

MANDATE THE ELECTRONIC RECORDING OF POLICE INTERROGATIONS

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Since 1989 there have been more than 200 DNA exonerations of innocent men and women who were wrongly prosecuted, convicted, and imprisoned (Innocence Project, 2007). Approximately 15–20% of these wrongful convictions were caused by police-induced false confessions (Garrett, 2008). There have been more non-DNA post-conviction exonerations of the innocent in the same period (Gross et al., 2005) and even more confessions proven false through non-DNA means (Drizin and Leo, 2004). Regardless of the source of the exonerations, in virtually all of these cases, police elicited the false confession through psychologically coercive and/or improper interrogation methods (Leo, 2008). In virtually none of these cases did police electronically record their interrogations, although in some—as in the infamous Central Park Jogger case in which New York police elicited confessions from five juveniles that were proven false many years later—police selectively recorded the “recap” (i.e., post-interrogation admission), not the actual interrogation itself.

In the last 20 years, there has been a large and growing amount of empirical research on the psychology of police interrogation and false confession (for a review, see Kassin and Gudjonsson, 2004). As a result, the social science research community now has a better understanding of the causes and consequences of false confession than ever before (Leo, 2001). Most of the wrongful convictions caused by false confession could have been prevented had police recorded the (entire) interrogation that produced the false confession. Whether by legislation or by appellate court decision, the time has come to mandate the electronic recording of police interrogation across the United States. This reform will not only reduce the number of false confessions police elicit and minimize the role they play in generating wrongful convictions, but also it will improve the investigative process more generally and save time, money, and other resources at multiple levels of the criminal justice system. In the remainder of this article, we analyze why this is so.

As Steve Drizin and Marissa Reich (2004:620) have pointed out, “calls to electronically record interrogations are almost as old as the technology itself.” For more than 70 years, social scientists, law professors, and even some police leaders have been calling for the verbatim recording of interrogations (Leo, 2008). Since the early 1980s, however, the use of video technology has become increasingly common in American law

enforcement. In 1985, Alaska became the first state to require—as a result of a state Supreme Court ruling—the electronic recording of custodial interrogations from start to finish in all felony cases for a defendant's confession to be admissible at trial (*Stephan v. State* [711 P.2d 1156 (Alaska 1985)]). At the time of this writing in 2007, six other states (Minnesota, Illinois, Maine, New Mexico, Wisconsin, and New Jersey) and the District of Columbia now also have laws requiring police to record interrogations in their entirety in some or all types of criminal cases.

The movement to record is both a recognition of and response to the most fundamental policy problem with American police interrogation practices: inadequate record-keeping and thus unreliable fact-finding. This is a rather curious state of affairs since the easiest and most neutral of all possible reforms would simply be to require that police electronically record interrogations from start to finish. It is all the more curious when we consider how inexpensive, ubiquitous, and readily available high-quality recording technology has become in recent years. Recording offers numerous benefits—to police, prosecutors, judges, juries, and society in general—and few costs. Unlike some potential reforms, the recording of police interrogations is not a zero-sum solution: It benefits all parties who value accurate fact-finding and more informed decision making. Therefore, we argue, electronic recording is the most important and compelling policy reform available for the problems of American police interrogation.

Although electronic recording of interrogations has become increasingly common in American law enforcement, many police departments continue to resist it. Their arguments against recording essentially fall into three categories: that it inhibits suspects from talking and thus lowers the confession rate, that it is too costly, and that it is not feasible. None of these arguments are persuasive, however.

The notion that recording prevents suspects from making incriminating statements has never been empirically supported (Thurlow, 2005). On the contrary, several studies—including one by the International Association of Chiefs of Police (1998)—have concluded that electronic recording does not cause suspects to fall silent, refuse to talk, or stop making admissions (Geller, 1992; Sullivan, 2004). This is true for two reasons: In most states, police are not required to notify suspects that they are recording and thus can do so surreptitiously, and even in those states where permission is required, most suspects consent (Oliver, 2005) and quickly forget about the recording (which need not be visible) (Slobogin, 2003).¹ The irony of the criticism that electronic recording has a chilling effect on suspects, in

1. Of course, even if the suspect does not consent to electronic recording, detectives can still take notes.

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fact, is that exactly the *opposite* seems to be true. As Sullivan (2004:22) notes, “the majority of agencies that videotape found that they were able to get more incriminating information from suspects on tape than they were in traditional interrogations.” In a recent survey of police interrogators in Alaska and Minnesota, police reported that electronic recording benefits the prosecution more (48%) than that it benefits the prosecution and defense equally (45%) or that it mostly benefits the defense (7%) (Buckley and Jayne, 2005).

The argument that electronic recording is too costly is both misconceived and wrong—in fact, electronic recording is an effective way to conserve scarce resources in an overburdened criminal justice system. Any cost–benefit analysis of recording must take into account the costs and benefits to the entire criminal justice system, not just to police. They include savings in salary and court time by reducing the time that police, prosecutors, judges, and juries must spend reconstructing, testifying about, or evaluating interrogations and confessions. It is true that police departments must expend funds for recording equipment, tapes (unless the recording is digital), and maintenance. But these front-end costs will be repaid many times over. If police record the entire interrogation, their departments no longer need to have a second interrogator present for the sole purpose of taking notes on the suspect’s statements, which is a potentially significant savings in personnel time and salary. Officers no longer need to expend valuable time preparing reports on their interrogations from handwritten notes.

Moreover, as Slobogin (2003:315) writes, “In a day when municipalities are spending thousands of dollars on scores of closed circuit TVs for the purpose of monitoring the public streets, paying for a camera in the interrogation room is unlikely to break the budget.” Although it would be unfair to expect individual police departments to bear the entire cost, they need not: The National Institute of Justice allotted over \$178 million in 2002 to develop police technology and provide grants to local law enforcement agencies. In 2006, the Wisconsin Office of Justice Assistance gave out approximately \$650,000 to Wisconsin police departments to purchase recording equipment (Richmond, 2006). If these sources are not sufficient, it would be appropriate for legislatures to pay the cost of implementing such a policy.

In addition, recording saves police time and resources in court by preventing unnecessary litigation of false claims of police improprieties, particularly about alleged *Miranda* violations (Leo, 1996). When police record, fewer pretrial motions to suppress statements and confessions and fewer trials occur (Geller, 1992; Sullivan, 2006). If police interrogate suspects lawfully, no basis will exist for defense attorneys to challenge successfully the interrogators’ behavior or the admissibility of the

defendant's statements. Even if motions and trials do occur, the court can view the interrogations directly and therefore call fewer witnesses to testify. Thus, recording also saves the time of prosecutors, defense attorneys, judges, and juries in court (Geller, 1992; Sullivan, 2004). Finally, in helping to avoid a major cause of wrongful conviction of the innocent, recording saves the state from making these devastating errors and, eventually, from paying settlements to those who are exonerated, which can and has run into the millions of dollars.

As for the argument that it is not feasible for police to record interrogations under all circumstances, recording laws and proposals tend to pertain only to custodial interrogations. And although police are concerned that good-faith operator mistakes or equipment failures will result automatically in the exclusion of confession evidence, this need not be the case. In those states where electronic recording is required by law, "safety valves" or exceptions always are in place to prevent police from being punished for non-willful failures to record. The best way to handle questions of feasibility, as several states have done, is to require the prosecution to persuade the trial court, by a preponderance of the evidence, that recording was not feasible under the circumstances in order for any unrecorded confession to be admissible (Leo et al., 2006).

In sum, much law enforcement opposition to electronic recording seems to be born of police inexperience or ignorance about what it actually entails or mistaken assumptions about its burdens. In fact, electronic recording of interrogations has proven to be an effective investigative tool for several reasons. First, recording preserves the details of a suspect's statement that may have been overlooked initially but subsequently became important. Detectives can then review the interrogation as a case unfolds and in light of subsequent evidence. In addition, recording allows police to more effectively present the results of their interrogations in court. As the Alaska Supreme Court noted many years ago (*Stephan v. State*, 1985:1161), "A recording, in many cases, will aid law enforcement efforts by confirming the content and the voluntariness of a confession, when a defendant changes his testimony or claims falsely that his constitutional rights were violated."

Second, electronic recording allows police to more effectively interrogate suspects and elicit admissions and confessions. By recording rather than taking notes, detectives can focus better on their interrogation strategy and can obtain information from suspects, who are less defensive when police are not taking notes (Sullivan, 2006). And in multiperpetrator cases, detectives can use videotaped statements against co-conspirators more effectively than written statements (which some suspects might think are fabricated). Recordings help detectives better prepare for the interrogation of subsequent suspects as well. According to Sullivan (2004),

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some police believe that recording interrogations actually *increases* the rate at which they obtain confessions.

Generally speaking, recording creates an objective, comprehensive, and reviewable record of an interrogation, making it unnecessary to rely on the incomplete, selective, and potentially biased accounts of the disputants over what occurred. It prevents untruthful allegations and faulty recollections—by all parties—from being treated as fact. Electronic recording prevents suspects from falsely accusing police of failing to give them Miranda warnings or of using coercive methods, and it also prevents police from making false claims about the suspect's behavior or statements. Removing the secrecy of interrogation opens up police practices to the possibility of outside scrutiny, and, as a result, interrogators are less likely to use impermissible or questionable techniques, including the psychologically coercive and improper ones that are the primary cause of false confessions.

By the same token, electronic recording professionalizes interrogation by opening it up to greater external review. This review improves the quality of interrogation and lends greater credibility to detective work—especially in urban communities where police may be distrusted by large segments of the populations—by demonstrating the lawfulness of police methods and the confessions they obtain (Drizin and Reich, 2004). Detectives who know they will be videotaped are more likely to prepare their strategies beforehand and to be more self-conscious about their conduct during questioning. They are less likely to violate constitutional standards or to engage in unprofessional or illegal interrogation practices. Recording also enhances professionalism in that it assists in police interrogation training by allowing detectives and their superiors to analyze what worked and what did not in previous cases.

Even if police continue to elicit some false confessions, electronic recording will help prevent them from being introduced into the stream of evidence that can lead to wrongful convictions, providing a means by which third parties, such as courts, can monitor police practices and enforce other safeguards (White, 1997). If the propriety of police techniques or the reliability of the suspect's statements are in question, police managers can review the taped interrogation and transcript to decide whether to present the case to the prosecutor. Even if detectives and police managers fail to recognize a confession as false, the prosecutor is in a better position to assess its reliability when an electronic recording exists of the entire interrogation. A recording allows the prosecution to evaluate the police methods, how the suspect responds to questions, and whether the suspect independently provides nonpublic details about the offense (Leo et al., 2006).

Still, false confessions sometimes slip through police and prosecutorial filters; even the most well-meaning police and prosecutors make erroneous judgments. In many false confession cases, trial judges have ruled mistakenly that the confession was voluntary, and in all cases in which false confessions have led to wrongful convictions, judges and juries—when asked to evaluate the interrogation—have believed mistakenly that the confessions were reliable (Drizin and Leo, 2004). A recording of the entire interrogation helps prevent these types of errors and contributes to reliable fact-finding by allowing judges and jurors to make more factually informed decisions about whether to admit confessions into evidence and what weight to put on them when determining guilt or innocence.

Finally, while helping to protect the wrongly accused, electronic recording of interrogations also helps prosecutors secure convictions of those who are actually guilty, avoiding additional victimization and threats to public safety. Prosecutors report that recording not only allows them to evaluate and prepare their cases more thoroughly but enhances their bargaining power during plea negotiations, leading to more guilty pleas (Geller, 1992; Sullivan, 2004). And with a recording, if a case goes to trial, judges and juries are more likely to convict, because a recorded confession is more credible and convincing evidence of guilt than a police officer's summary of the interrogation. As one Oklahoma detective told Sullivan (2004:9–10), “There is nothing better than a video and audio tape of a confession obtained by a skillful detective whose questions, demeanor, and methods are as important as the confession.”

In conclusion, the mandatory electronic recording of police interrogation is a policy reform for which the overwhelming benefits and minimal costs can no longer be denied. By creating an objective and reviewable record, electronic recording promotes truth-finding in the criminal process, relegates “swearing contests” to the past, and saves scarce resources at multiple levels of the criminal justice system. Electronic recording of interrogations will not only benefit police and prosecutors by increasing the accuracy of confessions and convictions, and thus better protect public safety, but it will also reduce the number of police-induced false confessions and the wrongful convictions they cause.

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