a ground for suppression of confessions,<sup>172</sup> though, as noted above, several states have recently done so in the precise context of non-recording.<sup>173</sup> Accordingly, in many states this Act might create a new basis for potential exclusion of a confession—and it is

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<sup>166</sup> IL ST CH 725 § 5/103-2.1; MONT. CODE ANN. § 46-4-409; NJ R CR R. 3:17.

<sup>167</sup> See cites *supra* note 167.

<sup>168</sup> N.C. GEN. STAT. ANN. § 15A-211

<sup>169</sup> Compare UERCIA .§.13a\_ with IL ST CH 725 § 5/103-2.1 .

<sup>170</sup> Compare *id* with NJ R CR R. 3:17

<sup>171</sup> Compare UERCIA with IL ST CH 725 § 5/103-2.1; MONT. CODE ANN. § 46-4-409; NJ R CR R. 3:17 ; N.C. GEN. STAT. ANN. § 15A-211

<sup>172</sup> See *e.g.*, *Lego v. Twomey*, 404 U.S. 477 (1972) (focusing on the involuntariness of the confession -- reliability being a determination for the jury); see *infra* text accompanying notes 170-76 (noting many states' lacking such a provision, even in statutes specifically aimed at recording custodial interrogations).

<sup>173</sup> See *supra* text accompanying notes 167-69.

worth emphasizing again that this is only *potential* exclusion via a multi-factor weighing process and only if none of the exceptions to the Act are met. Because of the novelty of this approach in many, though by no means all, states, further comment on the role of reliability in suppression motions is warranted. Relative novelty is also why the language of reliability in this section is bracketed.

The most common constitutional grounds for suppression of confessions are violations of the *Miranda* rule and the involuntariness of the confession under the due process clauses of the United States Constitution.<sup>174</sup> A confession is “involuntary” only if coercive police activity has overborne the suspect’s will.<sup>175</sup>

A complex of values underlies this involuntariness rule.<sup>176</sup> 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.<sup>177</sup> 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.<sup>178</sup> Thus, in *Colorado v. Connelly*,<sup>179</sup> 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

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<sup>174</sup> See HENNING, ET AL., *supra* note 144, at 237-38.

<sup>175</sup> See *id.* at 237-39.

<sup>176</sup> See TASLITZ, PARIS, & HERBERT, *supra* note 86, at 659-68.

<sup>177</sup> See *id.* at 667.

<sup>178</sup> See TASLITZ, PARIS, & HERBERT, *supra* note 86, at 658.

<sup>179</sup> 497 U.S. 157 (1986).

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.”<sup>180</sup>

Read in isolation, this quote might suggest that the majority was thoroughly unconcerned with “reliability,” that is, with whether there is good reason to trust that the confession was truthful, the defendant therefore guilty. But that impression would be misleading, for in other cases the Court, lower courts, and commentators have recognized that one important function of the voluntariness test is to reduce the chances of convicting the innocent.<sup>181</sup> 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.<sup>182</sup> 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.<sup>183</sup> Yet the Court recognized that a fundamental purpose of a criminal trial is to admit “*truthful* and probative evidence before state juries. . . .”<sup>184</sup> The Court additionally recognized that, even where coercive police activity is lacking, “this sort of inquiry . . . [may] be resolved by state laws governing the admission of evidence. . . . A statement rendered by one in the condition of respondent might be proved to be quite *unreliable*, but this is a matter to be governed by the evidentiary laws of the forum.”<sup>185</sup>

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<sup>180</sup> *Id.* at 167 (quoting *Lisenba v. California*, 314 U.S. 219, 233-36 (1941)).

<sup>181</sup> See generally *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, (1973); *Hof v. State*, 97 Md. App. 242, 289, 629 A.2d 1251, 1275 (1993), *aff’d*, 337 Md. 581, 655 A.2d 370 (1995); WILLIAM E. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 24:2 (2010); TASLITZ, PARIS, & HERBERT, *supra* note 86, at 660-62.

<sup>182</sup> See, e.g., *id.* at 658; *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.”).

<sup>183</sup> See TASLITZ, PARIS, & HERBERT, *supra* note 86, at 658.

<sup>184</sup> See *Connelly*, 497 U.S. at 166 (quoting *Lego v. Twomey*, 404 U.S. 477, 488-89 (1972)).

<sup>185</sup> *Id.* at 167 (emphasis added).

Justice Brennan, joined by Justice Marshall, squarely addressed the reliability question. Brennan's main point of disagreement with the majority was that he thought that free will and reliability, not overreaching by police officers, should be the sole constitutional due process inquiries.<sup>186</sup> 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."<sup>187</sup>

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.<sup>188</sup> Indeed, Brennan was particularly concerned about false or unreliable confessions because of their "decisive impact on the adversarial process."<sup>189</sup> 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.'"<sup>190</sup> 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."<sup>191</sup>

In other areas of due process, the Court has reaffirmed that police overreaching is indeed

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<sup>186</sup> See *id.* at 174, 181 (Brennan, J., dissenting).

<sup>187</sup> *Id.* at 181 (quoting in part *Rogers v. Richmond*, 365 U.S. 534, 541 (1961)).

<sup>188</sup> *Id.* at 181 (quoting *Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964))(emphasis added).

<sup>189</sup> *Id.* at 182.

<sup>190</sup> *Id.* Social science supports this conclusion. See *infra* text accompanying notes 245-46 (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).

<sup>191</sup> *Connelly*, 497 U.S. at 182.

a requirement for a due process violation.<sup>192</sup> But the Court has also made its continuing concern with the reliability of fact finding under the due process clauses evident.<sup>193</sup> A particularly apt example is the Court’s due process analysis of eyewitness identifications, such as lineups or photo-spreads.<sup>194</sup> The Court will not suppress an identification resulting from a suggestive identification procedure unless that suggestion was unnecessarily created by the police.<sup>195</sup> 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.<sup>196</sup> Indeed, says the Court, reliability is the “linchpin” of the analysis.<sup>197</sup> 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.<sup>198</sup> The reason for this is that the reliability of the in-court identification then itself becomes suspect.<sup>199</sup>

Custodial interrogations by definition involve state action.<sup>200</sup> Similarly, motions to

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<sup>192</sup> See *Colorado v. Connelly*, 479 U.S. 157 (1986) (noting that t police overreaching is a component of a due process violation).

<sup>193</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970). (emphasizing that factfinding needs to be reliable and open to avoid due process violations); TAsLITZ, PARIS, & HERBERT, *supra* note 86, 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).

<sup>194</sup> See TAsLITZ, PARIS, & HERBERT, *supra* note 86, at 910-912.

<sup>195</sup> See *id.* at 910-11. The Court has 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 v. New Hampshire*, No. 10-8974.

<sup>196</sup> See TAsLITZ, PARIS, & HERBERT, *supra* note 86, at 912.

<sup>197</sup> *Manson v. Braithwaite*, 432 U.S. 98, 102 (1977).

<sup>198</sup> *Id.* at 109-14 (reaffirming this test); *Neil v. Biggers*, 409 U.S. 188, 198 (1972) (first articulating the test).

<sup>199</sup> See *Manson*, 432 U.S. at 109-14; *Biggers*, 409 U.S. at 198.

<sup>200</sup> 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); UERCIA §2(a) (defining “custodial 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 86, at 677-81 (synthesizing the many Chavez opinions). Although doctrinally freestanding due process and incorporated-by-due-process Bill of Rights claims and different, the former obviously must inform the latter for incorporation to make any sense. *Cf. generally* ANDREW E. TAsLITZ, RECONSTRUCTING THE FOURTH AMENDMENT:

suppress confessions resulting from such interrogations necessarily involve claims of police overreaching.<sup>201</sup> 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.<sup>202</sup> 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.”<sup>203</sup> Moreover, the Court’s due process jurisprudence is rarely muscular, generally setting a very low floor of reliability.<sup>204</sup> Accordingly, it is wise to craft other

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A HISTORY OF SEARCH AND SEIZURE, 1789-1868 (2006) (articulating an extended defense of this general point but as illustrated by the Fourth Amendment).

<sup>201</sup> See *Miranda*, 384 U.S. 436 (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).

<sup>202</sup> See TASLITZ, PARIS, & HERBERT, *supra* note 86, at 660-67.

<sup>203</sup> 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 overbearing the defendant’s will).

<sup>204</sup> See Jerold H. Israel, *Freestanding Due Process and Criminal Procedure: The Supreme Court’s Search for Interpretive Guidelines*, 45 ST. LOUIS URBAN L.J. 303, 421 (2001) 424 (“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 424. 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 (explaining at length the failures of the Court’s due process and common law doctrines adequately protect the reliability of confessions, a 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).

mechanisms for making suppression on the grounds of unreliability *alone* a basis for suppression. One such mechanism is the inherent supervisory power of the courts.<sup>205</sup> Explained the *DiGiambattista* court,

The issue is not what we “require” of law enforcement, but how and on what conditions evidence will be admitted in our courts. We retain as part of our superintendence power the authority to regulate the presentation of evidence in court proceedings. The question before us is whether and how we should exercise that power with respect to the introduction of evidence concerning interrogations.<sup>206</sup>

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.<sup>207</sup>

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*.<sup>208</sup> There, the Court created an exclusionary remedy under its state constitution’s due process clause for the failure electronically to record custodial interrogations in their entirety. Said the Court, “[s]uch recording is a requirement of state due process when the interrogation occurs in a place of detention and recording is feasible.”<sup>209</sup> “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.”<sup>210</sup> Due process, the court added, is not a “static” concept but “must change to keep pace with new technological

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<sup>205</sup> See, e.g., *Commonwealth v. DiGiambattista*, 442 Mass. 423, 440-49 (2004) (holding, via its supervisory power, that a sanction must be imposed on the state whenever it fails electronically to record the entire custodial interrogation process, though creating the sanction of a jury instruction rather than suppression, while rejecting claims that this approach violated the separation of powers.)

<sup>206</sup> *Id.* at 444-45.

<sup>207</sup> *Id.* at 446.

<sup>208</sup> 711 P.2d 1156, 1159-63 (1985).

<sup>209</sup> *Id.* at 1159.

<sup>210</sup> *Id.* at 1159-60.

developments.”<sup>211</sup> The technological feasibility of electronic recording of the entire custodial interrogation process was just such a development. Finally, the court concluded:

In the absence of an adequate record, the accused may suffer an infringement upon his right to remain silent and to have counsel present during the interrogation. Also, his right to a fair trial may be violated, if an illegally obtained, and *possibly false*, confession is subsequently admitted. An electronic recording, thus, protects the defendant’s constitutional rights, by providing an objective means for him to corroborate his testimony concerning the circumstances of the confession.<sup>212</sup>

Commentators have also argued that Federal Rule of Evidence (“FRE”) 403 and its state law equivalents already authorize suppression of evidence, including interrogations, that is unreliable.<sup>213</sup> 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.<sup>214</sup> Given the psychological data showing the powerful tendency of even false confessions to induce juries to convict,<sup>215</sup> argue these commentators, a confession obtained under circumstances having strong indicia of unreliability will mislead the jury.<sup>216</sup> 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.”<sup>217</sup> Law professor and cognitive psychologist Richard Leo made the point thus:

Several state courts and the federal district courts have chosen to adopt a ... rule of corroboration, most often termed the “trustworthiness standard”....In marked contrast to the corpus

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<sup>211</sup> *Id.* at 1161.

<sup>212</sup> *Id.* at 1161 (emphasis added).

<sup>213</sup> See RICHARD LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 288 (2008); FED. R. EVID. 403.

<sup>214</sup> See FED. R. EVID. 403.

<sup>215</sup> See *infra* text accompanying notes 245-46.

<sup>216</sup> See LEO, *supra* note 214, at 288.

<sup>217</sup> See *id.* at 281-85.

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.<sup>218</sup>

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.<sup>219</sup> What matters here are not the details of any particular approach but rather the recognition that the unreliability of a confession – one bearing hallmarks raising a risk of the confession’s falsity, or lacking any evidence suggesting the alleviation of such a risk -- should be an independent ground for suppression from 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.<sup>220</sup> In the interrogation context, Leo and others have recognized, furthermore, that electronic recording is essential to sound fact-finding concerning a confession’s reliability.<sup>221</sup> The ULC Act thus recognizes that violation of the Act’s recording mandates should be one factor in a motion to suppress a confession as unreliable but rejects the arguably draconian solution of per se exclusion under such

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<sup>218</sup> See *id.* at 284.

<sup>219</sup> See *id.* at 283-91.

<sup>220</sup> See ALEXANDRA NATAPOFF, 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 (4<sup>th</sup> ed. 2010) (discussing the “reliability” test for admitting what is claimed to be questionable expert testimony).

<sup>221</sup> See LEO, *supra* note 214, at 291-305.

circumstances.<sup>222</sup>

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.<sup>223</sup> 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.<sup>224</sup> Some courts articulate fuzzy grounds for their approach to reliability questions, and some approaches are too inflexible and harsh.<sup>225</sup> Legislative action, by contrast, brings a democratic imprimatur and the significant investigative resources of the legislature to bear on designing appropriate remedies.<sup>226</sup> A Uniform Act's attention to remedies thus promises sounder and more uniform approaches to the remedies question. At the same time, the Act's approach does not even arguably intrude in any significant way upon judicial prerogatives because the Act merely makes violation of its provisions *one factor* for courts to consider in making the admissibility decision.

Finally, some commentators have argued that even the prospect of exclusion is unnecessary to deter police resistance to recording requirements because the virtues of the

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<sup>222</sup> See UERCIA §13(a).

<sup>223</sup> See Thomas P. Sullivan, Andrew W. Vail, and Howard W. Anderson III, *The Case for Recording Police Interrogations*, 34 No. 3 LITIGATION 30, 37 (2008) (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).

<sup>224</sup> The New Jersey Supreme Court in a path-breaking 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*, 2011 WL 3689387 (N.J. August 24, 2011) (creating an exclusionary rule for unreliable eyewitness identifications involving privately-induced suggestion under New Jersey's equivalent to Federal Rule of Evidence 403).

<sup>225</sup> See, e.g., *Stephan v. State*, 711 P.2d 1156, 1162 (Ala. 1985); *State v. Scales*, 518 N.W.2d 587, 591 (Minn. 1994); *supra* text accompanying notes 149-50 (discussing per se rules of exclusion).

<sup>226</sup> 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).

procedure will quickly become evident to police once they start recording.<sup>227</sup> 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.<sup>228</sup> One of its primary goals is to prevent conviction of the innocent and thus to promote conviction of the guilty.<sup>229</sup> 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.<sup>230</sup>

The only fully effective remedy for an innocent person who has given an unreliable confession is to exclude it as evidence entirely. But the failure to record does not alone, of course, establish such unreliability but rather turns on a case-specific judgment by the trial court. Accordingly, the Act leaves that judgment to the trial court while making plain that it is a judgment that the court must make and that the failure to record is a relevant factor in making this judgment. Like Illinois, therefore, the Act adopts exclusion of unreliable confessions as an option, albeit applying a much softer version of the exclusionary rule than did Illinois.<sup>231</sup>

## *B. Jury Instructions and Their Relative Efficacy*

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

Thomas Sullivan, one of the leading national advocates for electronic recording of custodial interrogations, and his co-author, Andrew Vail, have strongly endorsed cautionary jury

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<sup>227</sup> See Thomas A. Sullivan and Andrew Vail, *The Consequences of Law Enforcement Officials' Failure to Record Custodial Interviews as Required By Law*, 99 J. CRIM. L. & CRIMINOLOGY 215 (2009 [hereinafter *Failure to Record*]).

<sup>228</sup> See *supra* text accompanying notes 21-64.

<sup>229</sup> See *supra* text accompanying notes 21-64.

<sup>230</sup> See Richard Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. L. REV. 979, 1120-22 (1997); Mark A. Godsey, *Reliability Lost, False Confessions Discovered*, 10 CHAPMAN L. REV. 623 (2007).

<sup>231</sup> See *supra* text accompanying notes 167-223.

instructions as a remedy for violation of recording mandates.<sup>232</sup> 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.<sup>233</sup> 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.<sup>234</sup> 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.”<sup>235</sup> Pursuant to that mandate, the New Jersey judiciary has prepared fairly lengthy model jury charges as a remedy for violation of the statute.<sup>236</sup> Instructions are already an available remedy in several other jurisdictions, including Montana, Nebraska, Wisconsin, and Massachusetts,<sup>237</sup> highlighting the urgency of getting the instructions right.

Sullivan and Vail’s proposed instruction would caution jurors that the officers in the case before them inexcusably failed to comply with a recording requirement—one designed to give jurors a complete record of what occurred; that the jurors consequently have been denied “the most reliable evidence as to what was said and done by the participants” so that the jurors “cannot hear the exact words used by the participants or the tone or inflection of their voices.”<sup>238</sup> 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

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<sup>232</sup> See Thomas P. Sullivan and Andrew W. Vail, *The Consequences of Law Enforcement Officials’ Failure to Record Custodial Interviews as Required by Law*, 99 J. CRIM. L. & CRIMINOLOGY 215 (2009) [hereinafter *Failure to Record*].

<sup>233</sup> See *id.* at 221-22.

<sup>234</sup> See *id.*

<sup>235</sup> See New Jersey Supreme Court Rule 3:17.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*; see Sullivan and Vail, *Failure to Record*, *supra* note 233, at 218-19; MONT. CODE ANN. § 46-4-409 (2011).

<sup>238</sup> *Id.* at 226.

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.”<sup>239</sup>

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:

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

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

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

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

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

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<sup>239</sup> *Id.*

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.<sup>240</sup>

These proposed model instructions combine elements of Sullivan’s proposed federal instructions and of his later-proposed and similar state-level instructions,<sup>241</sup> with modifications made to adjust the instructions to a uniform act, like that of the ULC, recommended for state level adoption.

Sullivan and Vail at least implicitly argue that many jurisdictions might give cursory cautionary instructions without a fairly detailed model.<sup>242</sup> 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.<sup>243</sup> 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.<sup>244</sup> 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

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<sup>240</sup> See *id.* at 225-26 (one source that was adapted to create the above instruction); Thomas Sullivan, Recording Federal Custodial Interviews, 45 AM. CRIM. L. REV. 1297, 13342-44 (2008) [hereinafter Federal Recording] (proposing an analogous instruction for federal court).

<sup>241</sup> See sources cited *supra* note 241.

<sup>242</sup> Compare Sullivan & Vail, *Federal Recording*, *supra* note 241, at 1319 (suggesting more detailed instructions than previously used by some federal courts), with Sullivan and Vail, *Failure to Record*, *supra* note 233, at 217-26 (suggesting different instructions than are used in many states).

<sup>243</sup> See Sullivan and Vail., *Federal Recording*, *supra* note 241, at 1319; Sullivan and Vail, *Failure to Record*, *supra* note 233, at 218-21, 225 (proposed specific statutorily-mandated instructions rather than leaving it to judicial discretion).

<sup>244</sup> See Richard A. Leo and Steven Z. Drizin, *The Three Errors: Pathways to Wrongful Conviction*, in POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 21, 27 (G. Daniel Lassiter and Christian A. Meissner ed.s 2010) (“People find detailed, vivid, and plausible confessions to be persuasive evidence of guilt, even when they turn out to be false.”).

below).<sup>245</sup> 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.<sup>246</sup> On the other hand, the length of this sample instruction is unusual in comparison to many sorts of common instructions, and some observers may fear that a lengthy instruction will lead jurors to give *undue* weight to the failure to record by over-emphasizing it.<sup>247</sup> 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 that it was inexcusably unrecorded (if there were a recognized excuse, no jury instruction would be given).<sup>248</sup>

The Act, in subsection 13(b), leaves trial judges ample discretion in crafting instructions meeting the needs of each individual case.<sup>249</sup> Consequently, the Act mandates only that remedial instructions be given, leaving the details and length of those instructions to the trial court.<sup>250</sup> Nevertheless, the sample instructions provided here may help to inform trial judges' decisions on this question.

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

Nevertheless, it is important to explain why such instructions will not suffice as a sole remedy. Notably, there is no empirical data on whether the availability of jury instructions will

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<sup>245</sup> See *infra* text accompanying notes 255-63.

<sup>246</sup> Thomas P. Sullivan, *Recording Federal Custodial Interviews*, 45 AM. CRIM. L. REV. 1297 (2008).

<sup>247</sup> This was, at least, a fear expressed by some members of the ULC drafting committee.

<sup>248</sup> Cf. BRIAN CUTLER & STEVEN 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).

<sup>249</sup> See UAERCI §13(b).

<sup>250</sup> See *id.*

be an adequate deterrent to violations of recording mandates.<sup>251</sup> Opinions differ on the point,<sup>252</sup> raising cause for concern were such instructions to be the sole available judicial remedy. Furthermore, jury instructions will also be unavailable in bench trials.

More importantly, however, there is ample reason to question whether jury instructions alone will 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<sup>253</sup>). Nevertheless, ample studies show that juries routinely give confessions enormous weight, even under circumstances where there is substantial reason to be concerned about the confessions' accuracy.<sup>254</sup>

More specifically, research has shown that jurors are not good at separating true from false confessions—in fact do no better than chance—but do improve their ability to judge confession accuracy when the entire interrogation process is videotaped and proper camera

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<sup>251</sup> 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* Andrew E. Taslitz, Memorandum to Drafting Committee on Electronic Recordation of Custodial Interrogations, *Social Science Memorandum on the Impact of Cautionary Jury Instructions Concerning the Unexcused Failure to Record the Entire Custodial Interrogation Process*, October 8, 2008, posted in pdf on the Uniform Law Commission Website, [www.nccusl.org](http://www.nccusl.org) (summarizing research) [hereinafter Taslitz, *Jury Instruction Memorandum*].

<sup>252</sup> This observation was certainly true in the ULC drafting committee.

<sup>253</sup> 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.

<sup>254</sup> *See* Leo and Drizin, *supra* note 245, at 25 (“Once a suspect has confessed, the formal presumption of innocence is quickly transformed into an informal presumption of guilt that overrides their analysis of exculpatory evidence”; furthermore noting that juries, upon hearing evidence that the defendant confessed, “tend to selectively ignore and discount evidence of innocence.”); G. Daniel Lassiter and Andrew L. Geers, *Bias and Accuracy in the Evaluation of Confession Evidence*, in *INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT* 197, 198-99 (G. Daniel Lassiter ed. 2004) (summarizing the research showing that various forms of cautionary jury instructions concerning the risk of a confession's being involuntary or inaccurate have little impact on the high likelihood of guilty verdicts, concluding that “these studies unequivocally demonstrate that people do not necessarily evaluate and use confession evidence in the ways prescribed by law.”).

angles are used, that is, angles not focusing solely on the suspect.<sup>255</sup> Jury instructions alone are thus unlikely to improve jurors' accuracy where they are denied recordings of the entire interrogation process. Moreover, where there is no excuse for the police failure to record, there seems little justification for ignoring this risk to the innocent.

Ample social science concerning wrongful convictions in other areas (albeit analogous ones) than custodial interrogations also supports the conclusion that jury instructions will do too little to improve jurors' ability accurately to assess credibility and correctly to determine whether a confession was true or voluntary.<sup>256</sup> The effect of instructions on jurors varies with the subject matter of the instruction, and some can be modestly effective.<sup>257</sup> Yet, overall, instructions are frequently either ineffective in changing jurors' reasoning or have unintended effects.<sup>258</sup> 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.<sup>259</sup>

This risk is indeed no minor matter, for innocence concerns were among the primary forces motivating the movement for electronic recording in the first place,<sup>260</sup> and errors can result in an innocent person being sentenced to the death penalty or to life in prison—errors hard

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<sup>255</sup> See Leo and Drizin, *supra* note 245, at 25 (“[F]alse confessions whose cases are not dismissed pretrial will be convicted (by plea bargain or jury trial) 78% to 85% of the time, even though they are completely innocent.”); G. Daniel Lassiter, Lezlee J. Ware, Matthew J. Goldberg, and Jennifer J. Ratcliff, *Videotaping Custodial Interrogations: Toward a Scientifically Based Policy*, in POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 143, 143-57 (G. Daniel Lassiter and Christian A. Meissner ed.s 2010) (collecting research and concluding that jurors are best at differentiating true from false confessions when the camera focuses solely on the interrogator, second best when it focuses equally on the interrogator and the suspect, but suspect-focus camera angles alone “appear[] to actually diminish the capability of decision makers to arrive at objectively correct assessments.”).

<sup>256</sup> The social science supporting the arguments made in this paragraph is concisely summarized at Taslitz, *Jury Instruction Memorandum*, *supra* note 252.

<sup>257</sup> See *id.*

<sup>258</sup> See *id.*

<sup>259</sup> See *id.* at 6-7.

<sup>260</sup> See *supra* text accompanying notes 21-34.

to correct where confessions rather than DNA are the primary evidence offered.<sup>261</sup> These worries are important, therefore, even if it is correct that violations of recording mandates will be relatively rare. In other words, deterrence is not the only function to be served by an exclusionary rule in this context. Indeed, critics of the exclusionary rule, including those on the Court, have focused their ire on the rule's application to Fourth Amendment violations while generally embracing the rule's wisdom where the reliability of fact finding is at stake.<sup>262</sup>

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

But the limitations of cautionary instructions counsel against relying on them too heavily

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<sup>261</sup> See *False Confessions*, [www.innocenceproject.org](http://www.innocenceproject.org) (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 21, 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 255-56, it is unlikely that the system will accept having convicted the wrong man absent DNA evidence proving his innocence. See Aviva Orenstein, *Facing the Unfaceable: Dealing With Prosecutorial Denial in Postconviction Cases Of Actual Innocence*, 48 SAN DIEGO L. REV. 401 (2011) (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).

<sup>262</sup> See Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: the Sluggish Life of Political Factfinding*, 94 GEO. L.J. 1589 (2006).

as the sole judicial remedy. For example, analogous data suggests that jury instructions' impact can be weak or perverse, at least if not given in conjunction with other remedies, such as expert testimony alerting jurors to the reliability problems with certain evidence and to jurors' own reasoning problems that may interfere with their ability to give evidence its appropriate weight.<sup>263</sup> 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.<sup>264</sup> 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.<sup>265</sup> This circumstance might be sufficiently rare that suppression should neither be routine nor presumptive. Nevertheless, its consequences when it does occur are sufficiently grave that the ULC Drafting Committee has incorporated into the Act a provision permitting trial judges to take into account as one factor in deciding suppression motions the risks that

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<sup>263</sup> Cf. ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 131-33 (1999) (defending the use of such experts concerning rape victim behavior and jury reasoning processes in rape cases); Jennifer Devenport, Christopher D. Kimbrough, and Brian L. Cutler, *Effectiveness of Traditional Safeguards Against Erroneous Conviction Arising From Mistaken Eyewitness Identification*, in EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 51, 61-64 (Brian L. Cutler ed. 2009) (concluding that jury instructions currently relied upon by the courts concerning eyewitness identification accuracy "either have no effect or enhance juror skepticism rather than juror sensitization to eyewitnessing and identification conditions," leading the authors to suggest that "the courts may benefit from a set of cautionary instructions that more closely resemble expert psychological testimony," though the authors concede that expert testimony in the eyewitness area might, in the view of some commentators, itself raise different problems).

<sup>264</sup> See RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 314-16 (2009) (arguing that a "substantial and widely accepted body of scientific research" supports using experts on the factors affecting confession accuracy at trial and that such social scientist testimony is needed because traditional safeguards, including cautionary jury instructions, "are not sufficient to safeguard individuals against the likelihood of wrongful convictions based on unreliable confession evidence"); Solomon M. Fulero, *Tales from the Front: Expert Testimony on the Psychology of Interrogations and Confessions Revisited*, in POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 211, 211-22 (G. Daniel Lassiter and Christian A. Meissner eds. 2010) (arguing that such expert testimony is scientifically valid and reliable, useful to juries, and admissible under existing evidence rules governing experts).

<sup>265</sup> See GARRETT, *supra* note 21, at 14-45 (giving examples of extraordinarily unreliable confessions convincing juries to convict men who were later proved innocent).

confessions obtained in violation of the Act will be more likely to be involuntary or unreliable.<sup>266</sup>

### C. Expert Testimony

One remedy not yet tried *for violation of recording requirements* is to admit expert testimony on the factors contributing to involuntary or false confessions, the reasons why videotaping is desirable, and the risks of not doing so. The value of this remedy has apparently also not been studied empirically. Of course, there is growing recognition of the need for expert testimony whenever the risk of wrongful convictions looms.<sup>267</sup> Indeed, that is why the American Bar Association has included similar provisions meant to encourage expert testimony in the area of eyewitness identifications in the ABA's Innocence Standards.<sup>268</sup> Similarly there is cause for optimism in using expert testimony as a remedy based upon empirical research in the area of eyewitness identifications. That research reveals that expert testimony on the factors affecting eyewitness accuracy substantially improved jurors' sensitivity to the relevance and weight of those factors—even when the science contradicted jurors' preconceptions—and this effect was apparently even greater among jury-eligible adults than among undergraduate jurors.<sup>269</sup> Moreover, critics' fears that such testimony would unduly increase acquittals of the innocent have proven unwarranted. One recent review of the literature explained this last point thus:

Some judges have objected to psychologist experts on the ground that they might have too much influence on the jurors, causing them to undervalue, as opposed to overvalue, the

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<sup>266</sup> See UERCIA §13(a); cf. LEO, *supra* note 214, at 286-91 (arguing for suppression of confessions where the risk of their inaccuracy is unacceptably high).

<sup>267</sup> See LEO, *supra* note 214, 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 Cutler ed. 2009) (arguing for the importance of expert testimony on eyewitness identification to avoid wrongful convictions).

<sup>268</sup> See AMERICAN BAR ASSOCIATION, *ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY* 24, 41-42 (2006).

<sup>269</sup> See BRIAN CUTLER & STEVEN PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* 239-40 (1995) (summarizing the research).

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.<sup>270</sup>

The consistency of the eyewitness research with other research on experts suggests that similar results might obtain with experts on interrogations. Expert testimony might be wise independently of any recording requirement. Because jury instructions alone likely do too little to help a jury evaluate a confession's voluntariness or accuracy where there is no recording of the interrogation process, expert testimony suggests itself as an important supplementary remedy.<sup>271</sup> While a number of commentators and courts thus recognize the value of expert testimony in the area of false confessions, none suggest that expert testimony be particularly favored on this subject where the police inexcusably fail to record the entire custodial interrogation process.<sup>272</sup> In such circumstances, the mere failure to record raises suspicions about why police would, without any recognizable excuse, violate recording mandates. Moreover, juries are deprived of the best evidence of what occurred in the interrogation room and the best

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<sup>270</sup> See NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 195 (2007).

<sup>271</sup> Ample empirical and theoretical work suggests that jurors are ignorant of important lessons learned from the empirical study of interrogations and confessions and thus should benefit substantially from testimony on those topics if offered by a qualified expert. See, e.g., Danielle E. Chojnacki, *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 ARIZ. ST. L.J. (2008) (analyzing surveys revealing the average person's ignorance of the likelihood that innocent persons may confess and the factors affecting that likelihood); LEO, *supra* note 214, 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.").

<sup>272</sup> By inexcusable, I mean that none of the many statutory exceptions to the recording requirement apply. See *supra* text accompanying notes 81-87.

medium for determining the accuracy and voluntariness of the confession. Juries would just hear the confession itself or a summary of it. Given the powerful impact of such a confession on the jury – virtually guaranteeing conviction<sup>273</sup> – under circumstances where it is, at best, hard to judge the confession’s reliability, at worst there is ample reason to doubt it, there seems a particularly great reason to inform the jury of the circumstances that could have led to a false confession. Yet, as has been discussed above, jury instructions are unlikely alone to do that job adequately.<sup>274</sup> That should especially be true if the defense can produce any evidence, even via cross-examination of prosecution witnesses, that there are risk factors present in the current case. Experts can only testify probabilistically, however, that is, that risks of error exist but cannot opine that the individual case in fact involved a false or involuntary confession.<sup>275</sup>

The ULC drafting committee in fact originally saw the wisdom of such an approach. Consequently, a draft section of the Act indeed included a rule urging the admissibility of expert testimony as a remedy for recording violations where such testimony had not otherwise been admitted.<sup>276</sup> 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.<sup>277</sup>

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.”<sup>278</sup> Furthermore, the Act provided guidance to the trial court in making its

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<sup>273</sup> See *supra* text accompanying notes 244-45.

<sup>274</sup> See *supra* text accompanying notes 252-67.

<sup>275</sup> *State v. Henderson*, 2011 WL 3715028 \*50-51 (N.J. August 24, 2011) (making similar point concerning experts on eyewitness identification).

<sup>276</sup> See *UERCIA Draft, Dated July 1, 2008*, §13(c).

<sup>277</sup> The courts of a variety of jurisdictions are divided on the *Frye/Daubert* question. See Kyle C. Reeves, *Prosecution Function: False Confessions and Expert Testimony*, in AMERICAN BAR ASSOCIATION, THE STATE OF CRIMINAL JUSTICE: 2008 123, 123-29 (2009).

<sup>278</sup> See *UERCIA Draft, Dated July 1, 2008*, §13(c).

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.<sup>279</sup> 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).<sup>280</sup> 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 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.<sup>281</sup>

This approach thus does not mandate admissibility of expert testimony as a remedy in every case and does put the initial burden of demonstrating the potential value of such testimony on the defendant. Even once that demonstration is made, however, the trial court must determine that the case is an appropriate one for expert testimony. The admissibility of such testimony is thus an individualized determination but with substantial guidance given trial courts concerning how to make that determination. Of course, expert testimony on these subjects might be admissible even absent a recording act violation, as the proposed draft section of Act also made clear.<sup>282</sup> But

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<sup>279</sup> *See id.*

<sup>280</sup> *See* FED. R. EVID. 404(b).

<sup>281</sup> *See UERCIA Draft, Dated July 1, 2008*, §13(c). These factors are those articulated by leading social science authors in the field. *See, e.g.,* LEO, *supra* note 214, at 216-35, 253-54, 263-66, 286-91.

<sup>282</sup> *See UERCIA Draft, Dated July 1, 2008*, §13(c).

such testimony is especially urgent given such a violation because of the jury's reduced evidentiary basis for making a sound decision about the weight to give the confession. The expert testimony provision is also needed because some courts have expressed undue reluctance to admit such testimony where needed.<sup>283</sup> 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.<sup>284</sup>

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

Unfortunately, in my view, the drafting committee ultimately abandoned this experts 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. 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 and supported by sound science yet inexplicably resisted<sup>285</sup> -- hardly seems like an undue limitation on judicial discretion to me. Nevertheless, judicial opposition was intense. Dropping the provision was thus the right thing to do to create an enactable statute. But, as a policy matter, I believe it was a mistake.

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<sup>283</sup> See GARRETT, *supra* note 21, 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 21, at 314 (arguing that looking at cases without written opinion reveals frequent judicial willingness to admit such testimony, a very different conclusion than that reached by looking only at reported cases).

<sup>284</sup> See UERCIA Draft, Dated July 1, 2008, §13(c).

<sup>285</sup> See *id.*

### III. Rulemaking

#### A. Monitoring and Guiding Police Performance

##### 1. The Need for Rules Designed to Implement The Act

Building into a statute some means of monitoring police performance is highly desirable. Ample empirical literature demonstrates that transparency and accountability improve police performance.<sup>286</sup> 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.<sup>287</sup> 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.<sup>288</sup> Regulations also provide clear guidance to line officers charged with implementing the provisions of this Act, anticipating potentially problematic situations, reducing transition costs, and improving police efficacy and efficiency.<sup>289</sup> It is for similar reasons that subsection 14(a) requires adoption and enforcement of rules designed to implement this Act.<sup>290</sup>

Washington, D.C.’s statute provides that police “may” adopt an implementing general order.<sup>291</sup> The police have done just that, by adopting a general order requiring commanders or superintendents of detectives’ divisions to approve requests for deviations from standard

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<sup>286</sup> See generally DAVID A. HARRIS, *GOOD COPS: THE CASE FOR PREVENTIVE POLICING* (2005); Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities or, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7 (2010).

<sup>287</sup> 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).

<sup>288</sup> See Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 LAW AND CONTEMP. PROB.S 221, 244-48 (2003).

<sup>289</sup> See HARRIS, *GOOD COPS*, *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).

<sup>290</sup> UAERCI §.14(a).

<sup>291</sup> D.C. CODE § 5-116.02

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.<sup>292</sup> 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.<sup>293</sup> 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.<sup>294</sup> A model statute need not be as detailed as an implementing police general order, but the D.C. order reflects some basic requirements that a sound statute should contain, including:

1. mandates for detailed data collection within, and review by superiors within, each police department;
2. clear, specific assignments of supervisory responsibilities to specific individuals and a clear chain of command to promote internal accountability;
3. a mandated system of explanation for procedural deviations and administrative sanctions for those that are not justified;
4. a mandated supervisory system expressly imposing on specific individuals a duty of ensuring adequate manpower, education, and material resources to do the job; and
5. a mandated system for monitoring the chain of custody and responding to prosecutor evidence and informational requests to ensure responsiveness to the needs of the judicial branch, and to translate police action into reliable evidence

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<sup>292</sup> See <https://go.mpdconline.com/GO/3719000.pdf> (last visited August 10, 2011).

<sup>293</sup> See *id.*

<sup>294</sup> See *id.*

ready for efficient use by the courts and by lawyers in both trial and pre-trial proceedings.<sup>295</sup>

More generally, D.C.'s approach suggests a statutory mandate for police to draft detailed internal regulations for implementing general statutory requirements.<sup>296</sup> Subsection 14(a) of the ULC Act accordingly outlines the minimum important subjects to be included in police regulations but leaves those details to other entities.<sup>297</sup> 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.”<sup>298</sup> The first option leaves drafting to local law enforcement, the second to an existing state agency without otherwise substantially changing its responsibilities, the third to an existing or new state agency where the state chooses to identify a specific state-level entity charged with monitoring state and local law enforcement’s compliance with the Act. There are scores of existing model regulations from police departments already mandated to, or voluntarily choosing to, record upon which drafting entities may draw for models.<sup>299</sup>

Although the District of Columbia’s statute merely authorized police to adopt implementing regulations, it is worth noting that Maine, for example, by statute *requires* all law enforcement agencies indeed to adopt written policies concerning electronic recording procedures and for the preservation of investigative notes and records for all serious crimes.<sup>300</sup> Furthermore, the chief administrative officer of each agency must certify to the Board of

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<sup>295</sup> See *id.*; see also COMPILATION OF DEPARTMENTAL REGULATIONS (2008) (compiled by Thomas Sullivan and Andrew Vail) (available from author).

<sup>296</sup> See D.C. CODE §5-116.02, also available at <http://www.dccouncil.washington.dc.us/images/00001/20050106110442.pdf>.

<sup>297</sup> See UAERCI §14 (a).

<sup>298</sup> See *id.* at §15.

<sup>299</sup> See *Police Department Regulations: Custodial Interrogation* (unpublished looseleaf collection of all such regulations, collected by, and available from, Thomas P. Sullivan or Andrew W. Vail, attorneys, Chicago, Illinois).

<sup>300</sup> ME. REV. STAT. ANN. 15§801-A, also available at [www.mainelegislature.org/legis/bills/billtexts/LD089101](http://www.mainelegislature.org/legis/bills/billtexts/LD089101).

Trustees of the Maine Criminal Justice Academy of the State Department of Public Safety that attempts were made to obtain public comment during the formulation of these policies.<sup>301</sup> The statute also requires this same Board, by a specified date, to establish minimum standards for each law enforcement policy.<sup>302</sup> The chief administrative officer for each law enforcement agency must likewise certify to the Board by a specified date that the agency has adopted written policies consistent with the Board's standards and, by a second specified date, certifying that the agency has provided orientation and training for its members concerning these policies.<sup>303</sup> The Board must also review the minimum standards annually to determine whether changes are needed as identified by critiquing actual events or reviewing new enforcement practices demonstrated to reduce crime, increase officer safety, or increase public safety.<sup>304</sup> The chief administrative officer of a municipal, county, or state law enforcement agency must further certify to the Board by a specified date that the agency has adopted a written policy regarding procedures for dealing with freedom of access requests and that he has designated a person trained to respond to such requests—a system that can help to balance privacy concerns of interviewees facing potential trials with the need for public access and evaluation.<sup>305</sup>

Maine's Board, pursuant to this statute, indeed drafted a requirement of a written policy, including at least certain minimum subject matters.<sup>306</sup> 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;

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<sup>301</sup> *See id.*

<sup>302</sup> *See id.*

<sup>303</sup> *See id.*

<sup>304</sup> *See id.*

<sup>305</sup> *See id.*

<sup>306</sup> *See* Maine Chiefs of Police Ass'n, *General Order*, available at [www.Maine.gov/.../2-23A%20Recording%20](http://www.Maine.gov/.../2-23A%20Recording%20) (last visited August 20, 2011).

- 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.<sup>307</sup>

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.<sup>308</sup> That model policy included a statement disclaiming its creating a higher legal standard of safety or care concerning third party claims and insisting that the policy provides the basis only for administrative sanctions by the individual agency or the Board.<sup>309</sup>

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

## *2. Delegation Concerns: A Brief Note*

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<sup>307</sup> See *id.*

<sup>308</sup> See *Maine Chiefs of Police Association, Recording of Suspects in Serious Crimes & the Preservation of Notes & Records, General Order 2-23A (Draft February 11, 2005)*; also available at [http://www.nacdl.org/sl\\_docs.nsf/freeform/MERI\\_attachments/\\$FILE/ME\\_Police\\_Recording.pdf](http://www.nacdl.org/sl_docs.nsf/freeform/MERI_attachments/$FILE/ME_Police_Recording.pdf) (last visited August 11, 2011).

<sup>309</sup> See *id.* at 2-23A-6.

Many state courts will invalidate statutes that delegate rule-making power without “adequate” guidance to regulatory agencies.<sup>310</sup> But it is unlikely that this provision will prove troublesome in this regard. Illinois’ requirements offer a helpful example. In Illinois, a legislative delegation of regulatory authority will be valid if the legislature meets three conditions: first, it identifies the persons and activities subject to regulation; second, it identifies the harm sought to be prevented; and third, it identifies the general means intended to be available to the administrator to prevent the identified harm.<sup>311</sup> 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.<sup>312</sup>

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 as defined in *Miranda*, a definition with which law enforcement have been familiar for over four decades.<sup>313</sup> 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.<sup>314</sup> Similarly, the Act clearly aims at preventing three sorts of harms: the creation of involuntary confessions or of false or unreliable ones and the maximization of the factfinder’s ability to identify involuntary, false, or unreliable confessions.<sup>315</sup> Moreover, the means for law enforcement agencies to carry out their responsibilities are identified in numerous provisions: those describing when recording is necessary and when it is not (the various

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<sup>310</sup> Norman J. Singer and J.D. Shambie Singer, *Legislative Power, The Delegation of Powers*, in 1 SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION (2008) (providing a 50 state survey of state-level delegation rules).

<sup>311</sup> See *Stofer v. Motor Vehicle Cas. Co.*, 68 Ill. 2d 361, 12 Ill. Dec. 168, 369 N.E.2d 875 (1977).

<sup>312</sup> *Forest Preserve Dist. of Du Page County v. Brown Family Trust*, 323 Ill. App. 3d 686 (2d Dist. 2001).

<sup>313</sup> See UAERCI .§3; *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>314</sup> See UAERCI .§3.

<sup>315</sup> See *supra* text accompanying notes 5-8.

exceptions), those identifying what paperwork must be prepared and when, those addressing remedies that include internal discipline being but a few of the provisions offering detailed guidance.<sup>316</sup> Finally, for similar reasons, the Act provides easily intelligible standards to guide the law enforcement agency, for it will know with some specificity when, where, and how it must tell officers to record.<sup>317</sup> It will do so, however, with specificity sufficient to offer law enforcement agencies guidance but not so detailed as to straightjacket their choice of specifics.<sup>318</sup> The delegation doctrine should, therefore, not be cause for concern.

### *B. Numbers of Cameras and Angle*

A special comment must be made about the subsection (c) of the Act's Section \_c\_. This subsection requires rules to be made governing the manner of recording, including the proper camera angle. Subsection (c) is bracketed because it applies only in jurisdictions that require both audio and video recording.<sup>319</sup> Requiring rules specifying the number of cameras to use and their angle may seem like a small, unimportant detail. It is not. Indeed, ample research demonstrates that jurors are best at differentiating true from false confessions when the camera focuses solely on the interrogator, second best when it focuses equally on the interrogator and the suspect.<sup>320</sup> Yet a suspect-focus camera angle alone “appears to actually diminish the capability of decision makers to arrive at objectively correct assessments.”<sup>321</sup> This last point is particularly important because it is particularly counter-intuitive: audio recording may be superior to audio

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<sup>316</sup> See UAERCI §§3-13.

<sup>317</sup> See *id.* §.15(b).

<sup>318</sup> See *supra* text accompanying notes 297-310 (comparing the Act's specificity with the greater detail in the District of Columbia and Maine's statutes and policies).

<sup>319</sup> UERCIA §15(a).

<sup>320</sup> See G. Daniel Lassiter, Lezlee J. Ware, Matthew J. Goldberg, and Jennifer J. Ratcliff, *Videotaping Custodial Interrogations: Toward a Scientifically Based Policy*, in POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 143, 143-57 (G. Daniel Lassiter and Christian A. Meissner ed.s 2010).

<sup>321</sup> See *id.* at 153.

and video combined if the video focuses solely on the suspect.<sup>322</sup> 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.<sup>323</sup>

Most statutes and regulations ignore these details. But North Carolina recognizes their importance, declaring that, if a visual record is made, “the camera recording the interrogation must be placed so that the camera films both the interrogator and the suspect.”<sup>324</sup> 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.”<sup>325</sup> The Innocence Project of Cardozo University Law School, in its proposed model statute, makes a similar recommendation.<sup>326</sup>

### *C. Internal Discipline*

Violations of recording mandates that do not produce confessions or that produce

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<sup>322</sup> See *id.* at 152 (describing data supporting the conclusion that “confession presentation formats that provide access to suspects’ facial cues seem to hinder rather than help observers accuracy with regard to differentiating true from false confessions,” and this is particularly true where the sole focus of the camera is on the suspect), 155 (“[T]ime and time again the research demonstrates that this [suspect-focus] perspective leads to biased and inaccurate assessments of videotaped interrogations, which could increase the possibility of an innocent person being wrongfully prosecuted and ultimately wrongfully convicted.”).

<sup>323</sup> See *id.* at 154-55 (recommending ideally an audio-video presentation focuses solely on the interrogator, secondarily one focused equally on both interrogator and suspect, but arguing for suppression of the video – and use only of the audio portion and of a transcript – where video was made focusing solely on the suspect). See also *id.* at 155 (discouraging a split-screen presentation of face-on views of both suspect and interrogator as increasing the risks of error, thus favoring instead either a camera angle simultaneously and equally focusing on both suspect and interrogator or on interrogator alone). Additional summaries of relevant empirical studies supporting these conclusions may be found in G. Daniel Lassiter & Andrew L. Geers, *Bias and Accuracy in the Evaluation of Confession Evidence*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 197, 198-208 (G. Daniel Lassiter ed., 2005); RICHARD LEO, POLICE INTERROGATIONS AND AMERICAN JUSTICE 205, 250-51 (2008); S.M. Kassin & K. McNall, *Police Interrogations and Confessions*, 15 L. & HUMAN BEH. 231, 235 (1991); S.M. Kassin & H. Sukel, *Coerced Confessions and the Jury: An Experimental Test of the “Harmless Error” Rule*, 21 L. & HUMAN BEH. 27, 27-46 (1996).

<sup>324</sup> N.C. Gen. Stat. Ann. § 15A-211 (West)

<sup>325</sup> 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, 224 (2009).

<sup>326</sup> The Innocence Project. <http://www.innocenceproject.org/fix/Model-Legislation.php> (last visited August 11, 2011).

confessions that seem obviously to violate constitutional or other admissibility requirements and thus that are not offered as evidence at a criminal trial cannot be remedied by the criminal justice system. Yet, as is discussed below, no civil liability may be available either under the Act if the law enforcement agency has adopted and enforced reasonable regulations concerning recording,<sup>327</sup> and often potential litigants will not file suit because of minimal recoverable damages.<sup>328</sup> In such cases, the only effective deterrent to an individual officer's future mistakes will be administrative discipline. Moreover, while court remedies may be uncertain, vigorously enforced administrative sanctions are relatively certain and thus likely to deter future error.<sup>329</sup> Furthermore, the mere knowledge that such sanctions may be available can lead officers to act with great care and deliberation concerning recording procedures.<sup>330</sup> For these reasons, section 14(d) mandates that law enforcement agencies adopt rules imposing graded system of sanctions on individual officers, sanctions reasonably designed to promote compliance with this Act.<sup>331</sup> The subsection is bracketed, however, because in collective bargaining states, the subject matter of subsection (d) would be controlled by collective bargaining agreements.<sup>332</sup>

#### *D. Limitation of Actions*

Section 16 of the Act addresses civil liability. Subsection 16(c) unequivocally states that this Act does not by its terms create a cause of action against an individual law enforcement officer.<sup>333</sup> Subsection (b) adds further clarity by declaring that the only sanction that may be

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<sup>327</sup> See *infra* text accompanying notes 334-55.

<sup>328</sup> Sean Trende, *Why Modest Proposals Offer the Best Solution for Combating Racial Profiling*, 50 DUKE L.J. 331, 342-57 (2000) (discussing the many obstacles to lawsuits based upon alleged police violations of constitutional rights).

<sup>329</sup> Cf. Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 364-68 (discussing the importance of sanctioning individual officers to achieve deterrence).

<sup>330</sup> Cf. *id.* at 373-79 (explaining the psychological processes by which individual sanctions, albeit especially in the form of liquidated damages or a penalty schedule, are particularly likely to achieve deterrence).

<sup>331</sup> See UAERCI §14(d).

<sup>332</sup> See UAERCI. §15.

<sup>333</sup> See UAERCI §16(c).

imposed upon an individual officer who violates this Act is administrative discipline, though it does not mandate such discipline.<sup>334</sup> However, the Act recognizes the possibility, without mandating it, that courts or legislatures in individual states might find under legal principles other than those stated in this act a civil cause of action against a law enforcement agency that violates the provisions of this Act.<sup>335</sup> Subsection (a) gives law enforcement agencies a safe harbor against such liability for agencies that adopt *and enforce* rules reasonably designed to ensure compliance with this Act.<sup>336</sup> Subsection 16(a) is thus closely linked with Section 15: a law enforcement agency adopting and enforcing the rules provided for in section 15 will be protected from civil liability should individual officers nevertheless violate the Act despite the reasonable efforts of the law enforcement agency.<sup>337</sup>

The major justification for this provision is that it will provide an incentive to law enforcement agencies to vigorously implement the mandates of this Act, including providing adequate resources to get the job done.<sup>338</sup> If a law enforcement agency creates and enforces procedures designed to, and likely to, result in vigorous enforcement of this Act, there seems little justification in exposing it to civil liability for the occasional error by an individual officer. At the same time, however, because the primary responsibility and power to ensure compliance with this Act rests with the law enforcement agencies, little is gained in terms of fairness or deterrence by exposing individual officers to civil liability.<sup>339</sup>

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<sup>334</sup> See *id.* §16(b).

<sup>335</sup> See *id.* §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].).

<sup>336</sup> See *id.* §16(a).

<sup>337</sup> See *id.* §§ 15, 16(a).

<sup>338</sup> Cf. Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483, 502-04, 566-73 (2006) (making similar point in the context of search and seizure policy).

<sup>339</sup> This assertion, I admit, is subject to serious dispute. See Slobogin, *supra* note 330, at 364-68 (arguing for the importance of individual officer civil liability). But if these criticisms are correct, I note only this: no adequate

One helpful analogy occurs in the federal law concerning Title VII hostile environment sexual harassment cases.<sup>340</sup> 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.<sup>341</sup> The result of this defense has been for many employers to adopt and implement anti-harassment policies.<sup>342</sup>

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.<sup>343</sup> 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.<sup>344</sup> These programs are likely to be most effective when they also contain an individualized component addressing the training needs of particular employees.<sup>345</sup> At the same time, critics emphasize the need for employers to track their programs and tinker with them to

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system of officer individual liability has occurred in the Fourth Amendment search and seizure area because the political obstacles to such a system are fierce. Slobogin makes a powerful intellectual case for change in that area. None has occurred. There is no reason to believe that the politics will be any different in the area of custodial interrogation. Entity liability is likely more politically feasible, particularly where entities have an option to escape liability entirely, as the ULC Act provides.

<sup>340</sup> 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. L. 347, 409 (2008) (similar).

<sup>341</sup> E. Jacob Lindstrom, *All Carrots And No Sticks: Moving Beyond The Misapplication Of Burlington Industries, Inc. V. Ellerth*, 21 HASTINGS WOMEN'S L.J. 111 (2010) (summarizing the law, though criticizing lower courts for giving it an overly expansive application).

<sup>342</sup> See Jonathan D. Hoag, *Textual Harassment Trends Particularly Troubling for Illinois Employees*, 22 DCBA Brief 14 (2010).

<sup>343</sup> See *Lindstrom*, *supra* note 342. But even many critics agree that helpful policies can and have been designed by employers eager to take advantage of the reasonable care defense. See Joanna Grossman, *Sexual Harassment in the Workplace: Do Employers Efforts Truly Prevent Harassment, Or Just Prevent Liability?*, <http://writ.news.findlaw.com/grossman/20020507.html> (posted May 7, 2002) (praising Mitsubishi's recent policies for managing to "change its workplace culture to stem the proliferation of harassment.").

<sup>344</sup> See *id.* (citing social science research demonstrating the effectiveness of certain anti-sexual-harassment training programs in actually reducing sexual harassment).

<sup>345</sup> See *id.*

improve their actual effectiveness, based upon performance, in reducing sexual harassment.<sup>346</sup> Such tracking is needed to avoid prevention programs becoming more publicity stunts than serious efforts to resolve the harassment problem.<sup>347</sup> 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.<sup>348</sup> Proper program design is key; that is why Section 14 of this Act – seeking to learn lessons from the experience under Title VII – stresses that rules address training and education.<sup>349</sup> It is also why the rules mandated by that section require a process for explaining noncompliance.<sup>350</sup> Ample social science demonstrates that the mere knowledge that one must explain his or her actions improves performance, including that of the police.<sup>351</sup> Moreover, the availability of other potential remedies – not simply a defense against civil liability – provided for in this Act should provide an even greater incentive for creating sound regulatory policies and zealously enforcing them than is true in the case of sexual harassment.

Some commentators have indeed argued that the United States Supreme Court has, in its constitutional criminal procedure jurisprudence, been moving toward recognizing a “reasonable care” defense to suppression motions based on constitutional violations, perhaps doing so as well in civil actions for such violations.<sup>352</sup> That movement is likewise based on an implicit analogy to

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<sup>346</sup> *See id.*

<sup>347</sup> *See id.*

<sup>348</sup> *See generally* DAVID HARRIS, *GOOD COPS* (2005) (articulating an extended defense of this point); SAMUEL L. WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* (2005) (similar).

<sup>349</sup> *See* UAERCI §14.

<sup>350</sup> *See id.* §15.

<sup>351</sup> *See* Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7, 52-54 (2010).

<sup>352</sup> *See* Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483 (2006).

the law of entity liability in the area of sexual harassment.<sup>353</sup> 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.

#### *IV. 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. Even if it is not entirely the Act that I would have drafted were I king, it is an Act far more likely to receive widespread support from all stakeholders. 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 meeting their needs. Yet it does require recording at least some custodial interrogations in their entirety. Experience teaches that using recording in some instances will prove so fruitful for law enforcement that they will over time themselves seek expansion of the numbers of instances in which recording is required. Moreover, the Act contains provisions to promote efficiency and accountability, its commentary models jury instructions and other matters, and it contains incentives for police to record. It is, therefore, a huge step forward. Only time will tell whether my optimism is justified.

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<sup>353</sup> *Andrew E. Taslitz, Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism, and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781, 830-35 (1996).

