CHAPTER 4
Custodial Interrogations

Earl Washington served seventeen years for a murder that he did not commit, but to which he had falsely confessed. After two days of questioning, police claimed he had "confessed" to a total of five different crimes. Only on the fourth attempt at a rehearsed confession did authorities accept Washington's statement and have it recorded in writing with Washington's signature. Of the five crimes he "confessed" to, charges for the first four were dismissed because of the inconsistencies of the testimony and the inability of the victims to identify Washington. The fifth confession was for the murder of Rebecca Lynn Williams and it was the prosecution's only evidence linking Washington to the crime. The jury returned a conviction and death sentence even though Washington did not know the race of his victim, the address of the apartment where she was killed, or that she had been raped in front of her two small children. Psychological analyses of Washington revealed that, to compensate for his intellectual disability, Washington would politely defer to any authority figure with whom he came into contact. Thus, when police officers asked Washington leading questions in order to obtain a confession, he complied. On October 2, 2000, Virginia Governor Jim Gilmore granted Earl Washington an absolute pardon for the capital murder conviction based on DNA testing results that excluded him as the perpetrator after Washington had spent 17 years in prison for a crime he did not commit. He was later declared "actually innocent" by then-Governor Tim Kaine in 2007.

Recommendation 12. Custodial interrogations of a suspect in a homicide case should be videotaped or digitally recorded whenever practicable.

a) Recordings should include the entire custodial interrogation process.

b) Where videotaping or digital video recording is impracticable, an alternative uniform method, such as audiotaping, should be established.

c) Video or audio recording of the entire custodial interrogation process should not require the suspect's permission.

Over 600 jurisdictions nationwide have now employed videotaping of custodial interrogations.[1] These jurisdictions have concluded that the practice promotes effective law enforcement, increases respect for and understanding of police practices, lessens costs associated with retrying cases, and increases the accuracy of criminal proceedings. All fifty states and the District of Columbia have at least one police department engaged in recording in at least some cases.[2] Yet the vast majority of police departments – and the investigatory agencies of the U.S. Department of Justice – do not record custodial interviews on a routine basis. This distinction is significant in terms of its impact in the real-world.

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Of the 312 wrongful convictions in the United States that have been overturned based on DNA evidence, as of March 2014, nearly 25 percent involved a false confession or false incriminating statements, according to the Innocence Project.[3] In each of those cases, DNA evidence proved that the confession was false.[4]

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1 *See* Thomas P. Sullivan, *Recording Federal Custodial Interviews*, 45 Am. Crim. L. Rev. 1297, 1305-10 (2008).

2 *See* Thomas P. Sullivan, *A Compendium of Law Relating to the Electronic Recording of Custodial Interrogations*, 95 Judicature 212, 212 (2012).

3 *See* The Innocence Project, DNA Exonerations Nationwide, http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php.

4 Id.

There is also evidence that false confessions occur primarily in more serious cases, especially homicides and other high-profile felony cases. More than 80 percent of the 125 false confessions documented in a 2004 study occurred in homicide cases.[5] Additionally, 20 percent of the defendants who falsely confessed and were subsequently convicted received death sentences, suggesting that the effect of false confessions may be disproportionately high in capital cases.[6]

While the practice of videotaping custodial interrogations may not eliminate the chances of police obtaining a false confession in a homicide case, research shows that it may drastically reduce the likelihood. Moreover, mandatory recording has been demonstrated to have other trial advantages, including enabling judges to assess voluntariness, facilitating the fact-finder's ability to evaluate credibility and decreasing the number of challenges to witness statements.

False confessions can mislead police, prosecutors, defense attorneys, judges and juries into wrongly focusing on an innocent suspect, which may result in a wrongful conviction. False confessions will also likely focus attention away from the true perpetrator. Not only will justice not be done, but the result may be the perpetrator going free to commit additional crimes.

Confessions routinely result in convictions because of the dramatic impact a suspect's admission of guilt to the police can have at trial. One research team concluded that "placing a confession before a jury is tantamount to an instruction to convict …."[7] Common sense and our belief in the instincts of self-preservation make us question why people would confess to a crime that they did not commit. The assumption that a person would not falsely implicate him or herself in a crime makes confessions powerful evidence, particularly in serious crimes like murder. Academic literature, newspaper accounts and case decisions, however, describe many instances in which innocent persons confessed to crimes that they did not commit.[8]

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5 The Justice Project, Electronic Recording of Custodial Interrogations: A Policy Review at 21, at http://web.williams.edu/Psychology/Faculty/Kassin/files/Justice%20Project(07).pdf (citing Steven Drizin & Richard A. Leo, *The Problem of Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 948 (2004)).

6 *See* Electronic Recording of Custodial Interrogations, *supra* note 5 (citing Drizin & Leo, *supra* note 5, at 952 (reporting that researchers conducted an analysis of 37 innocent defendants who confessed and later took their cases to trial and whose confessions were later shown to be false; of those defendants, 8 percent were convicted and 20 percent of the convicted defendants were sentenced to death)).

7 Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denver U. L. Rev. 979, 1118 (1997).

8 *See, e.g.* Electronic Recording of Custodial Interrogations, *supra* note 5, at 9-15; *see generally* Report of the Governor's Commission on Capital Punishment 1 (April 15, 2002), at http://illinoismurderindictments.law.northwestern.edu/docs/Illinois_Moratorium_Commission_complete-report.pdf; *see also* The Constitution Project, False Confessions: When the Innocent Confess and the Guilty Go Free, http://www.constitutionproject.org/publications-resources/digital-media/.

The sorts of interrogation tactics likely to result in false confessions probably occur most often in the investigation of high profile crimes, especially in potential death penalty cases.[9] In such cases, police both have more time to investigate and face greater pressure to make an arrest.[10] The vast majority of police officers act in good faith and according to the law. However, one of the most conservative early estimates concluded that police-induced false confessions contributed to *at least* one out of every ten wrongful convictions in potential capital cases.[11] The current figure is likely far higher given modern estimates that flawed confessions play a role in nearly one fourth of all wrongful convictions.

Empirical studies reveal that the risk of the innocent confessing is highest for those most vulnerable to suggestion or where deceptive or manipulative interrogation techniques are used. For example, confessions by individuals with intellectual disabilities, mental illness or similar disabilities or by juveniles raise significant risks of false acknowledgements of guilt.[12] Individuals whose reasoning ability is compromised due to exhaustion, stress, hunger or substance abuse are also susceptible. Other causes may include threats of punishment or promises of leniency, threats of adverse consequences to a friend or loved one, police misrepresentation about the nature and quantity of the evidence of the suspect's criminal involvement, use of real or perceived intimidation or threats of force by law enforcement during an interrogation or fear by the suspect that failure to confess will yield a harsher punishment. Where the risks are higher – like in death penalty cases – the pressure to falsely confess guilt also increases.

Where the risks are higher – like in death penalty cases – the pressure to falsely confess guilt also increases.

Even when the police do not use psychological trickery or high-pressure tactics, isolated suspects facing lengthy interrogations can feel compelled to confess.[13] There is good reason to

9 *See* Welsh S. White, Miranda's Waning Protections: Police Interrogation Practices after Dickerson 140-46 (2001).

10 *See id.*; *see also Electronic Recording of Custodial Interrogations* at 21, *supra* note 5 (citing Drizin & Leo, 82 N.C. L. Rev. at 946.).

11 *See* Hugo M. Bedeau & Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21 (1987).

12 *See* Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 545 (2005) (In a study involving 340 exonerations between 1989 and 2003, 33 of the exonerated defendants were juveniles, of which 42 percent falsely confessed; and 26 were intellectually disabled, of which 69 percent falsely confessed); *see generally* Ofshe & Leo, *supra* note 7; White, *supra* note 9.

13 *See* Cass R. Sunstein, Why Societies Need Dissent 37-38 (2003) (relating an experiment in which test participants were led to believe that they had undertaken an act that they had not done based on the accusations of a false witness claiming to have seen the act).

believe that significant numbers of ordinary people under such circumstances "can be lead to agree that they have engaged in misconduct, even serious misconduct, when they are entirely innocent."[14] Moreover, a false confession may be made possible and rendered believable, ultimately leading to a conviction, when police intentionally or inadvertently feeds the suspect details of the crime that the suspect later repeats back in the confession.[15]

The U.S. Supreme Court's decision in *Miranda v. Arizona* acknowledges the risk of compelled confessions in "custodial interrogations" – those of a suspect held "incommunicado" in a "police-dominated atmosphere."[16] Accordingly, *Miranda* recognizes the constitutional right to counsel during such interrogations and mandates that police warn suspects of their rights to counsel and to silence. Suspects routinely waive these rights, however. A significant body of empirical research demonstrates that police have developed a wide range of effective tactics for encouraging *Miranda* waivers.[17] In one commentator's words, *Miranda* warnings have become weak rote recitations, "mere piece[s] of station house furniture."[18]

The Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution, which prohibit admission at trial of "involuntary" confessions obtained by the police, currently offer little protection. As recently applied by most courts, constitutional due process sets a low standard for voluntariness, turning on a case-by-case weighing of a wide range of circumstances concerning police tactics and the individual suspect's ability to resist those tactics.[19] Moreover, generally, a finding of a valid waiver of *Miranda* rights automatically renders the confessions voluntary in the view of most judges.[20]

Sullivan states that he has yet to encounter a single officer from a department that engages in recording of interrogations who, given the option, would elect to return to taking handwritten notes during interviews…

14 *Id.*

15 *See* Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1066-90 (2010).

16 *Miranda v. Arizona*, 384 U.S. 436 (1966).

17 *See generally* White, *supra* note 9.

18 Lawrence M. Friedman, Crime and Punishment in American History 304 (1993) (quoting David Simon, A Year on the Streets (1985)).

19 *See* Andrew E. Taslitz & Margaret L. Paris, Constitutional Criminal Procedure 590-612 (2d ed. 2003) (summarizing the case law).

20 *See id.* at 645.

Thomas P. Sullivan, Co-Chair of the Illinois Commission on Capital Punishment, a former U.S. Attorney and a leading expert on recording of interrogations, has conducted extensive research on this practice, contacting over 1,000 law enforcement agencies located in all 50 states and the District of Columbia that record interrogations. Sullivan states that he has yet to encounter a single officer from a department that engages in recording of interrogations who, given the option, would elect to return to taking handwritten notes during interviews, followed by the preparation of type-written summary reports.[21] Sullivan recounts that the positive results of recording are clear:

> The use of recording devices, even when known to the suspect, does not impede officers from obtaining confessions and admissions from guilty suspects …. Police are not called upon to paraphrase statements or try later to describe suspects' words, actions, and attitudes. Instead, viewers and listeners see and/or hear precisely what was said and done, including whether suspects were forthcoming or evasive, changed their versions of events, and appeared sincere and innocent or deceitful and guilty.
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> Experience shows that recordings dramatically reduce the number of defense motions to suppress statements and confessions …. Officers are spared from defending themselves against allegations of coercion, trickery, and perjury during hostile cross examinations. Trial and appellate judges, who repeatedly have been forced to listen to the prosecution and defense present conflicting versions of what took place during unrecorded custodial questioning, also favor recordings.
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> … An electronic record made in the station interview room is law enforcement's version of instant replay.
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> Jurors are coming to expect recordings when questioning takes place in police station interview rooms. When no recordings are made, defense lawyers are quick to argue that unfavorable inferences should be drawn…
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> Most costs come from the front end, and they diminish once the equipment and facilities are in place and training has been given to detectives. In contrast, savings continue so long as electronic recording continues.[22]

Without video recordings, police and criminal defendants may tell very different stories about what happened in the interrogation room, raising difficult credibility questions. Moreover, a suppression judge cannot hear the interrogating officers' tone of voice, see the suspect's face during questioning or feel the sense of sustained pressure from hour-upon-hour of

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[21] *See* Sullivan, *supra* note 2, at 213.

[22] Thomas P. Sullivan, Police Experiences with Recording Custodial Interrogations, Northwestern School of Law, Center for Wrongful Convictions 6, 24-26 (2004), at http://mcadams.posc.mu.edu/Recording_Interrogations.pdf.

interrogation. Videotaping or similar recording of an entire interrogation is one solution to this problem and offers a number of collateral benefits:

> Videotaping police interrogation of suspects protects against the admission of false confessions for at least four reasons. First, it provides the means by which courts can monitor interrogation practices and thereby enforce the other safeguards [such as the giving of *Miranda* warnings and the prohibition against coercive questioning techniques]. Second, it deters the police from employing interrogation methods likely to lead to untrustworthy confessions. Third, it enables courts to make more informed judgments about whether interrogation practices were likely to lead to an untrustworthy confession. Finally, mandating this safeguard device accords with sound public policy because the safeguard will have additional salutary effects besides reducing untrustworthy confessions, including more net benefits for law enforcement.[23]

Video recording encourages police to continue investigating until they find the true perpetrator, thus enhancing public safety. Law enforcement can also use videotaped interrogations to improve the training of officers in proper interrogation techniques, further reducing the risks of error. All these benefits accrue, however, only if all interrogation efforts in a case are recorded, not merely the ultimate confession. As the *New York Times* explained in an editorial about the Central Park Jogger case:

> By the time five teenage suspects gave the videotaped confessions that helped convict them in the 1989 rape of the Central Park jogger, they had been through hours of unrecorded interrogation …. [T]he exoneration of the young men begs for reforming the way suspects are lead [*sic*] to rehearsed statements of guilt.
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> According to the Innocence Project at the Cardozo School of Law at Yeshiva University, 23 percent of the people who are exonerated after conviction turn out to have falsely confessed to the crime. Many of these confessions were taped and played as compelling evidence to a jury. As the jogger case and other reversals demonstrate, innocent people can be led into confessions. Their questioners – wittingly or not – also often provide them with details that would seem to be known only to the real criminal.[24]

Since 2006, nine states have enacted laws requiring interrogation recording – Michigan (2012), North Carolina (2011), Connecticut (2011), Ohio (2010), Oregon (2010), Missouri

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[23] Welsh White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 Harv. C.R.-C.L. L. Rev. 105, 153-554 (1997).

[24] Editorial, *Crime, False Confessions, and Videotape*, N.Y. Times, Jan. 20, 2003, at A24; *see also* Stanley Cohen, The Wrong Men: America's Epidemic of Wrongful Death Row Convictions 255-67 (2003) (describing the detailed events supporting the exoneration of the Central Park jogger defendants).

(2009), Montana (2009), Maryland (2008), and Nebraska (2008).[25] In 2009, Indiana's Supreme Court amended its rules of evidence to mandate the recording of custodial interrogations.[26] In a 2006 case, *State v. Hajtic*,[27] the Iowa Supreme Court held that electronic recording, particularly videotaping, of custodial interrogations should be encouraged, although not required. A total of 16 states and D.C. now mandate recording of custodial interrogations for certain felonies.[28] At least 12 other states are considering mandatory recording, either by legislation or supreme court rule.[29] In addition, many local governments require police departments to record custodial interrogations, while in other jurisdictions police departments have voluntarily adopted recording requirements.

With the trend toward increased recording of custodial interrogations,[30] in 2004, the American Bar Association unanimously adopted a resolution that urges law enforcement agencies across the country to videotape interrogations.[31] The National District Attorneys Association also has endorsed an expansion of videotape protocols, although the association falls short of backing legislation to mandate the change.[32] Other organizations formally

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[25] Some jurisdictions' custodial recording laws and practices permit a number of exceptions to the recording requirement, such as if the recording equipment is "not available at the location where the interrogation takes place," that substantially limit the effectiveness of a recording requirement under law. *See, e.g.*, Mo. Stat. § 590.700.3(6) (2013). Further, defendants often have minimal or no remedy for law enforcement's failure to record in violation of the statute. *See infra* notes 42 - 47 and accompanying text.

[26] Ind. R. Evid. 617.

[27] 724 N.W.2d 449 (Iowa 2006).

[28] In addition to those listed above, Illinois, Maine, New Mexico, Wisconsin, Alaska, Minnesota, New Hampshire and New Jersey require the recording of custodial interrogations. In 2002, only two states, Alaska and Minnesota, required electronic recording of custodial interviews, resulting from state supreme court rulings. The vast majority of new state requirements have been implemented in the last decade. *See* Thomas P. Sullivan, *A Compendium of Law Relating to the Electronic Recording of Custodial Interrogations*, 95 Judicature 5 (2012).

[29] At the time of printing, Arkansas, Florida, New York, North Dakota, Pennsylvania, Rhode Island and Vermont were considering a recording requirement by legislation or supreme court recommendation. South Carolina had pending legislation mandating recording of custodial interrogations. Iowa, Massachusetts, New York and Utah had statewide recommendations urging law enforcement officers to record custodial interrogations of felony suspects.

[30] Military law enforcement also has started adopting recording policies. The Air Force, Army and Navy each authorize the use of recording devices. 32 C.F.R. § 637.21. In addition, the Commission on Military Justice has endorsed recording. Victor M. Hansen & Elizabeth L. Hillman, Report of the Commission on Military Justice 13-14 (2009).

[31] Am. Bar Ass'n, Report To The House Delegates 1 (2004), http://www.americanbar.org/content/dam/aba/directories/policy/2004_my_8a.authcheckdam.pdf.

[32] *See* Nat'l. Dist. Att'ys Ass'n., *Resolution Supporting A Uniform Act Authorizing The Recording And Introduction Of An Accused's Statements And Opposing Expanding The Use Of The Exclusionary Rule Or Other Sanctions For Voluntary, Unrecorded Statements* (Mar. 21, 2009), at http://www.ndaa.org/pdf/NDAA_reso_March_2009_recorded_statements.pdf.

supporting mandatory recording include the American Civil Liberties Union, the American Federation of Police and Concerned Citizens, the American Judicature Society, the American Law Institute, the Center for Policy Alternatives, the Innocence Project, the International Association of Chiefs of Police, the Justice Project, the National Association of Criminal Defense Lawyers, the National Conference of Commissions on Uniform State Laws, and this Committee.[33] In 2013, the International Association of Chiefs of Police issued a report resulting from a joint summit on wrongful convictions conducted with the Department of Justice's Office of Justice Programs, recommending law enforcement agencies record all interviews involving major crimes, preferably with video recording but at least with audio recording.[34]

In July 2010, the National Conference of Commissions on Uniform State Laws adopted the Uniform Electronic Recordation of Custodial Interrogations Act ("UERCIA"), model legislation that reflects current best practices and which individual jurisdictions can tailor to best suit their needs and resources.[35]

The U.S. Department of Justice remains opposed to video or audio recording of custodial interrogation as a routine practice. In 2006, the FBI released a memorandum reiterating its policy against recording of interviews or confessions except in specific circumstances in which an agent can obtain management authorization for recording.[36] The memorandum, issued by the FBI Office of the General Counsel, articulated four reasons, commonly cited by law enforcement agencies, for why the FBI does not support videotaping.[37]

The memorandum first argues that recordings may interfere with rapport-building techniques. However, the memorandum also concedes that surreptitious recording would not affect this approach. Experience in localities that have used videotaping also demonstrates

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[33] *See* National Association of Criminal Defense Lawyers, http://www.nacdl.org/criminaldefense.aspx?id=31572.

[34] *See* Int'l Assoc. of Chiefs of Police, National Summit on Wrongful Convictions: Building a Systemic Approach to Prevent Wrongful Convictions 18 (Aug. 2013).

[35] The pending South Carolina bills are based on this model legislation.

[36] Similarly, the Drug Enforcement Administration and Bureau of Alcohol, Firearms, Tobacco, and Explosives also have policies against general video or audio recording.

[37] *See* Memorandum from Federal Bureau of Investigation, Office of the General Counsel, Investigative Law Unit to All Field Offices, All HQ Divisions, and All Legats (March 23, 2006), at http://www.nytimes.com/packages/pdf/national/20070402_FBI_Memo.pdf. Notably, the memorandum itself characterized the policy as a positive one – *i.e.*, a case-by-case opportunity to use recording as a law enforcement technique where and when it will further the investigation and the subsequent prosecution. However, it noted that during the time the policy has been in effect, the management approval discretion provided by the policy has been viewed negatively – *i.e.*, as an exception to the "no recording" policy. The memorandum encourages the positive approach, and therefore should itself be considered limited support – or at least not complete opposition – to a recording policy, although it is a far cry from a recording requirement.

that, although police may sometimes have a brief adjustment period, they readily learn how to interrogate effectively without hampering the willingness of suspects to talk.[38] The memorandum asserts that the practice of routine recording would become well-known, which could be a concern when interrogating members of organized crime. This argument is weak at best, given that serious repeat criminals like members of organized crime are likely to be familiar with law enforcement techniques and aware of the possibility that they are being recorded anyway.

Experience in localities that have used videotaping also demonstrates that, although police may sometimes have a brief adjustment period, they readily learn how to interrogate effectively without hampering the willingness of suspects to talk.

Second, the memorandum argues that in the past, agents' testimony has been accepted by judges and juries based on non-recorded recollections and reports, and therefore there is no compelling need for a change in policy. This argument ignores the reality that judges are becoming increasingly vocal about their criticism of federal agencies' opposition, and advancements in science continue to reveal wrongful convictions, including those based on false confessions, years after they occur. Sound policy decisions regarding the criminal justice system must be designed to improve the search for truth, not to ensure that one party's testimony will be admissible.

Third, the memorandum warns that recording may disclose lawful investigative methods that jurors may deem inappropriate. This argument gives rise to questions about the ethical and legal propriety of law enforcement practices. If investigators are not willing to reveal the techniques they used to get a confession, perhaps they should not use those techniques. On the other hand, if techniques used to secure a confession are not unethical or illegal, but successfully expose criminal conduct, jurors should be trusted to discern the difference in favor of successful law enforcement.

Finally, the memorandum resists a policy change that would help ensure ethical and accurate criminal convictions based on the administrative burden it would impose. The FBI General Counsel's office argues that a recording requirement would entail massive logistical coordination and transcription support, and would cause unnecessary obstacles to the admissibility of lawfully obtained statements, which, through inadvertence or circumstances beyond the control of the interviewing agents, could not be recorded. Yet the

[38] *See* Shaila K. Dewan, *New York Police Resist Videotaping Interrogations*, N.Y. Times, Sept. 2, 2003; Thomas P. Sullivan, *Three Police Station Reforms to Prevent Convicting the Innocent*, 17 APR CBA Rec, 30 (2003).

support needed for traditional two-agent interviews, and the time required to prepare and transcribe handwritten notes is just as burdensome, if not more burdensome, than recording an interview in the first instance. Additionally, recording equipment is more affordable now than ever before, easy to use and, under the model rule, a failure to record is excusable if it is impracticable or impossible. In addition, the out-of-pocket costs of video recording are often far less than the financial costs of not recording, including lengthy suppression motions, large damage judgments for the wrongly convicted, expensive investigations into alleged police abuses, and re-trying cases where there is other credible evidence of guilt but the confession is seriously tainted. The declining cost of digital video recording methods, which store images on a computer, also can eliminate the expense of storing videotapes.

There are also numerous cases in which federal district judges have voiced their concerns about the failure of federal investigating agencies to routinely record custodial interrogations.

There are also numerous cases in which federal district judges have voiced their concerns about the failure of federal investigating agencies to routinely record custodial interrogations. For example, one judge in a case pending in the Northern District of Ohio stated:

> … I am deeply disturbed that the FBI continues its incomprehensible policy of not recording interviews …. It makes no sense. It gives the Bureau unfair advantage …. You have an undercover operation, you wire the informant for every single drug transaction. Why do you do it? Best possible record … But you get in an interrogation room with nobody else except a 20 year old defendant and … your Bureau sees fit at that moment, the most crucial moment of any investigation, not to record what he says and what you say … that's shameful. It's intolerable in a society under any government that values the rights of its citizens to a fair trial …. It's not playing fair. I expect more from our government law enforcement agents …. Shame on the Bureau, and tell them I said so. Tell them they can do better.[39]

A study conducted in 1993 by the Department of Justice found that jurisdictions that videotaped custodial interviews reported improved quality of police interrogations, including better preparation by detectives, avoidance of distractions at the interrogation, easy

[39] *United States v. Cook*, No. 3:10-CR-522, transcript of record, at 433-35, 2011 U.S. Dist. LEXIS 74333 (N.D. Ohio Sept. 8, 2011) (District Judge James G. Carr); *see* Thomas P. Sullivan, *The Department of Justice's Misguided Resistance to Electronic Recording of Custodial Interviews*, 59 The Fed. Law. 63 (2012) (discussing the remarks of federal district judges encouraging recording of federal law enforcement interrogations).

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monitoring of interrogations by supervisors, use of taped interrogations for training, and use of taped confessions to elicit a confession from suspected accomplices.[40] Also, the study reported that there were fewer allegations by defense attorneys of coercion or intimidation. Furthermore, of the local police departments surveyed concerning the effect of videotaping in obtaining guilty pleas, 55.4 percent said it helped a lot; 27.3 percent said it helped somewhat; 17.3 percent said it had no effect. No departments reported that it hindered their ability to obtain guilty pleas. The study reported that videotaping was used to some extent by one third of all police departments in jurisdictions with populations over 50,000. Given the early date of the study, that number has undoubtedly increased significantly since then.

Under the Committee's recommendation, costs are contained because recording suspect interrogations is limited to homicides. The Committee expresses a preference for video recording because of the ability to observe the demeanor and positioning of the interviewer and suspect, as well as the physical location where the interrogation is conducted, which can have a significant impact on the perceived voluntariness and reliability of the statement. The Committee recognizes that video recording is sometimes impracticable, either because of cost or because of limits on the availability of the video equipment. In those circumstances, the Committee recommends using next-best recording methods, starting with audio recording. The UERCIA permits individual jurisdictions to make the same determination about the priority of recording methods and to tailor the legislation accordingly.[41] Clear guidance also should be given to officers about when to record because that obligation would apply to any "custodial interrogation."

Recommendation 13. Whenever there is a failure for any reason to videotape or audiotape any portion of, or all of, the entire custodial interrogation process, and the statement was not otherwise suppressed, a defendant should be entitled, upon request, to a cautionary jury instruction, appropriately tailored to the individual case, that does the following:

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40 *See* William A. Geller, *Videotaping Interrogations and Confessions*, NAT'L INST. JUST. 139962 (Mar. 1993).

41 The Committee's 2005 publication of *Mandatory Justice: The Death Penalty Revisited* ("*Mandatory Justice 2005*") included a recommendation for videotaping custodial interrogations that was based on the ALI Model Code of Pre-Arraignment Procedure on the same subject. In its 2005 report, the Committee added to the ALI Model Code a cautionary instruction requirement because any failure to tape inherently prejudices a defendant's ability to litigate a suppression motion.

a) notes that failure,

b) permits the jury to give it such weight as the jury feels that it deserves, and

c) where appropriate, further permits the jury to use it as the basis for finding that the statement either was not made or was made involuntarily.

Any framework for requiring the video or audio recording of an interrogation must include an enforcement mechanism to ensure compliance.[42] While suppressing a confession that is not electronically recorded is sometimes a necessary remedy, some jurisdictions drastically limit the availability of *any* remedy for law enforcement's failure to comply with the recording law. Missouri's recording statute, for example, states that "[c]ompliance or non-compliance with [the recording statute] shall not be admitted as evidence, argued, referenced, considered, or questioned during a criminal trial."[43] Without a meaningful remedy, officers will have little incentive to comply with the mandate. A meaningful remedy does not require that suppression should always, or automatically, be the result when the recording requirement is violated. For example, if the violation was accidental and only a small portion of the interrogation process was not electronically recorded, and if there is no reason to believe that there is a significant risk that the interrogation was untrue, suppression would seem an extreme remedy. Suppression is appropriate for substantial violations.

The UERCIA takes this approach. Under that framework, recording is not required if it is not feasible because of exigent circumstances, the subject refuses to be electronically recorded,[44] the interrogation is conducted by another jurisdiction that does not require recording, all or part of the interrogation is not recorded because the law enforcement officer does not have a reasonable basis to believe that the subject committed a crime or the recording equipment malfunctions despite reasonable maintenance and timely repair.[45] If the prosecution intends

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[42] Statutes in Ohio and Texas and supreme court rulings in New Hampshire and Texas lack meaningful recording requirements, or sanctions for failures to record.

[43] Mo. Stat. § 590.700.6 (2013).

[44] *See* Thomas P. Sullivan, *Federal Law Enforcement Should Record Custodial Interrogations*, The Champion at 8 (2007) ("[I]f a suspect realizes that a recording is to be made and declines to proceed or is reluctant to do so, the routine response of the detectives with whom we have spoken is to make a recording of the circumstances, turn the recording equipment off, and proceed with the interview using handwritten notes. This relatively rare event is consistent with the statutes and court rulings referred to … and provides the complete solution to the concern that the suspect will clam up.").

[45] In *Mandatory Justice 2005*, the Committee changed the text of UERCIA in one regard, by deleting an exception to the recording requirement where the law enforcement officer conducting the interrogation or his superior believes that electronic recording would disclose the identity of a confidential informant or jeopardize the safety of an officer, the individual being interrogated, or another individual. The Committee

to rely on one of these exceptions in seeking to admit at trial an unrecorded statement, it must prove by a preponderance of the evidence that the exception applies.[46]

Conversely, a law enforcement officer's inducement to a suspect to refuse to be recorded, a police department's failure to provide its officers and other personnel with adequate training and properly maintained equipment (such as video or audio recording equipment) or transporting a suspect to a non-recording jurisdiction in order to avoid the requirement to record should be considered a willful violation of the recording requirement and an unrecorded suspect statement should be suppressed for this reason.

A court should give a cautionary instruction to the jury when a statement is not recorded and is not otherwise suppressed, allowing the jury to consider the failure to videotape in deciding whether a confession was made or, if made, whether it was voluntary. The UERCIA includes this requirement.[47] This instruction should be available even when the police are not at fault because, even when taping the entire custodial interrogation process was impracticable, regardless of the care or good faith of the state, the absence of taping creates an undue risk of error in the fact finding process. Such an instruction should be tailored to the individual facts of a case. For example, if there is evidence from which a reasonable jury might conclude that the police willfully violated the taping rule to hide details of the interrogation process, a stronger instruction might be needed. Correspondingly, if only a small portion of the process was not taped and there is evidence from which a reasonable jury might conclude that this failure was inadvertent, and no specific evidence has been offered of inappropriate interrogation tactics occurring during the taping gap, a jury might be instructed to take those matters into account

The jury should be instructed to give the failure to video or audiotape such weight as the jury feels it deserves, including, where appropriate, as the basis for finding that the statement was either not made or was made involuntarily.

believes that such a situation is more appropriately dealt with by local department rule than uniform legislation because these concerns may be properly addressed by redacting or not recording parts that give rise to such risk, rather than not recording the entirety of an interview.

[46] The Illinois recording statute takes a similar approach. *See* Act of Aug. 12, 2003, Ill. Public Act No. 93-0517 (providing that non-recorded custodial interrogations are presumptively inadmissible unless the state can establish by a preponderance of the evidence that the statement was voluntary and reliable based on the totality of the circumstances).

[47] This was an addition that the Committee made to the ALI Model Code in *Mandatory Justice 2005*.

in determining the weight of the failure to tape completely. The jury should be instructed to give the failure to video or audiotape such weight as the jury feels it deserves, including, where appropriate, as the basis for finding that the statement was either not made or was made involuntarily. This determination should be a fact-based inquiry taking into account the particular circumstances relating to the failure to record the interrogation.

Expert testimony about false confessions should be permitted if it is relevant to the facts of the case. In 2012, the New York Court of Appeals ruled that expert testimony should be allowed in such circumstances, although the court ruled that the testimony would not be permitted in the case at bar because it was not relevant.[48]

In short, especially in the capital case context, the benefits of recording the entire interrogation process far outweigh its costs and will help to promote fairness, accuracy, public safety, and public confidence in the system of justice.

[48] *See People v. Bedessie*, N.E.2d 380, 947 (N.Y. 2012); *see also* Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1102-06 (Oct. 2008).