Mandatory Recording of Custodial Interrogations Nationwide: Recommending a New Model Code

"As feasible, a videotaping requirement should cover all custodial interviews and interrogations. . . . This requirement offers a win-win outcome: It will protect the police and the accused, help prosecutors and defense lawyers assess their cases, promote accurate decision making at trial, and bolster the public’s trust in the criminal justice system."

I. INTRODUCTION

Recording a suspect’s entire interrogation provides substantial protection of the suspect’s rights as well as the rights of the police officers involved.2 Contrary to stated concerns, in jurisdictions that routinely record interrogations, recording has not led to a decrease in confessions or productivity.3 In fact, recording in these jurisdictions has resulted in more convictions and plea bargains, as well as fewer claims of police misconduct and coerced confessions.4 Both prosecutors and defense attorneys support mandatory


4. See State v. Scales, 518 N.W.2d 587, 591 (Minn. 1994) (holding recording deters unfair police tactics and protects state against meritless claims); Commonwealth v. Diaz, 661 N.E.2d 1326, 1329 (Mass. 1996) (declaring mandatory recording would "eliminate certain challenges to the admissibility of defendants’ statements"); see also Ruben Casteneda, Interrogation Problems Caught on Video in Md., WASH. POST, Oct. 27, 2003, at B1 (observing taping reduces allegations of police brutality and misconduct); Grumman, supra note 3, at C6 (explaining benefits of recording interrogations); Kassin, supra note 1, at A13 (arguing taped
recording because it captures what really happens in the interrogation room.\(^5\) According to a 1992 Department of Justice study, ninety-seven percent of police departments that videotape suspects’ statements find it to be a useful practice.\(^6\)

The idea of mandatory recording is not a novel concept.\(^7\) Yale Professor Edwin Borchard is believed to be the first person to advocate for the mandatory recording of suspects’ interrogations in his 1932 book, Convicting the Innocent.\(^8\) Professor Borchard wrote that all police questioning of suspects should be recorded “in the presence of phonographic records.”\(^9\) In 1975, the American Law Institute enacted a model code requiring that police officers make audio recordings of all interrogations.\(^10\) Alaska became the first state to require the electronic recording of suspects’ interrogations in 1985, and Minnesota followed in 1994.\(^11\) The Texas Rules of Evidence require the recording of custodial interrogations.\(^12\) The Illinois, Maine, New Mexico, and District of Columbia legislatures have all passed bills specifically requiring the videotaping of custodial interrogations that occur at police stations for certain confessions benefit defendants by deterring and publicizing police misconduct.\(^5\)

\(^5\) See Commonwealth v. Diaz, 661 N.E.2d 1326, 1329 (Mass. 1996) (acknowledging recording reduces ambiguity of interrogation’s substance); Klobuchar, supra note 2, at A21 (observing taping helps prosecutors obtain convictions while protecting suspect’s rights); Steve Mills & Michael Higgins, Cops Urged To Tape Their Interrogations; Cty Videotapes Only Confessions, CHIC. TRIB., Jan. 6, 2002, at C1 (determining videotaping helps prosecution and defense by clarifying what occurred in interrogation room); Michael Higgins, Taping Police Interrogations May End the Lies With . . . : Irrefutable Evidence, 84 A.B.A. J. 18, 18 (1998) (noting recording solves dispute over what was said in interrogation room). But see Geller, supra note 3, at 7 (stating some defense attorneys oppose videotaping, suggesting it gives government advantage).

\(^6\) Geller, supra note 3 at 10 (discussing consensus recording is beneficial); see also CTR. FOR POL’Y ALTERNATIVES, supra note 3, at 122 (citing William A. Geller, Police Videotaping of Suspect Interrogations and Confessions: A Preliminary Examination of Issues and Practices, in REPORT TO THE NATIONAL INSTITUTE OF JUSTICE (1992)) (noting police appreciate recorded interrogations); Thomas P. Sullivan, Police Experiences With Recording Custodial Interrogations, in NORTHWESTERN SCHOOL OF LAW: CENTER ON WRONGFUL CONVICTIONS 1, 6 (2004) (finding all police officers interviewed who record interrogations in favor of practice).

\(^7\) See infra notes 28-39 (discussing origins of mandatory recording).


\(^9\) Borchard, supra note 8, at xvii (suggesting recording of all police questioning of suspects); see also Gail Johnson, False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations, 6 B.U. PUB. INT. L.J. 719, 749 (1997) (addressing Borchard’s assertion that police should record all questioning of suspects).

\(^10\) See infra notes 36-38 and accompanying text (describing requirements of A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (MODEL CODE)); see also Johnson, supra note 9, at 749 (addressing Model Code provisions).

\(^11\) See Stephan v. State, 711 P.2d 1156, 1159 (Alaska 1985) (requiring electronic recording of suspect interrogations under state due process clause); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) (recognizing electronically recording interrogations part of state’s supervisory power); see also infra notes 51-53 and accompanying text (describing Alaska’s mandatory recording requirement).

\(^12\) TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 2001) (providing Texas Rules of Evidence require recording of interrogations).
crimes. Although legislatures and courts in many states have advocated for
electronic recording, no other states expressly mandate recording. As only a
few jurisdictions have refused to mandate recording outright, and more
jurisdictions are realizing the value of recorded interrogations, there seems to
be a general consensus developing that recording is beneficial and, therefore,
should be mandatory. States are increasingly proposing legislation to require
recording custodial interrogations, with twenty-two states proposing legislation
in 2004-05 alone.

There are many factors to consider when developing a comprehensive model
rule for the mandatory recording of custodial interrogations. The first is
whether the rule should require only video or audio recording, or both. There
is also the issue of whether the entire interrogation should be taped, including
the reading and waiver of Miranda warnings, or just the confession.

13. See D.C. CODE ANN. § 5-133.20 (2004) (holding police must record entire interrogation in dangerous,
violet crimes); 725 ILL. COMP. STAT. 5/103-2.1 (2003) (indicating custodial interrogation in homicide and
sexual offense cases not admissible unless recorded); ME. REV. STAT. ANN. tit. 25, § 2803-B (2004) (requiring
videtaping when suspect questioned at police facility).
14. See Steven A. Drizin & Marissa J. Reich, Heeding the Lessons of History: The Need for Mandatory
Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions, 52
DRAKE L. REV. 619, 620 (2004) (noting only Alaska, Minnesota, Illinois, and Maine currently have recording
entire interrogations in dangerous, violent crimes); TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 2001)
(providing Texas Rules of Evidence require videotaping of interrogations); Higgins, supra note 5, at 18
(stressing Texas strongly encourages taping).
15. See Johnson, supra note 9, at 747-49 (noting trend toward mandatory recording).
legislation has been proposed in the following twenty-five states: Arizona, California, Connecticut, District of
Columbia, Florida, Georgia, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Nebraska, New
Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, South Carolina, Tennessee, Texas,
Washington, West Virginia, and Wisconsin. Ehlers, supra, at 34; Moreno, supra, at 418; Mandatory Electronic
Recording, supra.
17. See infra notes 18-21, 126-131 and accompanying text (reviewing recording requirements in various
jurisdictions); see also D.C. CODE ANN. § 5-133.20 (2004) (setting forth District of Columbia’s mandatory
recording requirements).
18. See 725 ILL. COMP. STAT. 5/103-2.1 (2003) (requiring either audio or video recording); ME. REV.
STAT. ANN. tit. 25, § 2803-B (2004) (requiring videotape); TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon
2001) (requiring videotape); H.B. 382, 47th Leg., 1st Sess. (N.M. 2005) (allowing either audio or video
recording); Stephan v. State, 711 P.2d 1156, 1160 (Alaska 1985) (holding mandatory recording of entire
interrogation by either audio, video, or court reporter transcript); State v. Scales, 518 N.W.2d 587, 592 (Minn.
1994) (deciding audio recording sufficient); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 130.4 (1975)
(requiring only sound recording).
19. See 725 ILL. COMP. STAT. 5/103-2.1 (2003) (requiring only recording of actual interrogation); ME. REV.
STAT. ANN. tit. 25, § 2803-B (2004) (requiring recording of interrogation for serious crimes); TEX. CODE
CRIM. PROC. ANN. art. 38.22 (Vernon 2001) (requiring recording of interrogation and of suspect “knowledgeably,
intelligently, and voluntarily” waiving Miranda warnings); H.B. 382, 47th Leg., 1st Sess. (N.M. 2005)
Additional questions arise about whether recording should be required for all interrogations, or just those concerning violent crimes or felonies, and whether the rule should permit the interrogation to be recorded surreptitiously or only voluntarily. 20 Another important issue is whether the rule should require mandatory exclusion of the interrogation and confession in some cases, or merely a jury instruction regarding the state’s preference for recording. 21

Part I of this Note briefly addresses the status of the mandatory recording of custodial interrogations in the United States. 22 Part II will look at the history of mandatory recording, as developed by case law, legislation and other means. 23 It will review the different powers invoked to create this requirement, including a state’s due process or supervisory powers. 24 This part of the Note will also discuss the recent movement to make recording suspects’ interrogations mandatory, as well as the attempt by some states to compromise by strongly encouraging—but not mandating—recording. 25 Additionally, Part II will address the pros and cons of mandatory recording, practical considerations, and the benefits and successes that many states have had with mandatory recording. 26 Finally, Part III will recommend implementing a new model code for mandatory recording. 27

20. See D.C. CODE ANN. § 5-133.20 (2004) (stating police must record entire interrogation in dangerous, violent crimes); 725 ILL. COMPL. STAT. 5/103-2.1 (2003) (requiring recording only in homicide and sexual offense cases); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 130.4 (1975) (requiring full disclosure about presence of recording to suspect). But see Higgins, supra note 5, at 18 (noting former prosecutor thinks police should have ability to tape suspects secretly). A mandatory recording rule “is designed to preserve evidence accurately, not to discourage defendants from talking,” according to a former prosecutor. Id.


22. See supra notes 2-21 and accompanying text (describing history and current status of mandatory recording in United States).

23. See infra notes 28-125 and accompanying text (addressing statutory and case law).

24. See infra notes 28-125 and accompanying text (reviewing different methods states use to mandate recording).

25. See infra notes 28-125 and accompanying text (discussing various states rules on mandatory recording).

26. See infra notes 126-168 and accompanying text (addressing pros and cons of mandatory recording).

27. See infra notes 169-194 and accompanying text (recommending implementation of new model rule).
II. HISTORY

A. The Origins of Mandatory Recording

Professor Edwin M. Borchard of Yale Law School was the first to advocate for the mandatory recording of custodial interrogations in 1932. Despite his recommendations, courts avoided addressing the topic of recording interrogations for decades. It was not until 1966, in the landmark United States Supreme Court decision *Miranda v. Arizona*, that the Court began to address suspects’ rights in the interrogation room. The Court in *Miranda* held that the police must inform a suspect of certain enumerated rights if the suspect is in custody and subject to interrogation. *Miranda* enabled courts to protect defendants’ rights during interrogations, which has led to recent case law and legislative mandates on recording. *Miranda* is an important aspect of mandatory recording because the reasoning behind giving *Miranda* warnings, which focuses on the voluntariness of confessions, also applies to the recording of interrogations. Consequently, many jurisdictions that require law enforcement officers record the reading of *Miranda* warnings and the suspect’s waiver of such rights, also require that they record the interrogations.

28. See Borchard, supra note 8, at xvii (suggesting making of records of all police questioning of suspects); see also Drizin & Reich, supra note 14, at 622 (citing Borchard, supra note 8) (indicating recording interrogations correlates with voluntariness and reliability of confessions); Johnson, supra note 9, at 749 (citing Borchard, supra note 8) (contending police recording of interrogations not new idea).

29. See infra notes 30-35 (recognizing *Miranda* as first time suspects’ rights during interrogation addressed in case law).


31. Id. at 444 (holding prosecution cannot use statements resulting from custodial interrogation unless warnings given and waived). The United States Supreme Court in *Miranda* held that a suspect in custody prior to interrogation must be read, understand, and voluntarily waive certain rights. *Id*. at 479-80. The *Miranda* warnings require that a custodial suspect:

must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

*Id*. at 479.

32. *Id*. at 444 (deciding suspects must understand and waive rights before custodial interrogation).

33. See generally Stephan v. State, 711 P.2d 1156 (Alaska 1985); Commonwealth v. DiGiambattista, 813 N.E.2d 516 (Mass. 2004); Commonwealth v. Diaz, 661 N.E.2d 1326 (Mass. 1996); State v. Scales, 518 N.W.2d 587 (Minn. 1994). *Miranda* also has become important in that most states that require recording of interrogations also require or encourage recording the reading and waiver of such warnings. See Wayne R. LaFave, ETL, C RIMINAL PROCEDURE § 6.8(c) (2d ed. 2004) (suggesting recording *Miranda* warnings desirable).

34. See Drizin & Reich, supra note 14, at 631 (indicating recorded interrogations, like *Miranda* warnings, designed to protect suspects’ constitutional rights).

35. See infra note 128 and accompanying text (finding many jurisdictions requiring recording
In 1975, the American Law Institute published A Model Code of Pre-Arraignment Procedure [hereinafter Model Code] to offer lawyers and criminal justice officials more assistance in developing criminal procedures than they were getting from case law alone. The Model Code was the first comprehensive national guideline assisting police departments develop procedures for recording interrogations. The Model Code requires that the police make audio recordings of all suspects’ interrogations, including the reading and waiver of Miranda warnings. Additionally, the Model Code provides for the suppression of statements and confessions if they are not recorded.

B. A Survey of Current Recording Requirements

The United States Supreme Court has never directly addressed the issue of whether the recording of suspects’ custodial interrogations should be mandatory. Therefore, all recording requirements are decided on a state-by-state basis. There are three general approaches to recording custodial interrogations in the United States. First, there are those jurisdictions which

interrogations also require recording of Miranda warnings); see also 725 ILL. COMP. STAT. 5/103-2.1 (2003) (requiring only recording of custodial interrogation); ME. REV. STAT. ANN. tit. 25, § 2803-B (2004) (requiring recording of interrogation for serious crimes); H.B. 382, 47th Leg., 1st Sess. (N.M. 2005) (requiring recording of rights and interrogation); TEX. CODE CRIM. PROC. ANN. art. 38.22 § 3(a)(2) (Vernon 2001) (requiring recording of interrogation and of suspect “knowingly, intelligently, and voluntarily” waiving Miranda warnings); Stephan v. State, 711 P.2d 1156, 1159 (Alaska 1985) (holding entire interrogation must be recorded); State v. Jones, 49 P.3d 273, 279 (Ariz. 2002) (recommending videotaping entire interrogation); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) (holding recording must include information about rights, waiver of rights, and entire interrogation); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 130.4 (1975) (requiring reading and waiver of warning and all questions and answers).

38. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 130.4 (3) (1975) (requiring sound recording of suspects warnings, waiver, and any questioning of suspect). The Model Code requires that police make written records covering the period that the suspect is in custody. Id. The suspect must be informed that he is being recorded and the statement informing him must also be on tape. Id. See also UNIF. R. CRIM. P. 243(b), in 10 U.L.A. 21 (Master ed. Supp. 1992) (quoted in Commonwealth v. Diaz, 661 N.E.2d 1326, 1328 (Mass. 1995)) (suggesting rights, waiver must be recorded whenever feasible and questioning occurs at place of detention).
40. See State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) (noting United States Supreme Court has not addressed recording issue under federal constitution); Johnson, supra note 9, at 748 (stating no decision from United States Supreme Court on whether federal constitution requires recording custodial interrogations).
41. See BRIAN C. JAYNE, EMPIRICAL EXPERIENCES OF REQUIRED ELECTRONIC RECORDING OF INTERVIEWs AND INTERROGATIONS ON INVESTIGATORS’ PRACTICES AND CASE OUTCOMES 9 (2003) (suggesting recording laws reserved to states without Supreme Court decision).
42. See infra notes 46-111 and accompanying text (examining in detail different jurisdictions’ recording
require recording in some circumstances, and provide for suppression if the interrogation is not recorded. 43 The second group includes those states which encourage recording but provide no remedy for the failure to do so. 44 The third group encompasses those jurisdictions which have either expressly refused to mandate recording or have not yet addressed the issue of state-wide mandatory recording of custodial interrogations. 45

1. Mandatory Recording and Suppression

Alaska, Minnesota, Maine, Illinois, New Mexico, Texas, and the District of Columbia are the only jurisdictions that currently require custodial interrogations be recorded to be admissible against the defendant at trial. 46 These jurisdictions arrived at the same conclusion through utilizing different methods and reasoning. 47 Each jurisdiction, however, requires that suspects’ interrogations be recorded, and provides for possible suppression of the interrogation and confession if they are not recorded. 48

Of those states which require the recording of custodial interrogations, only Alaska and Minnesota have done so through court order. 49 Both states provide for the suppression of unrecorded confessions in certain cases. 50 The Alaska...
Supreme Court paved the way for mandatory recording in 1985 with *Stephan v. State*, holding that the Due Process Clause of the Alaska Constitution requires that a defendant’s entire interrogation be recorded if the interrogation occurs at the place of detention. The court further held that unrecorded confessions will be excluded from evidence where recording was feasible and the police had no excuse for failing to record the interrogation.

In 1994, in *State v. Scales*, the Minnesota Supreme Court held that all custodial interrogations must be electronically recorded if they occur at a place of detention, and the recording must include the reading and waiver of *Miranda* warnings in addition to the entire interrogation. If the police do not record the interrogation, the suspect’s statements may be suppressed, and the court will apply the exclusionary rule on a case-by-case basis. The court, however, did not address whether recording is a due process requirement under the Minnesota Constitution; instead, it decided that recording falls within the court’s supervisory powers to “insure the fair administration of justice.”

Maine, Illinois, New Mexico, and the District of Columbia have recently enacted statutes requiring the recording of custodial interrogations. The


52. Id. at 1159 (suggesting recording essential to protect defendant’s rights). The Alaska Supreme Court held that the due process clause of the state constitution requires the recording of interrogations, because recording is “a reasonable and necessary safeguard, essential to the adequate protection of the accused’s right to counsel, his right against self-incrimination and, ultimately, his right to a fair trial.” *Id.* The *Stephan* decision is composed of two separate cases with similar factual issues and a common legal issue which were consolidated before the Alaska Supreme Court. *Id.* In each case, the defendant was arrested and interrogated and subsequently confessed. *Id.* at 1158. In both cases, there was a working audio or video recorder in the interrogation room which the police used to record some, but not all of the interrogations. *Id.* Additionally, the police officers in each case had no satisfactory excuse for not recording the interrogations, which was already recommended by the court in Alaska. *Id.; see also* Mallott v. State, 608 P.2d 737, 743 n.5 (Alaska 1980) (informing police that, if possible, they should record suspects’ custodial interrogations).

53. *Stephan*, 711 P.2d at 1164 (holding court will exclude evidence if “unexcused failure” to record “when such recording is feasible”). The court said that although most police departments will use either audio or video recording, other recording methods, such as a transcript by a court reporter of the interrogation, will also be acceptable. *Id.* at 1159.

54. 518 N.W.2d 587 (Minn. 1994).

55. *Id.* at 592 (outlining Minnesota’s recording requirement). The defendant in *Scales* was arrested on murder charges and questioned for three hours before a formal statement was recorded. *Id.* at 590. The defendant claimed that he was not told that he was under arrest, nor was he given his *Miranda* warnings during this interrogation. *Id.* He argued that because he did not waive his rights, and that because his interrogation was unrecorded, his conviction should be overturned. *Id.* The court applied the recording rule prospectively and affirmed the defendant’s murder conviction, stating that even with a recording requirement, the admission of the unrecorded statements in this case was harmless error. *Id.* at 593.

56. *Id.* at 592 (following Model Code, holding “substantial” violation of recording requirement requires suppression of statements). *But see State v. Conger*, 652 N.W.2d 704, 705 (Minn. 2002) (refusing to extend *Scales* rule to noncustodial interrogations even if occurring at police station).

57. *Scales*, 518 N.W.2d at 592 (acknowledging court applied supervisory powers rather than due process). The court avoided the issue of a due process requirement for mandatory recording, putting off such analysis for a later time, if necessary. *Id.*

Maine Legislature signed a mandatory recording statute into law on May 5, 2004; the statute reads: “A police department or other law enforcement agency shall videotape any examination of an individual that concerns the commission of a crime and that is conducted within a police department or other law enforcement facility.” In 2003, the District of Columbia enacted a statute requiring the electronic recording of interrogations for dangerous and violent crimes. The statute requires that such interrogations be recorded if they are conducted at police department interview rooms equipped with recording equipment.

The Illinois Legislature approved a mandatory recording law which became effective in July 2005, requiring that a defendant’s statements to police be video and audio recorded to be admissible at trial. The Illinois statute also requires that the recording include a reading and waiver of the defendant’s Miranda warnings. Illinois’s recording requirement, like the District of Columbia’s, does not apply to all interrogations, but rather only to homicides and certain sexual offenses.

In 2005, the Governor of New Mexico signed House Bill 382 into law, requiring custodial interrogations to be recorded in their entirety. The law requires that interrogations in felony cases be video or audio recorded, including the reading and waiver of the suspect’s rights. The recording requirement, which goes into effect on January 1, 2006, provides exceptions for good cause.

Texas is the lone ranger in implementing mandatory recording through its state rules of evidence. Enacted in 1965, the Texas Rules of Evidence require that interrogations be electronically recorded, including the reading and waiver of Miranda warnings. Similar to Illinois, Texas requires that a copy of the

61. Id. (outlining other factors police chiefs should consider in enacting new recording procedure).
63. Id. (requiring recording of Miranda reading and waiver). Unrecorded statements are presumed inadmissible in homicide and sexual offense cases, except that such statements may be used for impeachment purposes. Id. Additionally, the recording must be preserved until the defendant’s conviction is final and all appeals are exhausted. Id.
64. Id. (requiring recording in homicides and sex offenses); see also D.C. CODE ANN. § 5-133.20 (2004) (requiring recording for dangerous, violent crimes).
66. Id. (restricting recording requirement to felony offenses).
67. Id. (listing exceptions to recording requirement).
68. TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 2001) (articulating Texas’ recording requirement). But see Higgins, supra note 14, at 18 (contending Texas evidence rules not mandatory, only “strongly encourage taping”); Drizin & Reich, supra note 14, at 620 (suggesting only Alaska, Minnesota, Illinois, and Maine have recording requirements).
69. TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 2001) (listing requirements for recording interrogations).
recording be preserved until the defendant’s conviction is final.\textsuperscript{70}

\textbf{2. Recording But No Suppression-Encouraging Recording Without Requiring It}

Other states endorse and encourage the electronic recording of custodial interrogations but have stopped short of mandating recording and suppressing unrecorded confessions.\textsuperscript{71} The Massachusetts, New Hampshire, Arizona, and Indiana state supreme courts have all expressed a desire that custodial interrogations be recorded, but none have gone so far as to provide for the suppression of unrecorded interrogations.\textsuperscript{72} Massachusetts provides a jury instruction in lieu of suppression; New Hampshire only allows testimony about the interrogation at trial, rather than the actual recording, if the interrogation is not recorded in its entirety; and Arizona allows judges to look at the lack of recording in determining the voluntariness of a confession.\textsuperscript{73} Hawaii, Tennessee, and Utah courts have all expressed a preference for recording in dicta, without mandating it.\textsuperscript{74}

In August 2004, the Supreme Judicial Court of Massachusetts ruled in \textit{Commonwealth v. DiGiambattista}\textsuperscript{75} that custodial interrogations should be electronically recorded.\textsuperscript{76} The court held that if an interrogation is not recorded, the defendant can request a jury instruction to regard the statement with caution.\textsuperscript{77} The court, however, did not provide for the suppression of

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\item \textsuperscript{70} 725 ILL. COMP. STAT. 5/103-2.1 (2003) (requiring preservation of recording until conviction final, habeas corpus appeals exhausted, or prosecution barred); TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 2001) (stating preservation of recording required until conviction final, appeals exhausted, prosecution barred); see also Johnson, supra note 9, at 745 n.190 (asserting Texas’ recording requirement less stringent than Alaska or Minnesota). The article, written before Illinois or Maine legislatures enacted their recording statutes, states Texas’ recording requirement is the most lenient as it does not require that the police record the interrogation, only the confession itself. Johnson, supra note 9, at 745 n.190.
\item \textsuperscript{71} See infra notes 72-90 and accompanying text (discussing various jurisdictions’ recording requirements); see also Hendricks v. Swenson, 456 F.2d 503, 506-07 (8th Cir. 1972) (asserting federal appeals court approves recording as it protects defendant and finds truth); Johnson, supra note 9, at 746-47 (contending many courts encourage but refuse to make recording mandatory).
\item \textsuperscript{72} See infra notes 73-90 and accompanying text (discussing Massachusetts, New Hampshire, Indiana, and Arizona cases).
\item \textsuperscript{73} See infra notes 74-90 and accompanying text (addressing different procedures courts use in lieu of suppression of interrogation).
\item \textsuperscript{74} See State v. Kekona, 886 P.2d 740, 745-46 (Haw. 1994) (stating recorded interrogations helpful in determining truth, but holding no due process recording requirement); State v. Godsey, 60 S.W.3d 759, 771-72 (Tenn. 2001) (concluding no recording requirement, but characterizing it as good policy, and leaving decision to legislature); State v. James, 858 P.2d 1012, 1017-18 (Utah Ct. App. 1993) (declining to adopt state recording requirement, but noting several policy reasons for recording interrogations).
\item \textsuperscript{75} 813 N.E.2d 516 (Mass. 2004).
\item \textsuperscript{76} \textit{Id}. at 518 (explaining if interrogation not recorded, defendant can request jury instruction to regard confession with caution).
\item \textsuperscript{77} \textit{Id}. at 518 (describing jury instruction for unrecorded custodial interrogation). The Supreme Judicial Court in \textit{DiGiammbattista} held that:
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unrecorded interrogations, or make them otherwise inadmissible at trial.\footnote{78}{Id. at 518.}

In \textit{State v. Barnett},\footnote{79}{789 A.2d 629 (N.H. 2001).} the New Hampshire Supreme Court held that the actual recording of a confession is only admissible if the entire interrogation is recorded.\footnote{80}{Id. at 632 (noting testimony as to unrecorded confession still allowed, but not actual recording).} The court held that the authority to mandate recordings stems from the state’s supervisory powers, like in \textit{Scales}, but concluded that both the Alaska and Minnesota courts went too far in providing for the suppression of unrecorded interrogations.\footnote{81}{Id. at 632 (establishing recording rule).} The court in \textit{Barnett} held that while the incomplete recording of an interrogation is inadmissible, testimony about the interrogation will be allowed.\footnote{82}{Id. at 632-33 (delineating remedy for failure to record suspects entire interrogation).}

The Arizona Supreme Court expressed a preference for recording custodial interrogations in \textit{State v. Jones}.\footnote{83}{49 P.3d 273 (Ariz. 2002).} Although it did not mandate recording, the court stated in dicta that a recording of the entire interrogation is the best evidence of what happened in the interrogation room, and is beneficial to the defense as well as the prosecution.\footnote{84}{Id. (recommending recording of entire interrogation and notation of gaps in recording).} The court added that in determining the voluntariness of a confession and the waiver of a suspect’s rights, judges should take into consideration the reasons provided by police for gaps in the recording of interrogations.\footnote{85}{833 N.E.2d 1036 (Ind. Ct. App. 2005).}

In \textit{Gasper v. State}\footnote{86}{692 N.E.2d 1386 (Ind. Ct. App. 1998).} and \textit{Stoker v. State},\footnote{87}{842 A.2d 97, 100 (N.H. 2004) (declining to extend \textit{Barnett} rule to pre-Miranda statements).} the Indiana Court of Appeals the admission in evidence of any confession or statement of the defendant that is the product of an unrecorded custodial interrogation, or an unrecorded interrogation conducted at a place of detention, will entitle the defendant, on request, to a jury instruction concerning the need to evaluate that alleged statement or confession with particular caution.

\textit{Id.} at 518.

\footnote{78}{Id. at 532 (declining to adopt bright-line test). The court recognized that jurisdictions that have mandatory recording requirements have had positive experiences with it, but said there are various issues that an exclusionary rule would have to address. \textit{Id.} at 532. These issues include whether the rule should cover only custodial interrogations, or if it should cover noncustodial interrogations if they occur at a police station. \textit{Id.} Additionally, the court was concerned about interrogations occurring at places other than the police station, and what would happen if a noncustodial interrogation at a police station turned custodial. \textit{Id.} Another concern of the Massachusetts Supreme Judicial Court was what to do about justifiable failures to record, such as malfunctioning of equipment or the suspect’s refusal to allow recording. \textit{Id.} But see \textit{Stephan v. State}, 711 P.2d 1156, 1164 (Alaska 1985) (concluding “exclusion is the appropriate remedy for an unexcused failure to electronically record an interrogation”); \textit{State v. Conger}, 652 N.W.2d 704, 705 (Minn. 2002) (refusing to extend \textit{Scales} rule to noncustodial interrogations even if occur at police station); \textit{State v. Scales}, 518 N.W.2d 587, 592 (Minn. 1994) (applying suppression on case-by-case basis); \textit{State v. Velez}, 842 A.2d 97, 100 (N.H. 2004) (declining to extend \textit{Barnett} rule to pre-Miranda statements).

\footnote{79}{789 A.2d 629 (N.H. 2001).}

\footnote{80}{Id. at 632 (noting testimony as to unrecorded confession still allowed, but not actual recording).}

\footnote{81}{Id. at 632 (establishing recording rule). The New Hampshire Supreme Court in \textit{Barnett} held that to be admissible, the entire interrogation must be recorded, but added that it is not necessary to record the reading and waiver of \textit{Miranda} warnings. \textit{Id.}}

\footnote{82}{Id. at 632-33 (delineating remedy for failure to record suspects entire interrogation).}

\footnote{83}{49 P.3d 273 (Ariz. 2002).}

\footnote{84}{Id. at 279 (expressing preference for recorded interrogations).}

\footnote{85}{Id. (recommending recording of entire interrogation and notation of gaps in recording).}

\footnote{86}{833 N.E.2d 1036 (Ind. Ct. App. 2005).}

\footnote{87}{692 N.E.2d 1386 (Ind. Ct. App. 1998).}
expressed a strong preference for recording interrogations. Although in both cases the court ultimately declined to mandate the recording of custodial interrogations, it stressed that recording protects officers from unwarranted accusations of misconduct, benefits both parties, and preserves the interrogation as it occurred, relieving the judiciary from the task of determining what happened based on inconsistent versions of events. The court in *Stoker* stated that, “in light of the slight inconvenience and expense associated with the recording of custodial interrogations in their entirety, it is strongly recommended, as a matter of sound policy, that law enforcement officers adopt this [recording] procedure.”

3. No Recording Requirement

The third category encompasses those jurisdictions that do not mandate or explicitly encourage the electronic recording of suspects’ interrogations. Many state courts expressly refuse to enact a rule requiring the recording of custodial interrogations. Many other states have not yet addressed the issue

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88. *Gasper*, 833 N.E.2d at 1041 (encouraging but declining to require recording of custodial interrogations); *Stoker*, 692 N.E.2d at 1390 (accord).

89. *Gasper*, 833 N.E.2d at 1041 (stressing benefits of recording interrogations); *Stoker*, 692 N.E.2d at 1390 (describing various policy reasons to record interrogations). The court in *Gasper* noted that since its decision in *Stoker*, several courts and legislatures have implemented recording requirements in certain cases. *Gasper*, 833 N.E.2d at 1040.

90. *Stoker*, 692 N.E.2d at 1390 (suggesting encouragement for recording of custodial interrogations); see also *Gasper*, 833 N.E.2d at 1040 (quoting *Stoker*).

91. See *Johnson*, supra note 9, at 746-47 (admitting many courts refuse to make recording mandatory). Some courts have said the issue of mandatory recording should be left up to the state legislature, while others have declined to adopt a mandatory recording rule for different reasons. *Id.*

through their courts, but states are increasingly proposing mandatory recording legislation.\(^93\) In 2004-05 alone, Arizona, California, Connecticut, District of Columbia, Florida, Georgia, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Washington, West Virginia, and Wisconsin proposed legislation seeking to mandate the recording of custodial interrogations.\(^94\)

There is currently no federal recording requirement, and most federal agencies, including the Federal Bureau of Investigation (FBI) and Drug Enforcement Agency (DEA) do not routinely record interrogations.\(^95\) Those jurisdictions that do not require recording cite a variety of reasons, from impracticability to separation of powers arguments.\(^96\) In *State v. Gorton*,\(^97\) the Vermont Supreme Court held that the Vermont Constitution does not require the recording of all custodial interrogations.\(^98\) The court concluded that, absent legislation supplementing the rights set forth in the Vermont Constitution, it would not by “judicial fiat” prescribe such a requirement.\(^99\)

The Washington Appeals Court, in *State v. Spurgeon*,\(^100\) held that because their state constitution contains similar language to the U.S. Constitution, and because there is no federal recording requirement, there is no requirement under Washington state law either.\(^101\) In Montana, the state supreme court, in the 1995 case *State v. Grey*,\(^102\) declined to adopt a mandatory recording requirement, deferring to the state legislature.\(^103\) The court, however, held that

\(^{93}\) See infra notes 95-108 accompanying text (discussing states without recording requirements).

\(^{94}\) Ehlers, *supra* note 16, at 34 (listing proposed bills); Moreno, *supra* note 16, at 418 (discussing new proposed legislation); *Mandatory Electronic Recording*, *supra* note 16 (listing new legislation).

\(^{95}\) See United States v. Lewis, 355 F. Supp. 2d 870, 872 (E.D. Mich. 2005) (stating DEA does not have recording requirement); Higgins, *supra* note 14, at 18 (acknowledging FBI does not record interrogations). The Higgins article states that although FBI officials refused to comment on their recording policy, a spokesperson for the agency said that the lack of recording policy was under review. *Id.*

\(^{96}\) See Johnson, *supra* note 9, at 747 (describing reasons states give for not mandating recording).

\(^{97}\) 548 A.2d 419 (Vt. 1988).

\(^{98}\) *Id.* at 421 (determining Vermont Constitution does not require recording of interrogations).

\(^{99}\) *Id.* at 422 (declining to mandate recording for custodial interrogations).


\(^{101}\) *Id.* at 962 (suggesting Washington State Constitution does not require recording); see also infra notes 112-125 and accompanying text (discussing lack of federal recording requirement). Georgia and Ohio state courts have held that there is no recording requirement under the federal constitution or their respective state constitutions. Coleman v. State, 375 S.E.2d 663, 664 (Ga. Ct. App. 1988) (concluding no state or federal custodial recording requirement); State v. Smith, 684 N.E.2d 668, 686 (Ohio 1997) (accord). Many other state courts, including Kentucky, Mississippi, and Pennsylvania, have held that there is no recording requirement under their state constitutions. Brashars v. Commonwealth, 255 S.W.3d 38, 61 (Ky. 2000) (holding Kentucky Constitution does not require recording); Williams v. State, 522 So. 2d 201, 208 (Miss. 1988) (holding Mississippi Constitution does not require recording); Commonwealth v. Craft, 669 A.2d 394, 394 (Pa. Super. Ct. 1995) (concluding no Pennsylvania constitutional recording requirement).

\(^{102}\) 907 P.2d 951 (Mont. 1995).

\(^{103}\) *Id.* at 955 (deciding Montana does not require recording of reading and waiver of *Miranda* warnings.
where police do not have a “tangible record” of the giving and waiver of Miranda warnings, the voluntariness of the waiver will be “viewed with distrust.”104

While declining to mandate recording in State v. Cook,105 the Supreme Court of New Jersey used its supervisory authority to establish a committee to make recommendations regarding the possible mandatory recording of custodial interrogations.106 On August 10, 2004, the Chief Justice of the New Jersey Supreme Court appointed a “Special Committee on Recordation of Custodial Interrogations” (Committee) to examine current mandatory recording requirements nationwide and develop recommendations for the court.107 The Committee report, published on April 15, 2005, describes the process by which the Committee conducted its research, as well as its final recommendations to the court.108

Even without state-wide recording requirements, many police departments record post-Miranda interviews in major felony cases of their own accord.109

104. Id.
106. Id. at 533 (holding no due process recording requirement, establishing committee to make recommendations); see also DiGiambattista, 813 N.E.2d at 535 (Greaney, J., dissenting) (suggesting legislature should do study on mandatory recording before adopting requirement).
107. REPORT OF SUPREME COURT SPECIAL COMMITTEE ON RECORDATION OF CUSTODIAL INTERROGATIONS, 1, 3 (N.J. 2005) (describing purpose of Committee); see also John Caher, N.J. Attorney General to Expand Policy of Taping Suspects’ Confessions, LEGAL INTELLIGENCER, Dec. 22, 2004, at 4 (describing trend in New Jersey to expand recording to include entire interrogation). According to New Jersey Attorney General Peter Harvey, “in the aftermath of Cook, the wave of the future is recording defendants’ statements. Caher, supra, at 4.

108. See generally REPORT OF SUPREME COURT SPECIAL COMMITTEE ON RECORDATION OF CUSTODIAL INTERROGATIONS (N.J. 2005). The Committee recommended that custodial interrogations occurring at a place of detention be audio-or video-recorded, beginning with and including Miranda rights, but only for certain crimes. Id. The Committee provided exceptions to the recording requirement, including infeasibility and non-custodial statements. Id. The Committee recommended a jury instruction similar to that of Massachusetts, as opposed to suppression of the statements, for the police’s failure to record. Id.

109. See Geller, supra note 3, at 1 (estimating in 1990, one-sixth of police departments “videotaped at least some interrogations or confessions”); Thomas P. Sullivan, Three Police Station Reforms to Prevent Convicting the Innocent, 17 Apr CBA REC. 30, 31-32 (2003) (listing police departments who record custodial interviews in major felonies); Margaret Talbot, True Confessions, ATLANTIC MONTHLY, Jul. 1, 2002, at 24-25 (indicating San Diego, California and Kansas City, Missouri police departments already record interrogations voluntarily). Even in states like Colorado where the state supreme court has refused to mandate recording of custodial interrogations, many police departments, such as Denver, Boulder, Colorado Springs, and Ft. Collins, have policies requiring the recording of interrogations in major felonies. Sullivan, supra, at 31-32; see also People v. Raibon, 843 P.2d 46, 49 (Colo. Ct. App. 1992) (refusing to require recording of interrogations state-wide). Other police departments across the country also routinely record custodial interrogations, including: San Diego County, California; Broward County and Floral Springs, Florida; Prince George’s County, Maryland; Las Cruces, New Mexico; Aberdeen, South Dakota; numerous police departments in Connecticut. Sullivan, supra, at 31-32.
Additionally, more and more cities and towns are encouraging and requiring the recording of custodial interrogations. 110 Judging from the increase in proposed legislation and case law addressing the electronic recording of custodial interrogations, a consensus appears to be developing that such recording is beneficial and should be mandatory.111

C. Looking Toward the Future—Potential Constitutional Requirements for the Mandatory Recording of Custodial Interrogations

The United States Supreme Court has never directly addressed the issue of a federal recording requirement. 112 Nonetheless, there are various theories as to where the legal justification for such a requirement might be found. 113 The potential constitutional grounds for mandating recording include the duty to preserve evidence under the Due Process Clause, the Fourth Amendment requirement to document the reading and waiver of Miranda warnings, the Fifth Amendment privilege against self-incrimination, and the right to

110. See Drizin & Reich, supra note 14, at 639 (highlighting how states are increasingly encouraging and mandating recording of custodial interrogations).


112. See State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) (stating United States Supreme Court has not addressed recording issue under federal constitution); Johnson, supra note 9, at 748 (acknowledging Court has not decided whether United States Constitution requires recording of suspect’s custodial interrogations).

113. See Johnson, supra note 9, at 747-48 (noting Supreme Court has not decided whether Constitution requires recording of suspect’s custodial interrogations); Christopher Slobogin, Toward Taping, 1 Otto St. J. Crim. L. 309, 309 (2003) (laying out potential Constitutional grounds for mandating recording). If the Court does adopt a federal recording requirement, it will “most likely be grounded in the fundamental fairness elements due process, structured to protect a defendant’s right to a fair trial.” Johnson, supra note 9, at 748.
confrontation under the Sixth Amendment. If the Court finds a federal constitutional ground for mandatory recording, it will likely revolutionize the custodial interrogation process even more so than Miranda.

The due process argument for mandating recording suggests that recording custodial interrogations is the best and only way to preserve exculpatory evidence. The United States Supreme Court has twice addressed the requirement to preserve exculpatory evidence. In both cases, the Court intimated that there is no federal constitutional basis for the mandatory recording of custodial interrogations. In California v. Trombetta, the Court developed a test to determine when a state is required to preserve exculpatory evidence. The test requires that states preserve evidence only if the exculpatory value was apparent before the evidence was destroyed and the defendant cannot get comparable evidence elsewhere.

In Arizona v. Youngblood, the Court moved further away from creating an electronic recording requirement by holding that, absent bad faith, there is no due process violation by the police’s failure to preserve potentially useful evidence. The result of Youngblood is that until recording becomes more prevalent, “[t]he Court will not likely find ‘bad faith’ in a police department’s failure to record interrogations and confessions . . . .” Thus, until such a time, the issue is left up to the states and individual police departments to develop and impose recording requirements for custodial interrogations.

115. See id. (listing potential Constitutional grounds for mandating recording).
116. See id. at 317 (describing due process argument for mandatory recording of custodial interrogations).
118. See infra notes 118-125 (discussing Court’s decisions in Arizona v. Youngblood and California v. Trombetta).
119. See Arizona v. Youngblood, 488 U.S. 51 (1988) (rejecting due process violation unless failure to preserve exculpatory evidence is in bad faith); California v. Trombetta, 467 U.S. 479, 488-89 (1984) (highlighting state’s duty to preserve exculpatory evidence); see also Johnson, supra note 9, at 748-49 (discussing Youngblood and Trombetta cases). If the Court imposes a recording requirement, it will likely be on due process grounds. Johnson, supra note 9, at 748.
120. Id. at 488-89 (outlining test for determining if state is required to preserve exculpatory evidence).
121. Id. (asserting due process requirement to preserve exculpatory evidence); see also Johnson, supra note 9, at 748 (summarizing Trombetta case and due process requirement to preserve exculpatory evidence).
123. Id. at 58 (concluding without bad faith, no denial of due process for failure to preserve evidence); see also Johnson, supra note 9, at 748-49 (critiquing Youngblood opinion).
124. See Johnson, supra note 9, at 748-49 (addressing Court’s likely refusal to find bad faith in failure to record custodial interrogations).
125. See Johnson, supra note 9, at 748-49 (stating as no federal grounds for recording, up to state courts and legislatures).
D. Making The Case For Mandatory Recording

There are many factors to consider in developing a new comprehensive model rule for mandatory recording. Should the rule require only video or audio recording, or both? Should the entire interrogation be recorded, with or without the reading and waiver of Miranda warnings, or just the confession? Should recording be required for all interrogations, or just those regarding violent crimes or felonies? Should the rule permit the interrogation to be recorded surreptitiously or only voluntarily? Should the rule require excluding unrecorded interrogations and confessions in some cases, or merely a jury instruction regarding a preference for recording? Courts and commentators have addressed some of these questions in recent years.

126. See infra notes 127-131 and accompanying text (examining recording requirements in various jurisdictions).
127. See Sullivan, supra note 6, at 6 (discussing benefits of recording, stating “audio is good, video is better”); see also 725 ILL. COMP. STAT. 5/103-2.1 (2003) (requiring either audio or video recording); ME. REV. STAT. ANN. tit. 25, § 2803-B (2004) (requiring “digital, electronic, audio, video, or other recording”); TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 2001) (requiring videotape); Stephan v. State, 711 P.2d 1156, 1160 (Alaska 1985) (holding entire interrogation must be recorded, can be audio, video, or court reporter transcript); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) (holding audio recording sufficient); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 130.4 (1975) (stating only sound recording required).
128. See Geller, supra note 3, at 4 (discussing strong opinions by police departments on both sides of issue); see also 725 ILL. COMP. STAT. 5/103-2.1 (2003) (requiring only recording of custodial interrogation); ME. REV. STAT. ANN. tit. 25, § 2803-B (2004) (requiring recording of interrogation for serious crimes); TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 2001) (requiring recording of interrogation and of suspect “knowingly, intelligently, and voluntarily” waiving Miranda warnings); Stephan v. State, 711 P.2d 1156, 1162 (Alaska 1985) (holding entire interrogation must be recorded); State v. Jones, 49 P.3d 273, 279 (Ariz. 2002) (recommending videotaping entire interrogation); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) (holding recording must include information about rights, waiver of rights and entire interrogation); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 130.4 (1975) (requiring reading and waiver of warning and all questions and answers).
130. See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 130.4 (1975) (requiring full disclosure to suspect that interrogation will be recorded). But see Higgins, supra note 14, at 18 (summarizing former prosecutor who says police should have ability to tape suspects secretly). A mandatory recording rule “is designed to preserve evidence accurately, not to discourage defendants from talking” according to the former prosecutor. Id.
131. See TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 2001) (contending interrogation admissible only if recorded); Stephan v. State, 711 P.2d 1156, 1164 (Alaska 1985) (concluding “exclusion is the appropriate remedy for an unexcused failure to electronically record an interrogation”); Commonwealth v. DiGiambattista, 813 N.E.2d 516, 518 (Mass. 2004) (acknowledging if interrogation not recorded, jury instruction may be given concerning state’s preference for recording); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) (arguing suppression determined on case-by-case basis). If there is no mandatory exclusion, absent a valid excuse from police, then some police officers who use improper tactics might ignore the recording requirement in order to shield their coercive methods from public view. White, supra note 21, at 1027.
132. See infra notes 133-160 and accompanying text (addressing and dispelling myths regarding mandatory recording).
I. Dispelling the Myths of Recording

States who expressly refuse to mandate recording and suppression cite various logistical and policy reasons for doing so.133 In those jurisdictions who mandate recording, however, empirical data and real life experience directly contradict most, if not all, of these stated concerns.134 For example, the problem of where to store the tapes is solved by keeping digital files on computers, with little or no need for physical storage.135 Additionally, any costs incurred in purchasing recording equipment and storage of tapes are offset by the money saved in litigating fewer wrongful conviction cases, pretrial suppression motions, as well as encouraging more plea bargains and fewer trials.136 Texas has dealt with the problem of how long to store the tapes by requiring that they be kept until the defendant’s conviction is final, all appeals are exhausted, or the statute of limitations has run.137

A few jurisdictions have voiced concerns over suppressing unrecorded interrogations because of possible equipment malfunction.138 States can, and should, provide exceptions to suppression, admitting evidence when there is a legitimate equipment problem.139 The Minnesota and Alaska cases provide for exceptions to suppressing unrecorded interrogations.140 Alaska only requires suppression where making a recording was feasible and the police have no legitimate excuse for their failure to record.141 Minnesota provides that unrecorded interrogations may be suppressed, but analyzes the issue on a case-

133. See supra notes 91-111 and accompanying text (identifying states who do not mandate recording and reasons for not doing so); see also Geller, supra note 3, at 3 (stating many police departments cited cost as reason for not recording interrogations). Other police departments surveyed which do not record custodial interrogations suggest that recording is not needed. Geller, supra note 3, at 3.

134. See supra notes 6, 49-57 and accompanying text (describing data, evidence showing stated concerns not valid).

135. See Grumman, supra note 3, at C6 (asserting storage problem solved by using digital files).

136. See Grumman, supra note 3, at C6 (describing cost-saving effects of recording); see also Geller, supra note 3, at 9 (reporting some police departments save money on recording equipment by using recovered property). Geller suggests that recording custodial interrogations may also save officers from stress and burnout, as recordings provide proof that the officers did not use coercion or improper interrogation tactics. Geller, supra note 3, at 11 n.4.

137. See supra notes 68-70 and accompanying text (discussing Texas’ recording requirements).

138. See supra note 78 and accompanying text (addressing Massachusetts’ concern about malfunctioning equipment); see also Grumman, supra note 3, at C6 (suggesting many states concerned with malfunctioning equipment).

139. See infra notes 140-142 and accompanying text (asserting need for exceptions and noting Alaska and Minnesota do have exceptions); see also Geller, supra note 3, at 8 (reporting results of survey regarding equipment malfunctioning); Grumman, supra note 3, at C6 (addressing need for exceptions in rule). In police departments surveyed, only seven percent found that equipment malfunction was a “major problem” and over half reported having “no problems at all” with equipment. Geller, supra note 3, at 8.

140. See supra notes 49-57 and accompanying text (addressing Alaska and Minnesota case law).

141. See supra note 53 and accompanying text (requiring exclusion in Alaska only if police have no excuse for failure to record).
A common misconception is that recording custodial interrogations will hinder police activity, resulting in guilty suspects going free. In fact, just the opposite has proven to be true. Jurisdictions that mandate the recording of custodial interrogations have seen an increase in guilty verdicts and plea bargains after they began recording.

The proposition that suspects will not talk if the camera is recording is also a fallacy. The same argument was made in the 1960’s by opponents of Miranda, and history has shown that eighty-percent of suspects routinely waive their Miranda warnings and talk to police. Jurisdictions that have mandatory recording find that most suspects agree to be taped. Additionally, in situations where the suspect refuses to be recorded, police may record the refusal, take hand-written notes, and the interrogation will still be admissible in court.

An additional rationale for not recording interrogations is that juries do not understand police procedures, and will perceive tough interrogation tactics as improper. According to one Illinois circuit court judge, however, juries are savvy about police procedures these days, due in part to television cop shows such as NYPD Blue and Law & Order. Additionally, juries are smart, and will understand police procedures if they are explained to them in court.

Some jurisdictions have expressed concerns over the scope of the

142. See supra note 57 and accompanying text (providing for suppression of unrecorded interrogations in Minnesota).
143. See Grummman, supra note 3, at C6 (describing fear recording will result in guilty going free).
144. See supra notes 3-6 and accompanying text (showing recording has been beneficial in jurisdictions mandating recording); see also Grummman, supra note 3, at C6 (finding where recording used, it was beneficial).
145. See supra notes 3-6 and accompanying text (citing benefits of recording); see also Grummman, supra note 3, at C6 (finding where recording used, it was beneficial); Sullivan, supra note 6, at 8 (stating data shows recording custodial interrogations results in fewer motions to suppress); Geller, supra note 3, at 9 (reporting results of survey indicating videotaping helps secure guilty pleas).
146. See infra notes 147-148 and accompanying text (dispelling myth that defendants will not talk in camera’s presence); see also Sullivan, supra note 6, at 19 (suggesting fears that suspects will not talk with camera on unfounded).
147. See Kassin, supra note 1, at A13 (asserting suspects still talk even with camera on).
148. Grummman, supra note 3, at C6 (stating concern that suspect will not talk in presence of police invalid). The Police Chief in Kankakee, Illinois, found that in 2002, 55% of felony suspects agreed to be recorded, as well as 95% of felony suspects at the sheriff’s office. Id.
149. Sullivan, supra note 6, at 21 (noting exception in state recording requirements for suspect’s refusal to be taped).
150. See Grummman, supra note 3, at C6 (addressing concern that jury will not understand police procedures); see also Geller, supra note 3, at 6 (describing fears that recording would inhibit interrogation tactics). Police in jurisdictions who record, however, said that any awkwardness in recording interviews is short-lived; that after becoming accustomed to recording, police relax and maintain a professional approach while using traditional interrogation techniques. Geller, supra note 3, at 6.
151. See Grummman, supra note 3, at C6 (writing about real life jury experiences with recording).
152. See Grummman, supra note 3, at C6 (suggesting juries understand tough interrogation techniques if explained to them in court).
suppression rule, such as what happens when an interrogation does not occur at a police station. 153 Minnesota answers this question by only mandating recording for custodial interrogations which occur at police stations, and merely recommends recording when a suspect is in custody elsewhere, such as a squad car or at a crime scene. 154 The police often carry small tape recorders, and many squad cars also have recording systems. 155 States should address these issues when developing mandatory requirements for mandating recording. 156

A few jurisdictions, including Massachusetts and New Jersey, refuse to mandate recording, citing a lack of empirical data, and seek a full legislative hearing on the issue. 157 As a significant amount of data is already available, however, their hesitancy is unwarranted. 158 Alaska has been recording interrogations for twenty years, and Minnesota has been recording for a decade. 159 Numerous studies and surveys of police officers have been conducted in those jurisdictions, as well as others who voluntarily record interrogations. 160

2. Both the Prosecution and Defense Support Mandatory Recording

Prosecutors and police officers support mandatory recording for various substantive, procedural, and policy reasons. 161 Recording interrogations improves community relations. 162 Allegations of police brutality and misconduct decrease. 163 Recorded confessions result in more convictions, and the defendant’s own words and actions are powerful evidence in court. 164

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153. See supra note 78 and accompanying text (addressing Massachusetts’ concerns about when to record interrogations); see also Grumman, supra note 3, at C6 (addressing protocol for when interrogation does not occur at police station).

154. See supra note 54-57 and accompanying text (explaining Minnesota’s recording requirement only applies to interrogations at place of detention).

155. See Grumman, supra note 3, at C6 (describing how Minnesota police officers carry small portable recording devices for field interrogations).

156. See supra notes 54-57 and accompanying text (addressing how Minnesota dealt with interrogations out of place of detention).

157. See supra note 106 and accompanying text (addressing Massachusetts and New Jersey cases requesting legislative hearings on mandatory recording).

158. See supra notes 6, 49-57 and accompanying text (describing data and use of recording in Alaska and Minnesota).

159. See supra notes 49-57 and accompanying text (addressing Alaska and Minnesota case law).

160. See supra note 6 and accompanying text (citing survey indicating 97% of police departments who videotape custodial interrogations support its continued use).

161. See infra notes 162-168 and accompanying text (discussing reasons why prosecution and defense support recording).

162. See Grumman, supra note 3, at C6 (stating detectives have better reputation in community since they began recording interrogations).

163. See Casteneda, supra note 4, at B1 (writing recording reduces claims of misconduct by police); Grumman, supra note 3, at C6 (asserting allegations of police misconduct decrease with recording).

164. See Klobuchar, supra note 2, at A21 (describing how defendants’ words are powerful evidence in
Additionally, police officers can learn new interrogation techniques by watching taped questioning, and they learn a lot about suspects from recording when the suspects think they are alone.\textsuperscript{165} Defense attorneys also advocate for mandatory recording because it protects criminal suspects’ rights.\textsuperscript{166} Mandatory recording deters police misconduct, or at least brings it into public view.\textsuperscript{167} Recording interrogations also solves the dispute of who said what in the interrogation room, thereby eliminating the swearing matches that the police usually win.\textsuperscript{168}

\textbf{III. ANALYSIS: DEVELOPING A COMPREHENSIVE MODEL STATUTE}

The best way to ensure that a mandatory recording requirement is effective and easy to apply is for the court or legislature to address all potential concerns in the statute or opinion itself.\textsuperscript{169} Many factors should be considered when developing a comprehensive model rule for mandatory recording.\textsuperscript{170} The first is whether the rule should require video or audio recording, or both.\textsuperscript{171} States who mandate recording are split on this issue.\textsuperscript{172} Maine and Texas require videotape, while Illinois, Alaska, Minnesota, and the Model Code only require audio recording.\textsuperscript{173} Video cameras and digital recording devices have become more readily available and affordable in recent years, and with the advent of digital storage, hardware and storage costs are no longer serious obstacles to

\textsuperscript{165} See Klobuchar, supra note 2, at A21 (stating recording is good police learning tool); Sullivan, supra note 6, at 10-11 (suggesting recording allows detectives to focus on suspect). The Ft. Collins, Colorado Police Department indicated that reviewing the videos of interrogations often shows inconsistencies in the suspects’ stories which were not readily apparent during the interrogation. Sullivan, supra note 6, at 10-11. In one instance in Minneapolis, Minnesota, a defendant said he was blind and acted as such during an interrogation, but when police left the room with the videotape still running, the defendant picked up a newspaper and began reading. Klobuchar, supra note 2, at A21; see also Grumman, supra note 3, at C6 (describing Minnesota blind man scenario).

\textsuperscript{166} See infra notes 167-168 and accompanying text (discussing reasons why defense attorneys approve of mandatory recording); see also Klobuchar, supra note 2, at A21 (stating reasons why defense supports recording).

\textsuperscript{167} See Kassin, supra note 1, at A13 (discussing how police misconduct decreases with recording).

\textsuperscript{168} See Mills & Higgins, supra note 5, at C1 (addressing additional reasons why defense attorneys support recording).

\textsuperscript{169} See infra notes 170-175 and accompanying text (addressing factors to consider in developing model statute).

\textsuperscript{170} See supra notes 18-21, 127-131 and accompanying text (describing recording requirements in various jurisdictions).

\textsuperscript{171} See supra notes 18-21, 127-130 and accompanying text (addressing Alaska, Minnesota, Illinois, Maine, New Mexico, Texas, Washington D.C., and Model Code recording requirements).

\textsuperscript{172} See supra notes 18-21, 127-130 and accompanying text (describing recording requirements).

\textsuperscript{173} See supra notes 18-21, 127-130 and accompanying text (addressing whether states require audio, video, or both).
mandating recording. Additionally, videotapes enable the jury to view the interrogation as it occurred, and reveal any signs of physical abuse, as well as the defendant’s demeanor outside police presence. Optimally, mandatory recording laws should require both an audio and video recording to ensure that there is still a record if either the audio or videotape malfunctions.

The second issue states must address is whether the interrogation should be taped, with or without the reading and waiver of Miranda warnings, or just the confession, or recap. Recording Miranda warnings in addition to the interrogation and confession protects defendants’ and police officers’ rights and preserves the record. It is hardly more difficult for officers to begin recording before giving Miranda warnings than after. As recording the reading and waiver of Miranda warnings saves states money because there are fewer challenges to unwarmed interrogations, it makes sense to require recording Miranda warnings as well as the interrogation and confession.

Another issue states must address is whether the mandatory recording law would permit the police to record the interrogation surreptitiously or only voluntarily. Secret recording may lead to constitutional privacy issues and is

174. See supra note 135 and accompanying text (addressing how digital age resolves media storage problems).
175. See supra notes 164-165 and accompanying text (providing video recording good evidence as to what actually happened); see also Klobuchar, supra note 2, at A21 (asserting videotaping is valuable evidence in court).
176. See supra notes 62-64, 171-175 and accompanying text (stating Illinois requires both video and audio, addressing reasons why both preferable).
177. See supra notes 35, 128, and accompanying text (discussing various states’ recording requirements regarding interrogation and rights); see also Sullivan, supra note 6, at 17 (asserting recording only confession is “very much inferior to recording the entire interrogation”). If police departments do not record the entire interrogation, officers are still subject to challenges to their conduct during the preceding interrogation, and coercion and abuse claims will still be a matter of “he said, she said.” Sullivan, supra note 6, at 17. Additionally, if the entire interrogation is not recorded, police are deprived of the training benefits that result from reviewing the interrogation, as well as the potentially useful and incriminating things the defendant says during the course of questioning. Id. at 18.
178. See supra notes 35, 128, and accompanying text (discussing reasons for recording interrogation and rights); see also Geller, supra note 3, at 5 (finding defense attorneys prefer entire interrogation be recorded, and some police officers prefer recaps). Public defenders interviewed said that if the entire interview is recorded, it will make the police more respectful of suspects’ rights, and if only a recap of the interrogation is recorded, defendants may appear cold or unremorseful in telling the story. Geller, supra note 3, at 5. Many police officers also prefer recording the entire interrogation, as many times suspects say spontaneous things during lengthy interviews that they would not say during a formal, premeditated recap. Id. However, there are some detectives and police departments who prefer recording only a recap, citing increased costs as well as the uncertainty that comes from recording the entire interrogation. Id. The costs of recording the entire interview as opposed to the recap are a real concern, as the average recap lasts 15-45 minutes, whereas an entire interrogation usually lasts from 2-4 hours, and may last up to 7 hours. Id. However, the costs can be alleviated by using digital recording and storage, and the advantages of recording the entire interrogation outweigh the costs. See supra notes 134-136 and accompanying text (discussing benefits of recording).
179. See supra notes 35, 128, 135, and accompanying text (discussing reasons for recording requirements).
180. See supra notes 3, 136, and accompanying text (describing cost savings measures of recording).
181. See supra notes 20, 130, and accompanying text (addressing voluntary versus surreptitious recording of custodial interrogations).
unnecessary; most jurisdictions who record have found that suspects are willing to talk, even in the presence of recording devices.\textsuperscript{182} Recording devices need not be conspicuous however, they may blend in with the surroundings.\textsuperscript{183}

A fourth issue to address is whether the rule should require mandatory exclusion of unrecorded interrogations, or merely a jury instruction regarding the state’s preference for recording.\textsuperscript{184} Without an exclusionary provision, police officers who use improper interrogation tactics might ignore the recording requirement to shield their coercive methods from public view.\textsuperscript{185} For recording requirements to be effective, there must be consequences for not following them.\textsuperscript{186} In \textit{DiGiambattista}, the SJC erred in only allowing the defendant to request a jury instruction that the government prefers recording.\textsuperscript{187} A jury instruction has little deterrent effect, and does not prevent the police from using improper tactics.\textsuperscript{188} The decision to suppress unrecorded interrogations should be made on a case-by-case basis, with exceptions made for reasonable failures to record, including equipment malfunction and impossibility.\textsuperscript{189} All interrogations should be videotaped, not just for certain crimes as the reasons supporting recording apply to all crimes, not just violent or serious felonies.\textsuperscript{190}

\textbf{IV. CONCLUSION}

Recording suspects’ interrogations and confessions has led to increased

\textsuperscript{182} See \textit{supra} notes 147-148 and accompanying text (refuting concerns that suspects will not talk with camera on); see also \textit{Geller, supra} note 3, at 4 (explaining reasons many departments do not secretly record interrogations). In addition to possible legal and ethical restrictions, many jurisdictions decide against covert recording as it may present a bad public image. \textit{Geller, supra} note 3, at 4. The public may perceive covert recording as unfair, and as word spreads quickly, many sophisticated suspects or repeat offenders would know they are being recorded, thereby defeating the purpose. \textit{Id. But see Geller, supra} note 3, at 4 (suggesting police departments that tape surreptitiously find practice useful).

\textsuperscript{183} See \textit{supra} note 148 and accompanying text (declaring camera does not have to be conspicuous to be visible); see also \textit{Grumman, supra} note 3, at C6 (recounting case where suspect agreed to be videotaped, camera placed behind thermostat); \textit{Geller, supra} note 3, at 4 (suggesting concealing cameras by using small microphones, lens openings, or placing behind one-way mirrors).

\textsuperscript{184} See \textit{supra} notes 21, 131, and accompanying text (addressing mandatory exclusion versus jury instruction in various states).

\textsuperscript{185} See \textit{supra} notes 21, 131, and accompanying text (contending mandatory exclusion necessary to prevent police abuse).

\textsuperscript{186} See \textit{supra} notes 21, 131, and accompanying text (suggesting mandatory exclusion).

\textsuperscript{187} See \textit{supra} notes 75-78 and accompanying text (addressing Massachusetts’ jury instruction as opposed to mandatory exclusion).

\textsuperscript{188} See \textit{supra} notes 21, 131, and accompanying text (suggesting anything less than mandatory exclusion ineffective).

\textsuperscript{189} See \textit{supra} notes 49-57 and accompanying text (discussing Alaska and Minnesota’s exclusionary rules).

\textsuperscript{190} See \textit{Caher, supra} note 107, at 4 (suggesting even third-degree crimes such as identity theft may result in jail time); see also \textit{supra} notes 160-168 (discussing reasons why defense and prosecution advocate for mandatory recording).
productivity in police departments across the United States. Many prosecutors and defense attorneys encourage mandatory recording because it preserves what was actually said in the interrogation room. Minnesota and Alaska alone have over thirty years combined experience with mandatory recording, and in both states, the practice has proven helpful in the administration of criminal justice. The age of digital recording has created easier and more affordable ways to record and store interrogations, and therefore, a new model rule for recording interrogations needs to be developed. Such a rule should require that the entire interrogation and confession be videotaped for all crimes, where the interrogations are custodial and occur at police stations or other places of detention. The recording should include the reading and waiver of Miranda warnings as well as the entire interrogation and confession. Unrecorded interrogations should be excluded from evidence unless the police provide a reasonable excuse for the failure, including, but not limited to, equipment malfunctions and infeasibility. The defendant should be appraised of the presence of recording equipment, and an electronic recording should be kept until such time as the defendant has exhausted all appeals. Each state should review its existing recording procedures and implement a mandatory rule, through the courts or the legislature. As the benefits are many and the drawbacks are few, the hope is that every jurisdiction mandates recording in some form or another.

APPENDIX: PROPOSED NEW MODEL STATUTE PROPOSED MODIFICATION OF THE SCALES RULE

All custodial interrogations including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention. If law enforcement officers fail to comply with this recording requirement, any statements the suspect makes in response to the interrogation may be suppressed at trial. The parameters of the exclusionary rule applied to evidence of statements obtained in violation of these requirements must be decided on a case-by-case basis.  

Mandatory recording of custodial interrogations should be required for all crimes with possible jail time, and a record of the recording should be kept until the defendant’s conviction is final, all appeals have been exhausted, or the statute of limitations has run. The suspect must be informed that the interrogation is being recorded and must consent to it. In the event that the interrogation is not recorded, any statements made by the suspect in response to the interrogation may be suppressed at trial. The parameters of the exclusionary rule applied to evidence of statements obtained in violation of these requirements must be decided on a case-by-case basis.

192. See supra note 70 and accompanying text (stating recording required for all crimes, copy must be kept until conviction final).
193. See supra notes 20, 130, 147-148 and accompanying text (addressing suspect must be informed of
defendant does not consent to recording or the police provide a reasonable excuse for not recording, the unrecorded interrogation will not be suppressed.\textsuperscript{194}

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